

ADVERTISING, COMMERCIAL SPEECH, AND FIRST AMENDMENT PARITY

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Advertising has been a part of our culture throughout our history. Even in colonial days, the public relied on “commercial speech” for vital information about the market. Early newspapers displayed advertisements for goods and services on their front pages, and town criers called out prices in public squares. Indeed, commercial messages played such a central role in public life prior to the founding that Benjamin Franklin authored his early defense of a free press in support of his decision to print, of all things, an advertisement for voyages to Barbados.¹

I.	INTRODUCTION	503
II.	HOW ADVERTISING AND COMMERCIAL SPEECH BENEFIT CONSUMERS	507
	A. Informational and Educational Effects	507
	B. Market and Competitive Effects	511
	C. Media Promotion and Content Cross-Subsidization ..	512
III.	THE PRACTICAL CASE AGAINST NEW COMMERCIAL SPEECH RESTRICTIONS	514
IV.	THE PRINCIPLED CASE: TOWARD FIRST AMENDMENT PARITY FOR COMMERCIAL SPEECH.....	516

I. INTRODUCTION

Advertising often makes an easy target for politicians or regulatory activist groups who make a variety of claims about its negative impact on society. Up until the late 1970s, federal

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1. 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 495 (1996) (internal citations omitted).

policymakers—especially Federal Trade Commission (FTC) officials—aggressively regulated commercial advertising and marketing efforts citing concerns such as deception, annoyance, offensiveness, or its effect on children. At root, what unites all such concerns, both then and now, is a general anxiety about advertising being a supposedly manipulative or unnecessary force in society. John Calfee dubbed this the “fear of persuasion” and noted that such “attacks on advertising are ironic in the extreme” since “[t]he essence of persuasion is the absence of coercion.”²

The aggressive regulatory stance of the 1960s and 1970s eventually came under intense scrutiny by economists and the courts, however, and federal advertising restrictions were reconsidered and relaxed throughout the 1980s and '90s. Academic and government research revealed that, despite the best intentions, advertising and marketing restrictions were driving up prices, creating barriers to entry, and denying consumers important information about goods and services.³ That latter problem eventually captured the attention of the Supreme Court, which began ruling in the '70s that restrictions on commercial speech were an affront to the First Amendment. For these reasons, the FTC and the courts largely deregulated advertising markets—at least the most onerous, preemptive policies—and then focused on policing clear-cut cases of deceptive advertising or consumer fraud.

Recently, however, federal policymakers, state legislators, and state attorneys general have shown renewed interest in regulating commercial advertising and marketing.⁴ Several new

2. JOHN E. CALFEE, FEAR OF PERSUASION: A NEW PERSPECTIVE ON ADVERTISING AND REGULATION 2 (1997).

3. See, e.g., George J. Stigler, *The Economics of Information*, 69 J. POL. ECON. 213 (1961); Phillip Nelson, *Advertising as Information*, 82 J. POL. ECON. 729 (1974).

4. “The prospect of more government regulation of advertising and marketing took on new life in 2009, alarming marketers and ad executives.” Suzanne Vranica, *For Ad Industry, 2010 Promises Scant Relief*, WALL ST. J., Dec. 24, 2009, at B5, available at <http://online.wsj.com/article/SB10001424052748703521904574614223788268550.html>. Dan Jaffe, executive vice president for government relations at the Association of National Advertisers, told *The Journal*, “We have never seen this type of scrutiny. . . .

regulatory initiatives are being proposed, or are already underway, that could severely curtail or restrict commercial speech on a variety of platforms.⁵ The affected platforms range from traditional media (newspapers, TV, and radio broadcasters, etc.) to the newest media outlets (the Internet, online ad networks, social networks, video games, mobile devices, and interactive television). Specific issues or products that would be covered by this expanded regulatory activism include pharmaceuticals,⁶ tobacco,⁷ alcohol,⁸ advertising during children's television programming,⁹ online marketing to children,¹⁰ the volume of ads on television,¹¹ product placement marketing,¹² and testimonials.¹³ Perhaps the most notable of

There is nothing we do that is not under a microscope right now." *Id.*

5. John Eggerton, *Ad Industry Gears Up for Battles with Washington*, BROADCASTING & CABLE (Aug. 8, 2009), www.broadcastingcable.com/article/print/326838-Ad_Industry_Gears_Up_for_Battles_With_Washington.php.

