

Sorrell v. IMS Health: Protecting Free Speech or Resurrecting *Lochner*?

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The Supreme Court's latest foray into commercial speech doctrine, *Sorrell v. IMS Health*,¹ confirms a remarkable trend in First Amendment jurisprudence over the past 30 years. In recent years, the Court's conservative justices have been far more likely than its liberal ones to strike down government speech restrictions on First Amendment grounds. But 35 years ago, those roles were largely reversed.

That trend is no more evident than in case law addressing commercial speech—that is, speech, such as advertising, that proposes a commercial transaction. When the Court first concluded in a 1976 decision that commercial speech was entitled to First Amendment protection, liberal justices unanimously joined Justice Harry Blackmun's majority decision.² Then-Justice William Rehnquist dissented, while Justice Potter Stewart and Chief Justice Warren Burger filed concurring opinions that expressed hesitancy over the new doctrine. But every conservative justice joined Justice Anthony Kennedy's sweeping, pro-First Amendment majority opinion in *Sorrell*, while three of the Court's four liberals (all but Justice Sonia Sotomayor) signed on to Justice Stephen Breyer's passionate dissent.³ In 1976's *Virginia Board*, the plaintiffs were represented by the liberal Public Citizen Litigation Group. In *Sorrell*, Public Citizen filed an amicus brief in support of government speech restrictions.

But while the new battle lines in commercial speech litigation have become increasingly clear, what is far less clear is what the *Sorrell* decision portends for the development of First Amendment doctrine. On the one hand, Justice Kennedy's opinion several times

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¹ *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653 (2011).

² *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

³ 131 S. Ct. at 2673 (Breyer, J., dissenting).

suggested that government restrictions on commercial speech should frequently be subjected to some sort of “heightened” scrutiny. (Heretofore, such restrictions have generally been subject to an “intermediate” level of First Amendment scrutiny, first articulated in *Central Hudson Gas & Electric Corp. v. Public Services Commission of New York*.⁴) But *Sorrell* never explained how its “heightened” scrutiny was to be applied. Indeed, the Court ultimately determined that because the speech restrictions at issue could not pass muster even under the less exacting *Central Hudson* test, there was no reason to decide whether a more rigorous First Amendment test should be applied.⁵

It thus remains to be seen whether *Sorrell* marks a major expansion of First Amendment protection for commercial speech. Several justices have expressed a willingness to eliminate the doctrinal distinctions between commercial speech and other forms of speech. *Sorrell* indicates that the Court’s majority is not yet willing to take that step.

I. The Vermont Statute

At issue was a Vermont statute (Act 80) that sought to restrict the access of pharmaceutical companies to information about the prescribing habits of Vermont doctors. Drug companies want that information because it permits them to identify those doctors most likely to prescribe their drugs, and because it allows them to ascertain how best to present their sales pitches when making sales calls at the doctors’ offices—a process called “detailing.” Vermont articulated two reasons why it wanted to restrict access to prescriber-identifying information. First, it sought to protect doctors’ privacy interests. Second, it noted that the economics of the pharmaceutical industry are such that only higher-priced, brand-name drugs are promoted through the detailing process. Vermont concluded that by restricting access to prescriber-identifying information, it could interfere sufficiently with the detailing process to effect a shift in overall drug sales away from brand-name drugs and toward lower-priced generic drugs (which Vermont concluded were often at least as safe and effective as equivalent brand-name drugs). Vermont

⁴ 447 U.S. 557 (1980).

⁵ 131 S. Ct. at 2667.

contended that such a shift would result in reduced health care costs and in improvements in health care.

Pharmacies are the principal source of information about doctors' prescribing habits. Federal law prohibits them from dispensing a prescription drug unless the customer presents a prescription signed by a licensed doctor. Pharmacies have a strong financial interest in retaining information regarding who prescribed dispensed drugs: medical insurance companies generally require them to reveal the prescriber's name before they will pay a share of the drug's costs. Data publishers (sometimes pejoratively referred to as "data miners") purchase prescription information from pharmacies, analyze it to determine which doctors prescribe which drugs, and then provide the analyzed data to their customers, most of whom are drug companies.

