A Twentieth Century Fund Paper

ADVERTISING *and The First Amendment*

by Michael G. Gartner

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Foreword

Virtually everyone agrees that smoking is bad for you. Each package of cigarettes sold in the United States is required by law to carry one of four dire messages, and Surgeon General C. Everett Koop, a leader in the fight against smoking, recently reported—to the dismay of those who claimed that free choice was at work in their decision to smoke—that smoking is as addictive as cocaine. And yet many Americans continue to smoke and, in many cases, to die. The answer, a growing number believe, is to ban cigarette advertising; they argue that such a ban would, at the very least, help prevent young people from taking up smoking. But others vigorously oppose such an advertising ban, arguing that in an attempt to eradicate one evil, another is encouraged.

What is at issue is commercial speech—the speech of the peddler and the advertiser. Few would dispute the importance of freedom of speech in a democracy, but many question whether commercial speech warrants the same protections as, for example, those given the press.

The Fund has long been interested in the press and, in recent years, in the issue of commercial speech. In 1986, *A Two-Faced Press?* by Tom Goldstein, a Twentieth Century Fund Paper, explored the issue of whether freedom of the press should be extended to a newspaper's advertising columns. The Fund was intrigued by the policy issues Goldstein raised. When Michael G. Gartner proposed another paper, one that would take an opposing view, the Fund couldn't resist adding another voice to the debate.

Gartner believes passionately in the First Amendment and is averse to censorship in all forms and for all reasons. For him, a flourishing democracy and a vital economy rest on an informed public—commercial speech and noncommercial speech are inextricably intertwined. There is something refreshing about Gartner's approach: he neither hedges nor

waffles. Whether one ultimately agrees with him is irrelevant. What matters is the clarity of his argument and the manner in which it forces the reader to clarify his own thoughts on this issue. He has done a splendid job, and we are grateful to him for it.

Marcia Bystryn, ACTING DIRECTOR
The Twentieth Century Fund
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Acknowledgments

Doris Batliner, the librarian at the *Courier-Journal* in Louisville, Kentucky, laboriously gathered over a period of several months hundreds of documents on commercial speech, ranging from law review articles and unpublished theses to short letters to the editor in obscure publications. David Vestal, a lawyer and journalism student in Iowa City, Iowa, painstakingly organized and catalogued all the material—and, in the process of reading it all, developed his own view that restrictions on commercial speech are necessary and proper. Subsequent discussions with him sharpened my own thinking. He also edited the final version. I am grateful to him and to Ms. Batliner, as well as to Robert Sack, a lawyer who has taught me much and who graciously read this paper in manuscript form.

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Preface

Two hundred years after the founding of this nation and nearly two hundred years after the writing of the Bill of Rights, it is taken for granted in this greatest of democracies that speech is free.

A voter can criticize his government.
A sportswriter can castigate the home team.
A politician can ridicule his opponent.
A worker can blow the whistle on his employer.
A churchgoer can question his preacher.
A teacher can tell off the school board.

But:

A lawyer often can't ask an accident victim for his business.
A company can't urge you to buy its stock.
A cigarette maker can't advertise its wares on television.
A liquor seller sometimes can't post his prices.

Speech is free to the voter and the reporter, the politician and the worker, the churchgoer and the teacher, but it is not free to the peddler and the advertiser.

For the peddler and the advertiser deal in commercial speech, and such speech is not accorded all the rights of regular speech. Commercial speech takes many forms—the billboards on the highway, the for-sale sign in the yard, the newsboy hawking newspapers at the stop sign, the "Dear Occupant" letter offering fantastic bargains on land in the Ozarks, the newspaper vending machine in the airport, the placard in the donut-shop window, as well as the everyday advertisements carried by newspapers, television, and radio.

Scores of law review articles and papers have addressed the issue, examining the series of court decisions that, since 1942, have relegated commercial speech to second-class status. It is an issue with many facets, and scholars come down on every side of it.