6. *E.g.*, Karmen Hanson, *Marketing and Direct-to-Consumer Advertising (DTCA) of Pharmaceuticals*, NAT'L CONF. OF STATE LEGISLATURES (Nov. 2010), <http://www.ncsl.org/default.aspx?tabid=14461> (reporting a compendium of state laws concerning the marketing and advertising of pharmaceuticals).

7. *E.g.*, *Obama Signs Tough Tobacco Regulations*, UPI.COM (June 22, 2009, 3:12 PM), http://www.upi.com/Top_News/2009/06/22/Obama-to-sign-tobacco-bill/UPI-61161245670133.

8. *See, e.g.*, CTR. ON ALCOHOL MKTG. & YOUTH, STATE ALCOHOL ADVERTISING LAWS: CURRENT STATUS AND MODEL POLICIES (2003), *available at* http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Alcohol_marketingand_youth/hhs_camy_state_report.pdf.

9. *E.g.*, Matthew Lasar, *FCC: TV Ad Content for Kids Back on the Regulatory Table*, ARSTECHNICA (July 23, 2009, 10:05 AM), <http://arstechnica.com/tech-policy/news/2009/07/fcc-tv-ad-content-for-kids-back-on-the-regulatory-table.ars>.

10. *See, e.g.*, Berin Szoka & Adam Thierer, Progress & Freedom Found., *COPPA 2.0: The New Battle over Privacy, Age Verification, Online Safety & Free Speech*, 16 PROGRESS ON POINT 1 (June 2009), *available at* www.pff.org/issues-pubs/pops/2009/pop16.11-COPPA-and-age-verification.pdf.

11. *E.g.*, Juliana Gruenwald, *Senate Backs Bill Aimed At Reducing Loud TV Ads*, TECH DAILY DOSE (Sept. 30, 2010, 10:38 AM), <http://techdailydose.nationaljournal.com/2010/09/senate-backs-bill-aimed-at-red.php>.

12. *See, e.g.*, Sponsorship Identification Rules and Embedded Advertising, 73 Fed. Reg. 43, 194-43, 200 (proposed July 24, 2008) (Notice of Inquiry and Proposed Rulemaking), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-08-155A1.pdf; *see also* W. KENNETH FERREE & ADAM THIERER, THE PROGRESS & FREEDOM FOUNDATION, COMMENTS ON SPONSORSHIP IDENTIFICATION RULES AND EMBEDDED ADVERTISING (Sept. 19, 2008), www.pff.org/issues-pubs/filings/2008/092208SponsorshipFiling.pdf (responding

these efforts is the recent push at the federal level to impose a comprehensive regulatory regime on online advertising and data collection efforts in the name of enhancing consumer privacy.¹⁴ This might include a so-called “Do Not Track” mechanism that would block advertising or data collection through the mandatory reengineering of Web browsers.¹⁵

The consequences of these stepped-up regulatory efforts could be profound and may adversely impact consumers both directly and indirectly.¹⁶ The role commercial speech plays in a free market economy is often misunderstood or taken for granted. This essay briefly outlines the reasons why new restrictions on advertising and marketing would diminish consumer welfare. Moreover, it underscores and endorses the Supreme Court’s recent jurisprudence in this area, which has bolstered the First Amendment status of commercial speech, although those decisions have fallen short of according commercial speech the same constitutional protections as other types of speech and expression. This distinction is less sensible and less enforceable in an age of media convergence and user-generated content; the boundaries between commercial and non-commercial speech are simply not as bright as they once were. Thus, there are both principled and practical rationales for ending this regulatory asymmetry and according commercial speech First Amendment protections on par with all other forms of speech and expression.

to the Notice of Inquiry and Notice of Proposed Rulemaking).

13. *See, e.g.*, FTC Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255 (2010).

14. FTC, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE: A PROPOSED FRAMEWORK FOR BUSINESS AND POLICYMAKERS (Dec. 2010), *available at* <http://www.ftc.gov/os/2010/12/101201privacyreport.pdf>.