Act 80 restricted access to prescriber-identifying information in three ways. First, it prohibited pharmacies, insurers, and similar entities from selling or leasing such information. Second, it prohibited them from permitting the use of such information "for marketing or promoting a prescription drug, unless the prescriber consents." Third, it imposed an identical prohibition on pharmaceutical manufacturers and marketers, in the absence of prescriber consent.⁶ The first two prohibitions contained several broad exceptions;⁷ according to the Supreme Court, those exceptions "made prescriber-identifying information available to an almost limitless audience"—that is, just about everyone other than drug companies.⁸

II. The First Amendment Challenge

Before Act 80 took effect, the nation's three largest data publishers challenged the statute on First Amendment grounds.⁹ A trade group of drug manufacturers filed a similar challenge, and the two suits were consolidated. The U.S. Court of Appeals for the Second Circuit agreed that the statute violated their First Amendment rights and

⁶ Vt. Stat. Ann. tit. 18, § 4631(d) (2011).

⁷ Vt. Stat. Ann. tit. 18, § 4631(e) (2011).

⁸ Sorrell, 131 S. Ct. at 2669.

⁹ The data publishers are referred to collectively as "IMS Health," the largest of the three publishers.

enjoined enforcement.¹⁰ The U.S. Court of Appeals for the First Circuit previously rejected First Amendment challenges that IMS Health had brought against similar statutes adopted in New Hampshire and Maine.¹¹ The U.S. Supreme Court granted review to resolve the conflict.

In affirming the Second Circuit's decision, the Court applied the four-part *Central Hudson* test that it has traditionally applied in commercial speech cases over the past 30 years. Under that test, courts consider as a threshold matter whether the commercial speech concerns unlawful activity or is inherently misleading. If so, the speech is not protected by the First Amendment. If the speech concerns lawful activity and is not misleading, the challenged speech regulation violates the First Amendment unless government regulators can establish that: (1) they have identified a substantial government interest; (2) the regulation "directly advances" the asserted interest; and (3) the regulation "is no more extensive than is necessary to serve that interest."¹²

Because Act 80 applied even to speech that was not inherently misleading and that did not propose an illegal transaction, the first *Central Hudson* prong was not relevant. Vermont identified two interests, both of which the Court assumed to be "substantial," that were served by Act 80: (1) medical privacy and (2) lowering the costs of medical services and improving public health. The Court held that neither rationale was sufficient to survive *Central Hudson* scrutiny.

The Court concluded, in light of the broad statutory exceptions that permitted widespread distribution of physician-identifying information, that Act 80 did not sufficiently "advance the State's asserted interest in physician confidentiality," and thus that the statute flunked the third prong of the *Central Hudson* test.¹³ It left open the possibility that a more broadly based privacy provision—one that regulated even more speech—might have passed the test.¹⁴

¹⁰ *IMS Health, Inc. v. Sorrell*, 630 F.3d 263 (2d Cir. 2010).

¹¹ *IMS Health, Inc. v. Ayotte*, 550 F.3d 42 (1st Cir. 2008), cert. denied, 129 S. Ct. 2864 (2009) (New Hampshire); *IMS Health, Inc. v. Mills*, 616 F.3d 7 (1st Cir. 2010) (Maine).

¹² *Central Hudson*, 447 U.S. at 566.

¹³ *Sorrell*, 131 S. Ct. at 2668.

¹⁴ *Id.*

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The Court deemed the second interest identified by Vermont as constitutionally insufficient because, it held, Act 80 did not advance that interest “in a permissible way.”¹⁵ It noted that Vermont was seeking to achieve its health care goals by restraining truthful speech by drug companies that, Vermont feared, would cause doctors to write inappropriate and costly prescriptions. The Court held that regulation of truthful commercial speech can never be justified based on concern over how others might react to the speech. It repeated its prior admonition that “the ‘fear that people would make bad decisions if given truthful information’ cannot justify content-based burdens on speech.”¹⁶ Such justifications for burdening speech were particularly inappropriate given that the targets of the speech—prescribing physicians—were “sophisticated and experienced consumers.”¹⁷

III. Content-Based and Speaker-Based Restrictions

Had the Court confined itself to consideration of whether Act 80 could survive intermediate scrutiny under *Central Hudson*, the *Sorrell* decision would likely have attracted little attention. But the Court went well beyond a typical *Central Hudson* analysis in its discussion of speech restrictions based on the content of the speech and the identity of the speaker. Instead, it stated unequivocally that “heightened judicial scrutiny is warranted” whenever a “content-based burden” is imposed on protected speech, and it concluded that Act 80 imposes just such a content-based burden.¹⁸ We will have to await future cases to discover what sort of heightened judicial scrutiny the majority had in mind.

