

## THE HIGH COST OF FREE SPEECH

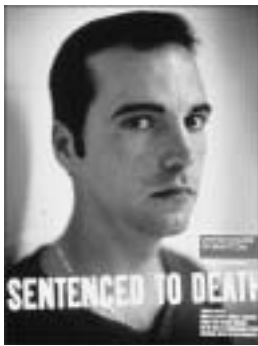
In U.S. courts, freedom of speech increasingly means freedom to advertise

by Jay Huber

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*Most of you already know what free speech is—the ability of people to openly express their political, religious, or other views. Commercial speech, on the other hand, is “expression related solely to the economic interests of the speaker.” (Advertising, for example) In the past, U.S. law distinguished free speech from commercial speech. Unlike free speech, commercial speech didn’t receive First Amendment protection. Over the past few decades, however, that has changed, and now “freedom of speech” often means “freedom to advertise.”*

*What is behind this change? What’s the difference between free speech and commercial speech and why was commercial speech regulated differently in the first place? What are the arguments in favor or extending protection to commercial speech? What are the arguments against it? Think about these questions as you read. —CM*



**A** stark image: a man, black or white, stands impassively and stares at the viewer. He wears a prisoner’s jumpsuit. The only words say the prisoner’s name and that he is on death row. The recent Benetton campaign contains no clear statement about

either clothing or the death penalty. They seem designed solely to grab your attention and make you wonder what the hell’s the point. Advertising? Political message? Claiming no point of view, the campaign illustrates how the two have blurred.

Historically, advertising didn’t receive the same constitutional protection as political speech, one form of free speech the Founding Fathers had in mind when they drafted the First Amendment. Political speech was valued for its role in guiding us toward a more just, democratic society, “a more perfect union.” But over the past few decades the courts have taken a differ-

ent view, granting free speech rights to commercial interests.

Adopted within the Bill of Rights in 1791, the Free Speech clause of the First Amendment reads: “Congress shall make no law . . . abridging the freedom of speech.”

Simple, clear. Maddeningly vague. A universe can fall within the word “speech,” and it has avoided easy definition.

There’s no doubt that political speech was at the core of the Founders’s concerns when they drafted this phrase, and by its adoption they established an ideal that robust debate was healthier for the people than suppression. By this measure, political speech educates and enlightens us, furthering democratic self-realization. The constitutional decisions of the federal courts tout the First Amendment’s role in determining truth, which emerges when all competing viewpoints see the light of day and are weighed by an engaged citizenry. Law professors cite the First Amendment’s “traditional values of rational decision-making and self-realization.”

No one considered advertising or other profit-motivated communications as constitutionally protected speech until fairly recently. According to legal scholars, the phrase “commercial speech” did not even appear in any decision of any court of the United States until 1971. Freedom of speech was an individual right, protected from abridgment by the government. But in 1886, the Supreme Court ruled that a corporation was a “person” for purposes of the Fourteenth Amendment, a holding that provided grounds to argue that business entities, as well as individuals, are entitled to First Amendment protection.

In 1942, a man named Chrestensen moored a submarine on New York City’s East

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River and began distributing handbills advertising tours of his boat. He soon found that distributing handbills was illegal, so he printed handbills with an advertisement for the sub expo on one side and a protest against the city's refusal to allow him to moor the sub where he pleased on the other. He figured that the political message removed his handbills from the realm of purely commercial activity. The case made it to the Supreme Court, which quickly dismissed Chrestensen's arguments while barely mentioning the First Amendment. The Court said: "We are . . . clear that the Constitution imposes no . . . restraint on government as respects purely commercial advertising."

This utter lack of protection for advertising was nicked at little by little until 1976, when the Court finally reversed itself. Virginia had banned advertising prescription-drug prices. The Court struck the law down, finding that the pricing information was important to consumer decision-making. More broadly, the Court held that Americans need such information to evaluate our free-market economy and determine whether it is in need of regulation or refinement.

The Court also rejected Virginia's argument that drug-price advertising would lead to errant, irrational behavior by consumers; drug-price advertising, Virginia argued, would degrade the pharmaceutical profession. Legal scholar Nat Stern has remarked that the Court's logic "embodied a constitutional judgment that 'the dangers of suppressing information' outweigh 'the dangers of its misuse if it is freely available.'" Justice Stevens reiterated the point in a 1996 case challenging Rhode Island's ban on advertising liquor prices. The state argued that it was promoting "temperance and the reasonable control of the traffic in alcoholic beverages," but the Court struck the law down. Stevens wrote: "The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good."

Despite this protection, commercial speech remains a lesser category than political speech for two reasons: Government can regulate it for truthfulness, and it is "hardier," or more resilient, than political speech—people will still

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buy ad time even if they have to tell the truth. In contrast, political speech once suppressed may stay squashed.

In 1980 the Court established a formal test for determining whether restrictions on commercial speech are constitutionally permissible—now familiar in the courts as the Central Hudson test. The Court defined commercial speech as "expression related solely to the economic interests of the speaker and its audience," and ruled that government may ban "forms of communication more likely to deceive the public than to inform it, or commercial speech related to illegal activity." To regulate commercial speech that is neither misleading nor unlawful, the Court established a four-part test: 1) the State has to assert a "substantial interest" to be achieved in regulating the speech; 2) the regulation must be in proportion to that interest; 3) the regulation must directly advance the State interest; 4) the regulation must be the most limited means available to achieving the State's interest.

This is a difficult test to meet, so many attempts to restrict commercial speech fail. A corporation's right to free speech can even trump individual's privacy. Such was the ruling in a 1999 case that overturned an FCC regulation protecting consumers from telecom companies' unauthorized use of personal data. In effect, the court said US West's use of personal data to communicate with customers fell within its free speech rights. In 1993 the Supreme Court stated:

The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information

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## **Outdoor advertisers are successfully using the First Amendment to defend themselves against billboard bans.**

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flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented. Thus, even a communication that does no more than propose a commercial transaction is entitled to the coverage of the First Amendment.

But the Court doesn't acknowledge that commercial speech communicates few "ideas." Direct appeals to consumers are rare; ads now revolve around short narratives, jokes, or visual wizardry. Advertising can drape itself in constitutional armor but needn't embody constitutional values. This is particularly insidious in the billboard wars taking place in U.S. cities. Outdoor advertisers are successfully using the First Amendment to defend themselves against billboard bans and zoning restrictions. . .



**The Founding Fathers considered free speech an inviolable right of citizens, essential for self-expression and self-realization. although the First Amendment doesn't distinguish free speech from commercial speech or advertising, it's a pretty safe bet that a twelve-story billboard on 6th Avenue in Manhattan isn't what they had in mind.**