15. Tanzina Vega & Verne Kopytoff, *In Online Privacy Plan, the Opt-Out Question Looms*, N.Y. TIMES, Dec. 5, 2010, at B1, *available at* <http://www.nytimes.com/2010/12/06/business/media/06privacy.html>; ADAM THIERER, MERCATUS CTR. GEORGE MASON UNIV., PUBLIC INTEREST COMMENT ON FEDERAL TRADE COMMISSION REPORT: PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE (Feb. 18, 2011), *available at* <http://mercatus.org/publication/public-interest-comment-protecting-consumer-privacy-era-rapid-change>.

16. ADAM THIERER, MERCATUS CTR. GEORGE MASON UNIV., ONLINE PRIVACY REGULATION: LIKELY MORE COMPLICATED (AND COSTLIER) THAN IMAGINED (Dec. 6, 2010), *available at* <http://mercatus.org/publication/online-privacy-regulation>.

II. HOW ADVERTISING & COMMERCIAL SPEECH BENEFIT CONSUMERS

Even if they do not always appreciate it, consumers benefit from advertising and commercial speech in three important ways: (1) informational/educational effects; (2) market/competitive effects; and (3) media promotion/content cross-subsidization. Each benefit will be briefly considered.

A. Informational & Educational Effects

Advertising provides important information and signals to consumers about goods and services that are competing for their allegiance. This helps solve an otherwise intractable information problem that would go unsolved without advertising's claims and counter-claims about goods and services. As Nobel laureate economist George Stigler pointed out in his legendary 1961 article on the economics of information, advertising is "an immensely powerful instrument for the elimination of ignorance."¹⁷ Similarly, John Calfee has argued "advertising has an unsuspected power to improve consumer welfare" since it "is an efficient and sometimes irreplaceable mechanism for bringing consumers information that would otherwise languish on the sidelines."¹⁸ More importantly, Calfee argues:

Advertising's promise of more and better information also generates ripple effects in the market. These include enhanced incentives to create new information and develop better products. Theoretical and empirical research has demonstrated what generations of astute observers had known intuitively, that markets with advertising are far superior to markets

17. Stigler, *supra* note 3, at 220. "Since Nobel laureate George Stigler's 1961 article on the economics of information, economists have increasingly come to recognize that, because it reduces the costs of obtaining information, advertising enhances economic performance." J. HOWARD BEALES & TIMOTHY J. MURIS, *STATE AND FEDERAL REGULATION OF NATIONAL ADVERTISING* 7 (1993). "[W]hat consumers know about competing alternatives influences their choices. Better information about the options enables consumers to make choices that better serve their interests." *Id.* at 8.

18. CALFEE, *supra* note 2, at 96.

without advertising.¹⁹

In other words, *advertising educates*. It ensures consumers are better informed about the world around them and not just educated on the specific goods or services being advertised.²⁰ It also raises general awareness about new classes or categories of goods and services. It helps citizens in their capacity as consumers to become better aware of the options at their disposal and the relative merits of those choices. For example, a February 2010 poll by About.com found that “[w]hile one-third of the online buyers who were aided by ads said they helped them save money, the majority appreciated online ads for informing them about a product or service previously unknown.”²¹ This is the educational power of advertising at work, and it suggests that many consumers *do* understand and appreciate the benefits of commercial speech.

Because of the important educational role played by advertising and marketing in the economy, the Supreme Court has made it increasingly clear that, like other forms of speech, commercial speech deserves First Amendment consideration and protection. Until recently, advertising had a tortured legal history, and “for reasons that have never been adequately explained, both judges and commentators have seen fit to give commercial speech a lower level of protection than other types of speech.”²²

Beginning in the early 1970s, however, the Supreme Court began handing down a string of decisions that greatly enhanced commercial free speech rights.²³ In *Virginia Pharmacy Board v.*

19. *Id.*

20. “Consumers therefore are better informed, resulting in enhanced market performance.” BEALES & MURIS, *supra* note 17, at 8.

21. *Online Ads Help Shoppers Save*, EMARKETER.COM (Feb. 22, 2010), www.emarketer.com/Article.aspx?R=1007524.