This paper seeks to explore and explain commercial speech. It does not, however, delve into certain aspects of the subject: false commercial speech, commercial speech and zoning, and so-called time, place, and manner restrictions on commercial speech.

False commercial speech, although an exceedingly important topic, is not examined here because the law and logic in this area are well established. Under the law, false commercial speech can be regulated or prohibited because, as the Supreme Court has stated, the First Amendment does not afford protection to illegal conduct in which speech is incidentally employed. For instance, insider stock tips, presidential death threats, and defamation can all be regulated, even though they involve speech. Likewise, since deception in a commercial transaction constitutes fraud, deceptive speech can be prohibited even though truthful commercial speech is protected.

Here I concentrate on the restrictions imposed by courts and legislatures on the *truthful* advertising of lawful products. I look at the impact of such restrictions on behavior and on freedom, and I arrive at a clear conclusion.

In writing this paper, I examined more than five hundred writings and many, many court cases. I also interviewed numerous lawyers and scholars with expertise in this area of the law.

As a newspaperman and a lawyer and an American, I entered this project with a bias toward freedom of speech for all. I finished the project with an even stronger belief that restrictions on commercial speech are ineffective as social policy and dangerous to our democracy.

Michael G. Gartner
Des Moines, Iowa
July 1988

N.B.: Since completing this manuscript, I have become president of NBC News. I want to make it clear that my proposal to pump dollars into television through government advertising occurred to me before I lined up at the television trough.

Chapter 1
Introduction

In April 1987, the awkwardly named Subcommittee on Transportation, Tourism and Hazardous Materials of the House Committee on Energy and Commerce held hearings on the harm done to us by the smoking of cigarettes. Among those testifying was James S. Todd, a doctor with the unwieldy title of senior deputy executive vice president of the American Medical Association.

"The health consequences of tobacco use have proven to be so serious and so difficult to correct that we cannot afford to overlook *any* preventive measure . . . ," Dr. Todd told the lawmakers. He went on to espouse the idea that the advertising—but not the use—of cigarettes and tobacco should be banned in this country. The position "was not a decision that the AMA took lightly," Dr. Todd told the committee. "We certainly appreciate the First Amendment freedoms we enjoy in this nation."

The American Medical Association does indeed appreciate First Amendment freedoms. Less than a year after Todd made his remarks, in early 1988, the *Journal of the American Medical Association* ran an anonymous letter to the editor in which a young doctor told how he, or maybe she, injected a dying twenty-year-old woman with enough morphine to kill her. ("With clocklike certainty, within four minutes the breathing rate slowed even more, then became irregular, then ceased. . . . It's over, Debbie.")

The dramatic letter caught the attention of the authorities in Chicago, who wondered if perhaps the doctor had committed a murder. The authorities subpoenaed the journal to disclose the name of the doctor.

The AMA refused to talk, arguing that the subpoena interfered with a free press as protected by the First Amendment.

I wondered aloud about this in the pages of *The Wall Street Journal*. The American Medical Association, I wrote, seemed to believe that the First Amendment protects those who anonymously want to tell you how they killed somebody, but not those who want to get you to buy a legal product that might cause you to kill yourself. That, I argued, was having it both ways, and you can't do that. You can't appeal to freedoms when it's to your convenience and smother them when it's not.

Kirk Johnson, the general counsel of the AMA, responded in a letter to the editor: "The First Amendment at its heart protects the freedom of the press—including medical journals—and the expression of ideas—even repugnant ones such as those expressed in the AMA Journal story about an act of euthanasia."

He went on: "But commercial speech—the peddler selling his product—historically had no First Amendment protection at all, and the Supreme Court continues to recognize the 'common sense distinction' between commercial advertising and other forms of speech. Thus, the Supreme Court last term upheld a ban on gambling advertising in Puerto Rico even though gambling is lawful there, and a federal ban on tobacco advertising likely would be upheld as well. There is no 'lawful-to-sell, lawful-to-advertise' principle under the First Amendment. . . . The AMA does not take its First Amendment rights, or anybody else's, casually."

