

## Should We Put a Price on Free Speech?

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Should public policy guarantee First Amendment rights to all citizens, at all times? Some of our commentators think not. We argue 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 (in this issue) 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 their statement 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.

Taylor and Capella (in this issue), provide a wide-ranging and useful literature review. Then they take a similar position as Perry and Blumnetal, stating, “a wholesale moratorium on mandatory information provision appears unwarranted.” They base this statement on the argument that “sound disclosure is grounded in the public’s right to know and corporate ethics.” They do not, however, provide any experimental evidence to support their argument or their implicit assumption that government lawmakers and enforcers will behave more ethically than people working in firms.

We encountered a similar status quo bias among some of the people who provided unpublished comments on our paper. We are not sure why we have to prove to them that it is wrong to deprive business people of First Amendment rights. And we are not sure how it would be possible to do so: they were unable to tell us what evidence would convince them. Normally it is up to the government to prove the case beyond a reasonable doubt when trying to take away a person’s freedom, say by putting them in jail.

As is shown by Sherman (in this issue), 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, of course, as in Judge Leon’s blocking of the FDA’s attempt to force tobacco sellers to use visuals (some of which were falsified) and text to persuade people to stop smoking. In that case, the government, armed with an enormous budget, failed to provide experimental evidence to support the imposition of speech restrictions<sup>1</sup>.

In the spirit of evidence-based policy, it would be reasonable to ask that each restriction on speech must 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, say 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 decide 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.

Since 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 U.S., we conclude that conducting cost-benefit analyses would support the right to free speech. However, conducting comprehensive and open analyses is enormously expensive, while holding to established rights of free speech is, as they say, “free.”

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<sup>i</sup> *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. [Available from [www.ana.net/getfile/16887](http://www.ana.net/getfile/16887)]