22. Alex Kozinski & Stuart Banner, *Who’s Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 653 (1990).

23. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); *Greater New Orleans Broad. Ass’n v. United States*, 527 U.S. 173 (1999); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996); *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618 (1995); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995); *Ibanez v. Fla. Dep’t of Bus. & Prof’l Regulation, Bd. of Accountancy*, 512 U.S. 136 (1994); *Peel v. Att’y Registration & Disciplinary Comm’n of Ill.*, 496 U.S. 91 (1990); *Shapero v. Ky.*

Virginia Citizens Consumer Council,²⁴ one of the first and most important of these decisions, the Court held that individual consumers and society as a whole “may have a strong interest in the free flow of commercial information.”²⁵ “As to the particular consumer’s interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day’s most urgent political debate,” Justice Blackmun stressed in that decision.²⁶ The Court continued:

So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.²⁷

Just four years later, the Court solidified this new approach in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*²⁸ by noting that “[t]he First Amendment’s concern for commercial speech is based on the informational function of advertising.”²⁹ In that case, the Court developed a four-part framework to evaluate the constitutionality of advertising restrictions:

Bar Ass’n., 486 U.S. 466 (1988); *Posadas de Puerto Rico Assocs. v. Tourism Co. of P. R.*, 478 U.S. 328 (1986); *Zauderer v. Office of Disc. Counsel*, 471 U.S. 626 (1985); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983); *Cent. Hudson Gas & Elec. Corp. v. Pub. Service Comm’n of N.Y.*, 447 U.S. 557 (1980); *Friedman v. Rogers*, 440 U.S. 1 (1979); *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977); *Linmark Assocs., Inc. v. Willingboro*, 431 U.S. 85 (1977); *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748 (1976); *Bigelow v. Virginia*, 421 U.S. 809 (1975); *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376 (1973).

24. 425 U.S. 748 (1976).

25. *Va. Pharmacy Bd. v. Va. Citizens Council*, 425 U.S. 748, 764 (1976).

26. *Id.* at 763. Similarly, Kozinski and Banner have argued that “in a free market economy, the ability to give and receive information about commercial matters may be as important, sometimes more important, than expression of a political, artistic, or religious nature.” Kozinski & Banner, *supra* note 22, at 652.

27. *Va. Pharmacy Bd.*, 425 U.S. at 765.

28. 447 U.S. 557 (1980).

29. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557 (1980).

[W]e must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.³⁰

Media Institute scholar Richard T. Kaplar notes that, when viewed holistically, the Court's recent commercial speech jurisprudence can be summarized with the following syllogism:

Economic concerns are as important to our society as political concerns. By extension, economic information is as important as political information. Political information receives full First Amendment protection. Therefore, economic information should receive full First Amendment protection.³¹

"Truthful speech about lawful products and services deserve[s] full First Amendment protection,"³² Kaplar concludes. "This is a simple proposition, but its implications for freedom of speech extend far beyond advertising."³³ Indeed, unlike its earlier jurisprudence, the Court's more recent approach assumes not only that commercial speech conveys important information, but that the public is generally better positioned to judge its underlying worth to society. As the Court held in *Bates v. State Bar of Arizona*³⁴:

The alternative—the prohibition of advertising—serves only to restrict the information that flows to consumers. Moreover, the argument assumes that the public is not sophisticated enough to realize the limitations of advertising, and that the public is better kept in ignorance than trusted with correct but

30. *Id.* at 566.

31. RICHARD T. KAPLAR, ADVERTISING RIGHTS: THE NEGLECTED FREEDOM 60 (The Media Institute, 1991).

32. *Id.*

33. *Id.* at 71; see also Jonathan W. Emord, *Contrived Distinctions: The Doctrine of Commercial Speech in First Amendment Jurisprudence*, CATO POLY ANALYSIS NO. 161 (Sept. 23, 1991), www.cato.org/pubs/pas/pa-161.html.