Although the majority suggested that “heightened” scrutiny had been applied in previous commercial speech cases involving content-based speech restrictions, none of the cases cited by the majority were commercial speech cases.¹⁹ *Turner Broadcasting System, Inc. v. FCC* was a First Amendment challenge to a federal “must carry” statute that required cable television systems to carry the signals of

¹⁵ *Id.* at 2670.

¹⁶ *Id.* at 2670–71 (quoting *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 374 (2002)).

¹⁷ *Id.* at 2671.

¹⁸ *Id.* at 2663.

¹⁹ *Id.* at 2663–64.

over-the-air television stations.²⁰ *United States v. Playboy Entertainment Group, Inc.* challenged a federal statute that prohibited cable stations from providing sexually explicit programming except during late-night hours.²¹ *Simon & Schuster, Inc. v. Members of New York State Crime Victims Board* challenged a New York State law that imposed financial burdens on those who sought to publish books describing their criminal activities.²² In each of those cases, the Court indicated that burdens imposed on speech based on its content are subject to heightened scrutiny even if the government does not ban the speech altogether, but none of those cases involved commercial speech—speech proposing a commercial transaction—and in none of the decisions did the Court suggest that its call for heightened scrutiny extended to commercial speech cases.

In noncommercial speech cases, the issue of “heightened” scrutiny usually arises in the context of determining whether the time-place-or-manner doctrine applies to a challenged speech restriction. Under that doctrine, “the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant government interest, and that they leave open ample alternative channels for communication of the information.”²³ Thus, for example, the Court applied this somewhat relaxed standard of review to uphold a New York City ordinance that controlled music volume at rock concerts in Central Park because the controls were imposed without regard to the content of the music and reasonably accommodated the needs of individual musicians.²⁴ An essential prerequisite to application of the time-place-or-manner doctrine is that the government’s motivation for regulating speech not be based on the content of the speech; the doctrine is inapplicable and heightened scrutiny is applied whenever “the government has adopted a regulation of speech because of disagreement with the message it conveys.”²⁵ But the Court has never considered the time-place-or-manner doctrine in the context of commercial speech and none of its

²⁰ 512 U.S. 622 (1994).

²¹ 529 U.S. 803 (2000).

²² 502 U.S. 105 (1991).

²³ *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

²⁴ *Id.* at 803.

²⁵ *Id.* at 791.

time-place-or-manner decisions has suggested that the doctrine is applicable to restrictions on commercial speech. Accordingly, *Sorrell's* assertion that "heightened" scrutiny applies to *any* content-based burdens imposed on speech, even when the speech is commercial in nature, suggests that the Court may be contemplating a substantial expansion of First Amendment protection for commercial speech.

Moreover, as the *Sorrell* dissent points out, most statutes restricting commercial speech are, by their very nature, to some degree content-based:

Regulatory programs necessarily draw distinctions on the basis of content. . . . Electricity regulators, for example, oversee company statements, pronouncements, and proposals, but only about electricity. . . . The Federal Reserve Board regulates the content of statements, advertising, loan proposals, and interest rate disclosures, but only when made by financial institutions. . . . And the FDA oversees the form and content of labeling, advertising, and sales proposals of drugs, but not of furniture.²⁶

If heightened scrutiny is to be applied to any commercial speech regulation that is based on the content of the speech being regulated, one could reasonably conclude that *all* such regulations will be subject to heightened scrutiny.

Indeed, it is reasonable to surmise that the Court ultimately disposed of *Sorrell* on relatively narrow grounds because it recognized the potentially wide-ranging implications of its "heightened scrutiny" language and wished to avoid committing itself irrevocably to a position whose ramifications remain unclear. By striking down Act 80 under the less exacting *Central Hudson* test, the Court bought time to work out precisely when commercial speech restrictions should be subject to "heightened scrutiny"—scrutiny more exacting than the *Central Hudson* test—and what "heightened scrutiny" should consist of in the commercial speech context.