But the AMA does take First Amendment rights casually, and it isn't alone. Each year, some $120 billion is spent on advertising in this country, and all those words, all those ideas, all those pitches, all that writing, and all those pictures have only limited protection under the First Amendment. This category of speech—called commercial speech by the courts and lawyers—has only second-class status, at best. Oddly, few people—journalists, advertisers, or legislators—seem to care.

They should, because commercial speech is expression, and freedom of expression is necessary in a democracy. An intelligent, self-governing people must shop freely in the marketplace of ideas, and that marketplace contains commercial as well as political stalls. No stall should be closed by the thought police. "The best test of truth is the power of thought to get itself accepted in the competition of the market," Justice Oliver Wendell Holmes wrote in 1919. Every person must develop his own views and philosophy, and this cannot occur if any expression, any idea, is censored.

Commercial speech is really just an unnecessary and confusing term that lawyers have concocted. When we talk about commercial speech, we are simply talking about the right of businesses truthfully to pro-

mote legal products and services in the commercial marketplace without interference from government.

There is no reason—though the AMA, the Supreme Court, the law journals and professors, and legislators have certainly tried to find one—that truthful commercial speech should be suppressed, even a little, in a country where free speech reigns. There is every reason why it should not be suppressed.

What the Founders Thought

The regulation of commercial speech is not just a theoretical problem. In the United States, where "Congress shall make no law abridging the freedom of speech . . . or of the press . . . ," it is perfectly legal to ban advertising for a product or service that itself is perfectly legal. And it is being done.

In the United States today:

- It is illegal to advertise cigarettes or tobacco products on television or radio. The products themselves, of course, are legal.
- It is illegal to mail "any newspaper, circular, pamphlet, or publication of any kind containing any advertising of a lottery or similar enterprise, or any list of prizes awarded in such an enterprise," according to postal regulations. (There is an exception: a newspaper can run advertising about an official lottery in its own or an adjacent state.)
- It is a criminal offense, punishable by a fine of up to $1,000 or imprisonment for a year or both, for any broadcaster knowingly to permit the broadcasting of any ad about lotteries except for official ones run by the state.
- It is illegal to use interstate commerce or the mails—including any writing or broadcast material—to offer any stock or security for sale. All that is permitted are so-called tombstone ads that state where a prospectus for a security can be obtained.
- It is legal for states to regulate the advertising of liquor. And several states do.
- It is legal for states to prohibit lawyers from engaging in in-person solicitation of clients; it is also legal for them to regulate the content of advertising by lawyers.
- It is illegal in Nevada to advertise a brothel in counties where prostitution is illegal even though the brothel itself is operating legally in another county.

- It is illegal in North Dakota for a licensed dealer in pistols to place a placard ad in his window saying that he sells them.
- It is illegal in New Jersey for doctors' ads to contain testimonials from satisfied patients.
- It is illegal in Utah to advertise cigarettes on billboards or buses.
- It is illegal in most instances to display U.S. currency in advertising.
- It is illegal in many states to advertise for surrogate motherhood arrangements.

How did all this come about?

Advertising has been around since at least the days of the founders of this republic. Yet historians have failed to uncover any meaningful discussion of advertising at the time the First Amendment was debated. Did the founders just assume that advertising would be protected? After all, the First Amendment doesn't guarantee "freedom of *noncommercial* speech"; it refers only to freedom of speech, period. Or did the founders just assume that advertising was such a stepchild form of expression that of course it wasn't protected and everyone knew it?

The predominant view is that the First Amendment was an attempt to secure freedom of political, rather than commercial, speech. Judges and philosophers have declared many times over that the First Amendment was a response to colonial prosecutions for seditious libel. Ever since the adoption of the Bill of Rights, it has been widely assumed that the original purpose of the First Amendment was to permit free and open criticism of government.