34. 433 U.S. 350 (1977).

incomplete information. We suspect the argument rests on an underestimation of the public. In any event, we view as dubious any justification that is based on the benefits of public ignorance.³⁵

B. Market & Competitive Effects

Advertising also keeps markets competitive by keeping competitors on their toes and forcing them to constantly respond to challenges by rivals who are offering better or cheaper services. This ensures consumers have more choices at their disposal. “The freedom to advertise encourages businesses to create new brands and improve old ones,” argues William F. Arens, author of *Contemporary Advertising*.³⁶ More importantly, he notes it “promotes the existence of more sellers, and that gives consumers wider choices.”³⁷ “Contrary to the argument that advertising wastes resources,” argues David G. Tuerck, “it expands sales by attracting additional consumers and producers into the market.”³⁸

As a result, advertising helps keep prices low (or even at zero) for many goods and services, especially media and entertainment offerings.³⁹ In *Bates*, the Supreme Court acknowledged the importance of commercial speech to the free market economy, noting: “[C]ommercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system. In short, such speech serves individual and societal interests in assuring informed and reliable decision making.”⁴⁰

Moreover, the pro-competitive effects associated with commercial speech are significant enough that the Court has

35. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 374–75 (1977).

36. WILLIAM F. ARENS, *CONTEMPORARY ADVERTISING* 61 (10th ed., 2006).

37. *Id.*

38. David G. Tuerck, *Introduction* to AM. ENTER. INST. FOR PUB. POL’Y RESEARCH, *ISSUES IN ADVERTISING: THE ECONOMICS OF PERSUASION* 1, 8 (David G. Tuerck ed., 1978).

39. See ARENS, *supra* note 36, at 60 (“Both the Federal Trade Commission and the Supreme Court have ruled that, by encouraging competition, advertising has the effect of keeping prices down.”).

40. *Bates*, 433 U.S. at 364 (citation omitted).

sternly warned would-be regulators that they bear a high standard of proof when seeking to restrict commercial speech. As the Court noted in *Zauderer v. Office of Disciplinary Counsel*,⁴¹ “Our recent decisions involving commercial speech have been grounded in the faith that the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful.”⁴²

Accordingly, because of this higher jurisprudential bar, restrictions on commercial speech must be grounded in a substantive, empirical showing of harm, not merely conjectural harms such as claims of “annoyance” or “unease.” “‘Mere speculation or conjecture’ will not suffice,” the Supreme Court noted in 1994, “rather the State ‘must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.’”⁴³

C. Media Promotion & Content Cross-Subsidization

Finally, advertising benefits society by subsidizing the creation of news, information, and entertainment. “Advertisers are critical to the success of commercial media because they provide the primary revenue stream that keeps most of them viable,” argues Robert G. Picard.⁴⁴ Mary Alice Shaver of the University of Central Florida puts this support in context: “Advertising revenues pay for virtually all broadcast media, 70% to 80% of support for newspapers and an equally high percentage for magazines.”⁴⁵

41. 471 U.S. 626 (1985).

42. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 646 (1985).

43. *Ibanez v. Fla. Dep’t of Bus. & Prof’l Regulation, Bd. of Accountancy*, 512 U.S. 136, 143 (1994) (quoting *Edenfield v. Fane*, 507 U.S. 761, 770–71 (1993)).

44. ROBERT G. PICARD, *THE ECONOMICS AND FINANCING OF MEDIA COMPANIES* 122 (Bus., Econ., & Legal Studies Ser. No. 1, 2002).

45. Mary Alice Shaver, *The Economics of the Advertising Industry*, in *MEDIA ECONOMICS: THEORY AND PRACTICE* 250 (Alison Alexander, et. al. eds., 3d ed. 2004).

Advertising is proving increasingly to be the only media industry business model with any real staying power for many commercial media and information-producing sectors. Pay-per-view mechanisms, micropayments, and even subscription-based business models are all languishing.⁴⁶ Consequently, the overall health of the modern media marketplace and the digital economy—and the aggregate amount of information and speech that can be produced or supported by those sectors—is fundamentally tied up with the question of whether policymakers allow the advertising marketplace to evolve in an efficient, dynamic fashion.⁴⁷ In this sense, it is not hyperbole to say that an attack on advertising is tantamount to an attack on media itself.⁴⁸

Increasingly, however, consumers are showing a strong preference for advertising-supported content and services, especially online where “free” is the order of the day.⁴⁹ Of course, the “free” business model predated the Internet in the form of advertising-supported over-the-air TV and radio broadcasts and low-cost daily newspapers. Without the cross-subsidy that advertising provided, those media outlets would have had to

46. To some extent, these are all just variations of a fee-for-service business model. “Micropayments,” for example, would require a small payment for each media unit accessed or downloaded, such as \$1 per news article or song. See Micropayments, BUSINESS DICTIONARY, <http://www.businessdictionary.com/definition/micropayment.html> (last visited Mar. 28, 2011).