IV. "Neutral Justifications" for Commercial Speech Restrictions

One hint regarding how the Court may answer those questions is contained in *Sorrell's* discussion of speech restrictions designed

²⁶ *Sorrell*, 131 S. Ct. at 2677 (Breyer, J., dissenting).

to protect consumers against fraud. The Court recognized that commercial speech restrictions may pass First Amendment muster when adopted to protect against fraud, even if they are content-based: "The Court has noted, for example, that 'a State may choose to regulate price advertising in one industry but not in others, because the risk of fraud . . . is in its view greater there.'"²⁷ The Court contrasted such permissible content-based commercial speech restrictions with Act 80, stating that "Vermont has not shown that its law has a neutral justification."²⁸

Of course, a statute that regulates price advertising in the used-car industry but not, for example, in the retail grocery industry cannot be said to have a "neutral" justification as that term is normally understood. Instead of treating all price advertising neutrally, it imposes greater burdens on one type of commercial speech based on its content (statements about used-car prices) than on other price advertising. And it likely does so precisely because legislators disfavor used-car price advertising; they deem it more susceptible to fraud than other forms of price advertising. Indeed, given that the Court was referring to "neutral justification[s]" for laws that by definition are not "neutral" with respect to the content of speech, the Court could not have intended the word "neutral" to be accorded its everyday meaning. Rather, the Court's statement that content-based commercial speech restrictions are constitutionally permissible only when they possess a "neutral justification" may simply indicate that the Court intended to limit such restrictions to a small number of narrowly defined and well-accepted categories.

As *Sorrell* indicates, one such category covers speech restrictions designed to protect consumers from fraud: "Indeed, the government's legitimate interest in protecting consumers from commercial harms explains why commercial speech can be subject to greater governmental regulation than noncommercial speech."²⁹ Even where commercial speech is not inherently misleading, it can be regulated to reduce the possibility that some consumers might nonetheless be misled. Disclaimers may appropriately be required in advertisements, "in order to dissipate the possibility of consumer confusion

²⁷ *Id.* at 2672 (majority opinion) (quoting *R.A.V. v. St. Paul*, 505 U.S. 377, 388–89 (1992)).

²⁸ *Id.*

²⁹ *Id.*

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or deception.”³⁰ Thus, for example, states may require a lawyer to attach a disclaimer to an advertisement offering contingency fee services, to make clear to potential clients that even though they will owe no “fees” unless they win their case, they may still be responsible for court costs.³¹ The Court has never tolerated the imposition of similar burdens on noncommercial speech.

A second (and less controversial) “neutral justification” is the suppression of commercial speech that is false or that proposes an illegal transaction. While false noncommercial speech is generally accorded a modicum of First Amendment protection in order to guard against the chilling of truthful speech,³² false commercial speech has never been deemed entitled to any First Amendment protection.³³ Moreover, a ban on false commercial speech arguably could never properly be described as “content-based” suppression of speech because it applies to *all* false commercial speech, not merely false commercial speech touching on specific topics. While a ban on commercial speech that proposes an illegal transaction generally qualifies as content-based (because it undoubtedly has been adopted based on government disapproval of the specific message being conveyed), the Court has long recognized that such speech restrictions are compatible with the First Amendment,³⁴ and *Sorrell* characterized such restrictions as “restrictions directed at commerce or conduct” that impose no more than “incidental burdens on speech.”³⁵

A third “neutral justification” implicitly endorsed by *Sorrell* is protection of privacy. *Sorrell* rejected Vermont’s privacy-based justifications for Act 80, but the Court did so primarily because the statute permitted dissemination of prescriber-identifying information in so many circumstances that it did not directly advance Vermont’s claimed privacy interests (and thus did not satisfy prong three of the *Central Hudson* test). The Court indicated, however, that the Vermont statute might have been upheld had it more broadly

³⁰ In re R.M.J., 455 U.S. 191, 201 (1982).

³¹ *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651–52 (1985).

³² *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

³³ *Central Hudson*, 447 U.S. at 563.

³⁴ *Pittsburgh Press Co. v. Human Relations Comm’n*, 413 U.S. 376, 388 (1973).