Thus a judge in 1941 wrote that "such men as Thomas Paine, John Milton and Thomas Jefferson were not fighting for the right to peddle commercial advertising." Similarly, in a dissent to a 1977 advertising case, Justice William Rehnquist wrote: "If those responsible for the Bill of Rights, by feats of valor or efforts at draftsmanship, could have lived to know that their efforts had enshrined in the Courts the right of commercial vendors of contraceptives to peddle those to unmarried minors through such means as window displays and vending machines located in the men's rooms of truck stops, not-withstanding the considered judgment of the New York Legislature to the contrary, it is not difficult to imagine their reaction."

In a Ph.D. thesis for the University of Minnesota in 1977, Kent Richards Middleton attempted to trace the intentions of the founders with respect to commercial speech. Justice Rehnquist might be surprised. Middleton wrote:

The role of commercialism in the eighteenth century as well as intellectual and legal currents of the time offer little conclusive evidence that the founding fathers would have necessarily excluded commercial advertising from First Amendment protections. More persuasive evidence that the First Amendment was never intended to protect commercial speech is the relentless repetition by judges, philosophers and politicians since the eighteenth century of the idea that free expression must be protected for political—not commercial—reasons.

The founding fathers were conspicuously reticent about what the First Amendment was supposed to mean. No American leader is known to have argued specifically for including commercial advertising under the First Amendment, but isolated statements and common ideas of the period provide evidence that advertising might not have been categorically excluded from First Amendment protections. "A free press," Richard Henry Lee said in his demand for a Bill of Rights, "is the channel of communication to *mercantile* and public affairs. . . ." The not-uncommon belief in the eighteenth century that speech should be free ". . . as far as . . . it . . . does not hurt or control the Right of Another . . ." also leaves room for advertising in a theory of protected expression.

Other evidence is found in the extensive use of advertising in the eighteenth century. The 1700s were a time of growing commercialism when advertising was of unquestioned value in announcing the arrival of a new shipload of useful products. After a long wait, a homemaker was often more interested in learning through advertising about the newly imported calicoes than in stale news of foreign intrigue.

The founding fathers, like other citizens in the eighteenth century, were not unfamiliar with, or hostile to, commercial advertising. They were materialistic people, some of whom used advertising themselves. George Washington advertised western lands in the newspaper.

Because the eighteenth century was a period of aggressive, individual commercial efforts, the distinction made by the supreme court in 1942 between editorial content and "purely commercial" advertising may never have occurred to the founding fathers. It was difficult at that time to draw a line between the commercial and the editorial. Advertising did not have a format or position in the paper distinct from news, and the paper's staff was not yet special-

ized. The editor was often reporter, salesman, editor and bookkeeper all at once.

To the scholarly founders, free and open discourse was indispensable if people were to remain informed about important matters. Since economic concerns played a central role in the lives of all Americans—then as now—the framers may have accorded communication of information needed for personal economic decisions a high degree of protection from governmental interference.

"Our framers understood that it makes no difference from the standpoint of free speech and self-government whether information appears in a news column or in a paid advertisement," Bruce Sanford, a lawyer who represents the media, told a business conference in 1987. "Both have value. Both contribute to informed decisionmaking in a free enterprise society."

Setting Limits—Why, and Why Not

So what happened? If indeed the founders believed in free speech for advertising as well as news and politics, how did we get to our sorry current state, in which messages sent to us can be cleared—or even banned—by the state?

What happened is this: over the years, especially in this century, judges and regulators have devised constitutional arguments to limit the protections accorded commercial speech. They are:

1. *Commercial speech bears no relation to public decisionmaking.* Though not exactly a new argument, the idea here is that commercial speech is undeserving of protection because the First Amendment applies only to issues relevant to the political process, to speech concerning how the government should be run. Proponents of this view hold that commercial speech does not contribute to political decisionmaking. A 1987 article in the *University of Toronto Law Journal*, while conceding that advertising may have an impact on political decisions, concluded that "a theory of political expression which included any utterance which has impact upon political decisions would simply sweep in too much to retain coherence."