47. LARRY DOWNES, *THE LAWS OF DISRUPTION: HARNESSING THE NEW FORCES THAT GOVERN LIFE AND BUSINESS IN THE DIGITAL AGE* 83–84 (2009) (“Much of the valuable information content available on the Internet, and so many of the useful services we use every day, is free Not because of some utopian dream of inventors or even because of the remarkably low transaction costs of the digital economy. The content is free because the costs of the services—blogs, stock quotes, even home movies posted on YouTube—are underwritten by advertisers. If we don’t read and respond to ads, we’ll have to pay for these services some other way.”).

48. See Adam Thierer et al., *THE PROGRESS & FREEDOM FOUND., COMMENTS IN THE MATTER OF THE FEDERAL COMMUNICATIONS COMMISSION’S EXAMINATION OF THE FUTURE OF MEDIA AND INFORMATION NEEDS OF COMMUNITIES IN A DIGITAL AGE* (2010), http://www.pff.org/issues-pubs/testimony/2010/2010-05-05-Comments_in_FCC_Future_of_Media_proceeding.pdf (responding to Notice of Inquiry).

49. See, e.g., Chris Anderson, *Free! Why \$0.00 Is the Future of Business*, WIRED (Feb. 25, 2008), http://www.wired.com/techbiz/it/magazine/16-03/ff_free.

charge significant sums for the information and entertainment they made available to the public.

This raises another under-appreciated point: Advertising helps promote media independence. As Arens rightly notes, advertising “facilitates freedom of the press and promotes more complete information.”⁵⁰ Although advertising was present even in the earliest days of the American republic, during the colonial period “private contributions, subscriptions, or political parties supported most newspapers,” notes Anthony R. Fellow, author of *American Media History*.⁵¹ Over time, however, advertising helped liberate media operators from most public and private patronage and influence. Commenting on the importance of advertising to journalism legends such as Joseph Pulitzer and William Allen White, media historian Paul Starr, author of *The Creation of the Media*, says “just as abundant advertising gave Pulitzer the independence to criticize corporate as well as governmental abuses, so it also gave White the material basis for his editorial independence.”⁵² Starr concludes that, for newspaper providers large and small alike, “the increasingly strong commercial foundation of journalism became a basis of independent power and influence, locally as well as nationally.”⁵³

III. THE PRACTICAL CASE AGAINST NEW COMMERCIAL SPEECH RESTRICTIONS

While it is unlikely that the current campaigns against advertising and marketing will dissipate anytime soon, proponents of stepped-up regulation of commercial speech bear both a *principled* and *practical* burden when advancing such proposals.

The practical case against increased regulation flows from the discussion of benefits itemized above. A renewed regulatory crusade against advertising and marketing efforts will hurt consumer welfare since it will likely raise prices, restrict choice,

50. ARENS, *supra* note 36, at 50.

51. ANTHONY R. FELLOW, *AMERICAN MEDIA HISTORY* 315 (2005).

52. PAUL STARR, *THE CREATION OF MEDIA: POLITICAL ORIGINS OF MODERN COMMUNICATION* 263–64 (2004).

53. *Id.* at 264.

and diminish marketplace competition and innovation—both in ad-supported content and service markets and throughout the economy at large. In particular, regulatory advocates must explain how the content and services currently supported by advertising and marketing will be possible if those techniques are choked off.

At a minimum, proponents of commercial speech restrictions should be required to provide a strict cost-benefit analysis of the restrictions they propose. Regulation is not a costless exercise. Simply stated, there is no free lunch. Something must sustain that content and culture and, increasingly, that something is advertising. This is equally true for traditional “analog era” media content and for newer digital and online offerings.