³⁵ *Sorrell*, 131 S. Ct. at 2664.

protected the privacy of doctors by restricting more speech.³⁶ A broader statute would still likely be deemed content-based because it would prohibit speech about what drugs a doctor prescribes but not speech that would entail a similar invasion of privacy, for example, speech about analogous conduct by a dentist or speech about a doctor's income. But *Sorrell* indicates that the government's interest in protecting privacy can, in at least some instances, serve as an adequate "neutral justification" for imposing content-based burdens on truthful commercial speech.³⁷

Such privacy-based speech restrictions are likely permissible even when the First Amendment would prohibit similar restrictions on noncommercial speech. In the noncommercial context, the Court has explained that "[a]s a general matter, state action to punish the publication of truthful information seldom can satisfy constitutional standards."³⁸ Thus, the Court upheld the First Amendment right of a radio station to air a tape of an illegally intercepted telephone conversation despite a federal law prohibiting such broadcasts, finding that the public interest in airing matters of public concern outweighed the privacy interests of the parties to the intercepted conversation.³⁹ Because commercial speech is less likely to be deemed a matter "of public concern," the Court appears more likely to uphold a government's interest in protecting privacy when the regulated speech is commercial in nature.

There is no indication in *Sorrell* that the Court is willing to recognize "neutral justification[s]" for content-based commercial speech restrictions outside these three areas, which are (1) prophylactic rules designed to protect against the possibility that consumers will be misled, (2) laws prohibiting commercial speech that is false or proposes an illegal transaction, and (3) laws designed to protect privacy. The Court made abundantly clear that one justification for content-based commercial speech restrictions is never compatible

³⁶ *Id.* at 2668.

³⁷ As an example of a statute that "would present quite a different case"—it might well survive First Amendment challenge—the Court cited the Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d-2 (2006), which broadly protects the privacy of patients' medical records, at least in a commercial context. *Sorrell*, 131 S. Ct. at 2668.

³⁸ *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001).

³⁹ *Id.* at 534.

with the First Amendment: a desire to influence the conduct of third parties indirectly, by restraining speech that might cause the third parties to act in a manner that the government deems undesirable.⁴⁰ *Sorrell* concluded that just such a desire had been among Vermont's principal motivations for adopting Act 80. The Court explained:

The State seeks to achieve its policy objectives through the indirect means of restraining certain speakers—that is, by diminishing detailers' abilities to influence prescription decisions. Those who seek to censor or burden free expression often assert that disfavored speech has adverse effects. But the fear that people would make bad decisions if given truthful information cannot justify content-based burdens on speech. . . . 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. . . . The State can express [its] views through its own speech. . . . But a State's failure to persuade does not allow it to hamstring the opposition. The State may not burden the speech of others in order to tilt public debate in a preferred direction.⁴¹

The *Sorrell* dissent was correct, of course, that economic regulation will often impose burdens on speech, whether intended or not.⁴² The majority made clear, however, that "the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech."⁴³ But when a statute imposes "more than an incidental burden on protected expression" and does so based on the content of speech or the identity of the speaker, it will be subject to "heightened scrutiny" and can never be undertaken to tilt public debate in a preferred direction.⁴⁴

V. Application to Existing Federal Speech Restrictions

Sorrell's pronouncement that content-based restrictions on commercial speech are subject to "heightened scrutiny" calls into question the constitutionality of speech restrictions imposed under a

⁴⁰ *Sorrell*, 131 S. Ct. at 2671.

⁴¹ *Id.* (citations omitted).

⁴² *Id.* at 2675 (Breyer, J., dissenting).

⁴³ *Id.* at 2664 (majority opinion).

⁴⁴ *Id.* at 2664–65.

variety of federal regulatory programs. Such federal speech restrictions in most instances are content-based. In response to previous First Amendment challenges, the federal government has raised a variety of defenses, some of which may not meet *Sorrell's* definition of a "neutral justification" for burdening speech and thus may no longer be sufficient to withstand constitutional challenge. This article briefly examines *Sorrell's* potential effect on two federal regulatory programs: the regulation of prescription drugs and the regulation of sales of securities.