In a similar vein, an article in the *University of Illinois Law Review* in 1986 argued that "proposals for commercial transactions are so distinct from political debate that any public interest in advertisements is

totally irrelevant to first amendment values. Speech which does no more than propose a commercial transaction does not involve any expression essential to self-government."

That, of course, is hogwash. The free-market economy and our democratic system are inseparable. In a democracy, if people are to make their own personal, economic, and intellectual choices, there must be a free exchange of commercial opinion and information. Pure commercial speech may not affect how people are governed as directly as political speech does, but it indirectly affects people's attitudes and values about how they should be governed. While politics can shape a man's business, his business can just as surely shape his politics.

2. *Freedom of expression protects an open exchange of views in order to create a competitive marketplace of ideas, which will in turn enhance the search for truth.* In this view, commercial speech should not be protected because it is just huckstering and is not involved with *ideas*. Since commercial speech is just one company saying its product is better or newer or cheaper or costlier or nicer or prettier than the competition's, it is less integrally involved with ideas and thus not worthy of constitutional protection.

The argument was succinctly stated in the *Virginia Law Review* in 1979: "Measured in terms of traditional First Amendment principles, commercial speech is remarkable for its insignificance."

In truth, commercial speech performs a strong informational function, allowing consumers to make better-informed decisions about allocating their scarce resources. Advertising may be less objective than news copy, but it is no less informative. As Burt Neuborne, a First Amendment authority and professor of law at New York University, said in the summer of 1988, "Even if speech about economic choice was not essential to a functioning economic democracy, it would be entitled to special protection because it is among the most potent conveyors of information and ideas in modern society."

3. *Commercial speech can be regulated because the motivation of the regulators is not based on disapproval of the message.* Those holding this view maintain that the intent of the framers in drafting the First Amendment was to prevent the state from suppressing speech it disfavored. Commercial speech is regulated out of concern for public health and welfare, not out of any intolerance for ideas. Therefore, regulation of commercial speech does not violate the First Amendment.

This is a slick argument, but it is not true. In fact, most regulation of truthful commercial speech springs from the distaste of regulators

or the courts for the message transmitted. Recent history abounds with prohibitions on ads for activities that, though legal, were thought to threaten the community's moral standards. Nevada, which has legalized prostitution, prohibits brothels from advertising on public streets or highways or in any place of business. Puerto Rico attempts to discourage residents from engaging in legal casino gambling by forbidding advertising on the island. Likewise, many states prohibit ads for surrogate motherhood arrangements, even though the practice itself is legal.

4. *The protection of commercial speech cheapens or dilutes the constitutional protection afforded other speech.* Former Justice Potter Stewart noted in the Pentagon Papers case that when everything is classified, nothing is. In the same way, say those in this camp, protecting all speech equally means protecting no speech at all. As the U.S. Supreme Court said in a unanimous 1978 opinion in the case of *Ohralik v. Ohio State Bar Association,* "To require a parity of constitutional protection for commercial and non-commercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech."

Chief Justice Rehnquist has persistently argued this point, maintaining that the First Amendment, "long regarded by the Court as a sanctuary for expressions of public importance or intellectual interest, is demeaned by invocation to protect advertising of goods and services." He added, "advertising, however truthful or reasonable it may be, is not the sort of expression that the First Amendment was adopted to protect."

But if the speech is protected by the First Amendment, as commercial speech is, that should be the end of the debate. The level of protection should not vary according to the value members of the public might accord that speech. For who is to determine the scale of values? The Constitution does not establish a class of philosopher-kings to decide for all of us which forms of speech, among all those protected by the First Amendment, deserve more protection and which less.

The First Amendment mentions only one classification of speech: *free.* Yet judges believe that they and other government officials have the right to police commercial speech in a way they never would dream of doing if noncommercial speech were involved.

5. *Commercial speech should be regulated because its purveyors are very knowledgeable about their subject and thus must be held to a higher standard than those engaging in other forms of speech.* In the words of former Justice Lewis Powell: "Two features of commercial speech