Importantly, the “harm” critics claim advertising or marketing efforts give rise to must be concrete, not merely conjectural. For example, the current debate over online advertising regulation is fundamentally tied up with concerns about personal privacy. It goes without saying, however, that privacy is a highly subjective⁵⁴ and ever-changing condition.⁵⁵

54. See Larry Downes, *A Market Approach to Privacy Policy*, in *THE NEXT DIGITAL DECADE: ESSAYS ON THE FUTURE OF THE INTERNET* 514 (Berin Szoka & Adam Marcus eds., 2010), available at http://nextdigitaldecade.com/ndd_book.pdf#page=510 (“In most conversations, no one knows what anyone else means by ‘privacy,’ or what information is included in the term ‘personally-identifiable information.’”); DAVID BRIN, *THE TRANSPARENT SOCIETY: WILL SOCIETY FORCE US TO CHOOSE BETWEEN PRIVACY AND FREEDOM?* 77 (1998) (“When it comes to privacy, there are many inductive rules, but very few universally accepted axioms.”); Betsy Masiello, *Deconstructing the Privacy Experience*, *IEEE SECURITY & PRIVACY*, July/Aug. 2009, at 70 (“On the social Web, privacy is a global and entirely subjective quality—we each perceive different threats to it.”); Jim Harper, *Understanding Privacy—and the Real Threats to It*, *CATO POLY ANALYSIS* 520 (Aug. 4, 2004), available at www.cato.org/pub_display.php?pub_id=1652 (“Properly defined, privacy is the subjective condition people experience when they have power to control information about themselves.”); MICHAEL FERTIK, *REPUTATION.COM, INC., COMMENTS TO THE U.S. DEPARTMENT OF COMMERCE* 13 (Jan. 28, 2011), <http://www.reputation.com/blog/2011/01/31/reputation-com-comments-commerce-department-privacy-green-paper> (“Privacy is a matter of taste and individual choice.”).

55. See HAL ABELSON, ET AL., *BLOWN TO BITS: YOUR LIFE, LIBERTY, AND HAPPINESS AFTER THE DIGITAL EXPLOSION* 68 (2008) (“The meaning of privacy has changed, and we do not have a good way of describing it. It is not the right to be left alone, because not even the most extreme measures will disconnect

But what makes the case for regulation even more suspect is that the harm many privacy advocates cite in defense of regulation is the “creepiness” factor associated with online data collection and targeted advertising.

“But creating new privacy rights cannot be justified simply because people feel vague unease,” notes Solveig Singleton, formerly of the Cato Institute.⁵⁶ If harm is reduced to “creepiness” or even “annoyance” and “unwanted solicitations” as some advocate,⁵⁷ it raises the question whether the commercial Internet as we know it can continue to exist. Such an amorphous standard leaves much to the imagination and opens the door to creative theories of harm that are sure to be exploited. In such a regime, harm becomes highly conjectural instead of concrete. This makes credible cost-benefit analysis virtually impossible since the debate becomes purely about emotion instead of anything empirical.

In this and other cases where commercial speech restrictions are being considered, policymakers must avoid untethering regulation from a harms-based analysis which tests whether concrete, tangible harms exist and then weighs the benefits of regulation against its costs.

IV. THE PRINCIPLED CASE: TOWARD FIRST AMENDMENT PARITY FOR COMMERCIAL SPEECH

Finally, as a normative matter, commercial speech *is* a form of speech, and regulatory advocates must explain why strict First Amendment scrutiny should not apply to any proposed restrictions. Importantly, commercial speech is also not always easily distinguishable from non-commercial or political speech, raising additional First Amendment concerns. Jonathan Emord has noted, “all speech comes inextricably intertwined with

our digital selves from the rest of the world. It is not the right to keep our private information to ourselves, because the billions of atomic factoids don't any more lend themselves into binary classification, private or public.”)

56. Solveig Singleton, *Privacy as Censorship: A Skeptical View of Proposals to Regulate Privacy in the Private Sector*, CATO POL'Y ANALYSIS NO. 2958 (Jan. 22, 1998), <http://www.cato.org/pubs/pas/pa-295.html>.