A. Prescription Drugs

The Food and Drug Administration comprehensively regulates the manufacture and sale of prescription drugs pursuant to the Federal Food, Drug, and Cosmetic Act.⁴⁵ No "new drugs" may be introduced into interstate commerce unless they are approved by the FDA for a specified use.⁴⁶ As part of the approval process, the FDA specifies the precise labeling for the approved product. The agency does not permit a manufacturer to market an approved product for a use that it has not approved; indeed, if an approved product is marketed for an unapproved new use, the FDA deems the product an unapproved new drug that is subject to seizure. The FDA also considers such a product to be "misbranded" (and thus subject to seizure) because its labeling will not provide directions for administering the drug for the new use, and federal law deems prescription drugs to be misbranded if not properly labeled for each of their intended uses.⁴⁷

But the medical community's knowledge regarding the safety and effectiveness of FDA-approved drugs inevitably outpaces FDA-approved labeling. Physicians who regularly work with such drugs learn of safe and effective uses for the drugs that are not included within the labeling; such uses are generally referred to as off-label uses. The FDA does not control the practice of medicine and thus does not seek to regulate the speech or conduct of physicians, who routinely prescribe FDA-approved products to their patients for off-label uses. But the FDA has repeatedly cracked down on drug

⁴⁵ 21 U.S.C. §§ 301–399d (2006).

⁴⁶ 21 U.S.C. § 355(a) (2006).

⁴⁷ 21 U.S.C. § 352(f)(1) (2006).

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companies that speak truthfully about off-label uses of their products. The courts have made clear that the First Amendment imposes some limits on the FDA's authority to sanction manufacturers that discuss off-label uses.⁴⁸

In defending against First Amendment challenges, the FDA has asserted that its restrictions on truthful manufacturer speech serve two important government interests: (1) manufacturers have a natural tendency to provide a biased summary of their products' attributes, and a ban on manufacturer off-label speech is the only means of ensuring that doctors and patients are not misled; and (2) prohibiting off-label speech provides manufacturers with an incentive to conduct the extensive product testing necessary to obtain agency approval for the new use, and conducting such testing is the only way to determine for sure that the off-label use is actually safe and effective. *Sorrell* will make it significantly harder for the FDA to sustain each of those arguments.

The FDA undoubtedly has a strong interest in preventing misleading speech about off-label use. But current enforcement policy entails a high degree of the content-based and speaker-based speech regulation of which *Sorrell* was so critical. For example, although the manufacturer of a drug is likely to be as well-acquainted as anyone with medical research regarding off-label uses of that drug, the manufacturer is the *only* entity that is prohibited from speaking truthfully about those uses. If any sort of "heightened scrutiny" is applied to the FDA's misleading-speech rationale for suppressing manufacturer off-label speech, the agency will have a very difficult time justifying its total ban on truthful speech and explaining why, for example, use of disclaimers would be insufficient to ameliorate any potentially misleading aspects of the speech.

The FDA's second rationale for its content-based speech regulation (providing an incentive for increased product testing) is unlikely to survive *Sorrell*. Nothing in the Court's decision indicated that content-based speech suppression as a means of inducing a censored party to engage in additional scientific research is the sort of "neutral justification" that can survive First Amendment scrutiny. Indeed, even under a traditional *Central Hudson* analysis, one can posit

⁴⁸ See, e.g., *Wash. Legal Found. v. Friedman*, 13 F. Supp. 2d 51 (D.D.C. 1998), appeal dismissed, 202 F.3d 331 (D.C. Cir. 2000).

numerous ways to provide a drug manufacturer with incentives to engage in research without restricting its right to speak truthfully.

B. The Sale of Securities

The Securities Act of 1933 sets forth detailed rules regarding the public offering of securities by an issuer or a controlling shareholder.⁴⁹ It provides that such public offerings may be made only pursuant to a prospectus, and it contains detailed rules regarding precisely what information must be included in that prospectus.⁵⁰ Among the Act's many other provisions regulating speech is Section 17(b), which prohibits anyone from writing about a security in return for compensation from the issuer, unless the compensation is fully disclosed.⁵¹

