

Should We Put a Price on Free Speech?

J. Scott Armstrong and Kesten C. Green

Should public policy guarantee First Amendment rights to all citizens at all times? Some of our commentators think not. We argue that there is good reason to hold to rights. Consistent with economic theory and behavioral research, experimental findings show that mandatory disclaimers harm producers and consumers. They are also expensive to develop and to enforce.

Perry and Blumenthal (2012) show that similar problems exist with respect to the broader area of mandatory *disclosures*. Their findings conflict with the common assumption that “more information is better” and demonstrate that confusion occurs even when negative words can be avoided. The problem is that people are overwhelmed with information that has little relevance to their decision making. We do not agree with Perry and Blumenthal’s (p. 305) opinion that experimental evidence is “necessary to examine the effects of disclosures on decision quality” and to improve public policy and consumer protection. The burden of proof should be on those who would deny the right of free speech. Furthermore, sufficient experimental evidence exists, and it favors retaining free speech (Ben-Shahar and Schneider 2011).

Kozup et al. (2012) provide a wide-ranging and useful literature review. Then they take a similar position to Perry and Blumenthal, stating that “a wholesale moratorium on disclosure use seems unwarranted” (p. 319). However, they do not provide experimental evidence to support their opinion, or their implicit assumptions that government lawmakers and enforcers will behave more ethically than people working in firms and more effectively than buyers and sellers to maximize welfare.

We encountered a similar status quo bias among some of the people who provided unpublished comments on our article. We are not sure why we need to prove to them that it is wrong to deprive businesspeople of First Amendment rights. In addition, we are not sure how it would be possible to do so: They were unable to tell us what evidence would convince them. Typically, it is up to the government to prove the case beyond a reasonable doubt when trying to take away a person’s freedom—for example, by putting him in jail.

As Sherman (2012) demonstrates, courts have been lax in supporting free speech. They have assumed that government restrictions on free speech are of obvious benefit and thus need no support from evidence. There are exceptions. In *R.J. Reynolds Tobacco Co et al. v. U.S. Food and Drug Administration et al.* (2012), Judge Leon blocked the Food and Drug Administration’s attempt to force tobacco sellers to use visuals (some of which were falsified) and text to persuade people to stop smoking. In this case, the government, armed with a large budget, failed to provide experimental evidence to support the imposition of speech restrictions.

In the spirit of evidence-based policy, it would be reasonable to require that each restriction on speech be shown beyond a reasonable doubt to confer benefits that are greater than all the costs. Because things change, it would also be reasonable to ask that the case be made again (e.g., every five years) with the same requirement for rigorous evidence.

While it is *reasonable* to ask for comprehensive cost–benefit analyses for government policies, we wonder whether it is *proper* to conduct cost–benefit analyses for the right to free speech. Should we consent to our governments going through each right in the Bill of Rights and deciding whether the potential dangers of freedom outweigh the benefits? To do so would be to ignore the years of struggle and lives spent to obtain and retain basic freedoms. Our ancestors put great value on these freedoms. It seems naïve to think they were wrong to do so.

Because we were unable to find experimental evidence to support even one successful use of a mandatory disclaimer over the roughly 70 years and thousands of applications of this policy in the United States, we conclude that conducting cost–benefit analyses would support the right to free speech. However, conducting comprehensive and open analyses is enormously expensive, whereas holding to the established right to free speech is, as they say, “free.”

References

- Ben-Shahar, Omri and Carl E. Schneider (2011), “The Failure of Mandated Disclosure,” *University of Pennsylvania Law Review*, 159, 647–749.
- Kozup, John, Charles R. Taylor, Michael L. Capella, and Jeremy Kees (2012), “Sound Disclosures: Assessing When a Disclosure Is Worthwhile,” *Journal of Public Policy & Marketing*, 31 (Fall), [DOI: 10.1509/jppm.12.047].
- Perry, Vanessa G. and Pamela M. Blumenthal (2012), “Understanding the Fine Print: The Need for Effective Testing of Mandatory Mortgage Loan Disclosures,” *Journal of Public Policy & Marketing*, 31 (Fall), [DOI: 10.1509/jppm.12.055].
- R.J. Reynolds Tobacco Co et al. v. U.S. Food and Drug Administration et al.* (2012), U.S. District Court for the District of Columbia, No. 11-cv-1482, (accessed August 22, 2012), [available at www.ana.net/getfile/16887].
- Sherman, Paul (2012), “Compelled Speech and the Case for Judicial Engagement,” *Journal of Public Policy & Marketing*, 31 (Fall), [DOI: 10.1509/jppm.12.111].