57. *Id.* at 19–20.

commercial and noncommercial elements that belie any effort to distinguish economically motivated or related speech from all other speech. Almost all persuasive speech contains informational components that are related to economic matters.”⁵⁸ “If you think carefully enough, you can find a commercial aspect to almost any first amendment case,” conclude Kozinski and Banner.⁵⁹ “Today’s protected expression may become tomorrow’s commercial speech.”⁶⁰

Indeed, modern advertising is often presented as a form of entertainment in its own right. For example, in 2001-02, German automobile manufacturer BMW hired several famous movie directors—including Ang Lee, John Woo, John Frankenheimer, Tony Scott, and others—to film a series of eight short films called “The Hire,” starring British actor Clive Owen.⁶¹ The clips, which featured various BMW automobiles, became an Internet and DVD sensation and spawned several imitators.⁶² Of course, product placement has been a long-standing feature of television and motion pictures, but when commercial messages are integrated into the storylines of entertainment products in this fashion, it begs the question whether varying levels of First Amendment scrutiny make sense. If those eight short BMW films had been produced for widespread cinematic release, there would be no question that strict scrutiny would apply to any efforts to regulate them. Why should lower scrutiny be applied simply because the films were produced at the request of an automobile manufacturer to showcase their new products? And what about television shows or movies that are essentially one massive product placement vehicle, such as *G.I. Joe* or *Transformers*?

Complicating matters further is the fact that modern advertising and marketing efforts are increasingly interactive and encourage the audience to play a role in tailoring the underlying commercial message. For example, during the

58. Emord, *supra* note 33, at 2.

59. Kozinski and Banner, *supra* note 22, at 653.

60. *Id.*

61. *TV & New Media: BMW Films*, <http://www.bmwusa.com/Standard/Content/Uniquely/TVAndNewMedia/BMWFilms.aspx> (last visited Mar. 26, 2011).

62. *See id.*

summer of 2010, Old Spice developed an innovative advertising campaign that involved an actor shooting over 150 videos for the company's body wash product⁶³ that responded directly to questions from Twitter, Facebook, and other social media sites.⁶⁴ Many companies now tap the power of online platforms, social media, and video games to encourage direct audience interaction with, and even creation of, ads or slogans. One prominent example involves Doritos tortilla chips. Since 2006, Doritos has conducted a "Crash the Super Bowl" contest inviting consumers to produce ads about the chips that are then voted on by the public.⁶⁵ Winning submissions are aired during the Super Bowl.⁶⁶

Separating "commercial" from "non-commercial" speech in such examples can be challenging, and this problem is only likely to grow as the volume of user-generated content available online from across the globe continues to grow.⁶⁷ "Rather than continuing down this road," argue Kozinski and Banner, "we should consider how the world would look if we stopped making the distinction between commercial and noncommercial speech."⁶⁸ The principled case against commercial speech regulation lies in the fact that, as Emord has argued, "The First Amendment . . . is not a catalogue of favored and disfavored forms of speech. It is by no means a vehicle for rendering a prejudice against profit-motivated speech the supreme law of the

63. All of Old Spice's advertisements are posted on its YouTube channel. See *Old Spice's Channel*, YOUTUBE, <http://www.youtube.com/oldspice> (last visited Mar. 23, 2011).

64. See Ken Bruno, *Old Spice Mixes Social Media and Web Ads*, FORBES (July 15, 2010, 3:55 PM), <http://www.forbes.com/2010/07/15/old-spice-youtube-procter-gamble-twitter-facebook-cmo-network-social-media-advertising.html>; Stan Schroeder, *Old Spice: The Archetype of a Successful Social Media Campaign*, MASHABLE (July 15, 2010), <http://mashable.com/2010/07/15/old-spice-social-media-campaign/>.

65. *Contest Info*, CRASH THE SUPERBOWL, <http://www.crashthesuperbowl.com> (last visited Mar. 23, 2011).

66. M. Bamieh, *Crash the Superbowl with Pepsi and Doritos*, THOUGHT PICK (Feb. 8, 2011), <http://blog.thoughtpick.com/2011/02/crash-the-superbowl-with-pepsi-and-doritos-3.html>.

67. Adam Thierer, *Privacy as an Information Control Regime: The Challenges Ahead*, TECH. LIBERATION FRONT (Nov. 13, 2010), <http://techliberation.com/2010/11/13/privacy-as-an-information-control-regime-the-challenges-ahead>.

68. Kozinski & Banner, *supra* note 22, at 650.

land.”⁶⁹ A free society would be better served by striving to achieve First Amendment parity among forms of speech that are occasionally treated asymmetrically through such artificial, illogical, and increasingly unenforceable distinctions.

69. Emord, *supra* note 33, at 46.