These provisions undoubtedly constitute content-based and speaker-based restrictions on speech. Many courts nonetheless have declined to subject the federal securities laws to more than cursory First Amendment review. One federal appellate decision frequently cited by federal government attorneys held that rules relating to the "exchange of information regarding securities" are subject to only "limited First Amendment scrutiny."⁵² The appeals court justified that limited scrutiny by noting that securities law was an area that traditionally had been subject to extensive federal regulation. The court explained, "In areas of extensive federal regulation—like securities dealing—we do not believe that the Constitution requires the judiciary to weigh the relative merits of particular regulatory objectives that impinge upon communications occurring within the umbrella of an overall regulatory scheme."⁵³ The appeals court thus concluded that a newsletter publisher was entitled to only limited First Amendment protection from a Securities and Exchange Commission lawsuit alleging that he published articles in violation of Section 17(b).⁵⁴

Sorrell will likely lead to significantly increased First Amendment scrutiny for restrictions imposed on truthful speech by the federal

⁴⁹ 15 U.S.C. §§ 77a–77aa (2006).

⁵⁰ 15 U.S.C. § 77j (2006).

⁵¹ 15 U.S.C. § 77q(b) (2006).

⁵² *SEC v. Wall St. Publ'g Inst.*, 851 F.2d 365, 373 (D.C. Cir. 1988).

⁵³ *Id.*

⁵⁴ *Id.* at 373–74.

securities laws. Because such restrictions are virtually always content-based—for example, Section 17(b) applies to journalists who have received compensation from a securities issuer but not to journalists who have received no compensation—*Sorrell* suggests that they will be subject to “heightened scrutiny,” above the level prescribed by *Central Hudson*. The fact that the sale of securities is an area of extensive federal regulation will no longer justify providing deferential review to securities regulations that burden speech.

It is unquestionably true that a principal purpose of the federal securities laws is to protect purchasers from fraud. *Sorrell* recognizes that combating potential fraud can be a valid basis for imposing content-based speech restrictions. But even under those circumstances, the content-based restrictions on truthful speech imposed by the securities laws must still survive heightened scrutiny. Contrary to the law as it existed pre-*Sorrell*, the judiciary will now be required “to weigh the relative merits of particular regulatory objectives that impinge upon communications occurring within the umbrella of an overall regulatory scheme.”⁵⁵ The SEC may have considerable difficulty demonstrating that consumers are likely to be misled by an issuer’s omission of statutorily required items from a prospectus or by a journalist’s truthful article about an issuer that fails to mention compensation received by the journalist. In the absence of such a demonstration, burdens imposed by the federal securities laws on the speakers in question would not withstand First Amendment challenge.

VI. First Amendment Protection for Data

One interesting aspect of the Supreme Court’s 6–3 decision striking down Act 80 is that it focused exclusively on the burdens imposed on the speech of pharmaceutical companies. Although the First Amendment claims of IMS Health and the other data publishers formed a significant portion of the plaintiffs’ case, neither the majority nor the dissent chose to address those claims.

IMS Health argued that Act 80 violated its First Amendment rights in two ways. First, the statute prevented it from receiving truthful information from pharmacies. Second, the statute prevented it from conveying its analyzed data to pharmaceutical companies. Vermont

⁵⁵ *Id.* at 373.

argued that IMS Health's data were unworthy of First Amendment protection, asserting that publication of the data was more akin to commercial conduct than to commercial speech. Without directly responding to that assertion, the Court appeared skeptical:

This Court has held that the creation and dissemination of information are speech within the meaning of the First Amendment. See, e.g., *Bartnicki*, [532 U.S.] at 527 (“[I]f the acts of ‘disclosing’ and ‘publishing’ information do not constitute speech, it is hard to imagine what does fall within that category, as distinct from the category of expressive conduct” (some internal quotation marks omitted)); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 481 (1995) (“information on beer labels” is speech); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759 (1985) (plurality opinion) (credit report is “speech”). Facts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs. There is thus a strong argument that prescriber-identifying information is speech for First Amendment purposes.⁵⁶

The Court ultimately concluded that it did not need to rule on Vermont's request that it create “an exception to the rule that information is speech,” given that it had already concluded that Act 80 infringed on the First Amendment rights of drug makers.⁵⁷

By ducking the is-it-conduct-or-speech issue, the Court avoided an issue that has lurked in the background of commercial speech case law for many years. Had the Court ruled that IMS Health's data are constitutionally protected speech, it would then have been required to consider whether to classify the data as commercial or noncommercial speech. The answer almost surely is that IMS Health is engaged in noncommercial speech because even though its information is sold for a profit, it is not uttered for the purpose of proposing a commercial transaction. IMS Health's noncommercial speech presumably would be entitled to full constitutional protection, thereby depriving the government of virtually all ability to regulate it as such. Yet, at the same time, the Court has been reluctant to accord the same First Amendment status to compiled data that it

⁵⁶ *Sorrell*, 131 S. Ct. at 2667.

⁵⁷ *Id.*

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accords to traditional political speech.⁵⁸ By avoiding the is-it-speech-or-conduct issue, the Court was able to put off having to decide whether to grant the highest levels of First Amendment protection to a form of speech (prescription data) that is a matter of limited public concern and thus may not be viewed by some justices as lying at the heart of the First Amendment's protections. Justice Breyer's failure to address the issue in his dissent is less understandable because the dissenters could not logically have voted to uphold Act 80 unless they had some reason for rejecting IMS Health's First Amendment claims.

VII. Burdening Speech vs. Directly Regulating Speech

Sorrell's reliance on the First Amendment rights of pharmaceutical companies rather than the First Amendment rights of data publishers introduced an additional wrinkle. Unlike IMS Health, whose entire business was directly affected by Act 80, drug manufacturers faced only minimal direct regulation under the statute. In particular, Act 80 did not seek to regulate the detailing process; manufacturers' sales representatives were free to continue to make all the visits to doctors' offices that they desired and were not restricted regarding the types of truthful information they were permitted to convey.

Accordingly, the Court's decision striking down Act 80 was not based on a finding that the statute directly regulated manufacturers' speech, but on a finding that it imposed "more than an incidental burden" on their speech.⁵⁹ The Court found that the statute made it significantly more difficult for drug manufacturers to convey their desired message to doctors and "is directed at certain content and is aimed at particular speakers."⁶⁰

The Court's conclusion—that the First Amendment protects not only against direct restrictions on speech but also against statutes that impose substantial burdens on speech—was hardly novel. In support of its conclusion, *Sorrell* cited numerous Court precedents, including a decision striking down, on First Amendment grounds,

⁵⁸ *Dun & Bradstreet*, 472 U.S. at 759.

⁵⁹ *Sorrell*, 131 S. Ct. at 2665.

⁶⁰ *Id.*

a Minnesota “use tax” imposed on the cost of paper and ink consumed by a small group of Minnesota newspapers and magazines.⁶¹ In concluding that Act 80 imposed a more-than-incidental burden on the speech of drug manufacturers, the Court stated, “Vermont’s statute could be compared with a law prohibiting trade magazines from purchasing or using ink. . . . Like that hypothetical law, [Act 80] imposes a speaker- and content-based burden on protected expression, and that circumstance is sufficient to justify application of heightened scrutiny.”⁶²

But by relying on the speech “burdens” imposed on drug manufacturers rather than on the direct speech restrictions imposed on IMS Health, the majority opened the door to Justice Breyer’s criticism that the majority was unduly interfering with “ordinary economic regulatory programs.”⁶³ He argued that Act 80 should be judged under the lenient “rational basis” standard of review normally applicable to economic legislation. He argued:

To apply a strict First Amendment standard virtually as a matter of course when a court reviews ordinary economic regulatory programs (even if that program has a modest impact upon a firm’s ability to shape a commercial message) would work at cross purposes with this more basic constitutional approach. Since ordinary regulatory programs can affect speech, particularly commercial speech, in myriad ways, to apply a “heightened” First Amendment standard of review whenever such a program burdens speech would transfer from legislators to judges the primary power to weigh ends and to choose means, threatening to distort or undermine legitimate legislative objectives.⁶⁴

Breyer concluded that Act 80 satisfied the “less demanding standards that are more appropriately applied in this kind of commercial regulatory case—a case where the government seeks typical regulatory ends” and where the “speech-related consequences . . . are indirect, incidental, and entirely commercial.”⁶⁵ Accusing the majority of resurrecting substantive due process, he concluded:

⁶¹ *Minneapolis Star & Tribune Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575 (1983).

⁶² *Sorrell*, 131 S. Ct. 2667.

⁶³ *Id.* at 2675 (Breyer, J., dissenting).

⁶⁴ *Id.*

⁶⁵ *Id.* at 2685.

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At best the Court opens a Pandora's Box of First Amendment challenges to many ordinary regulatory practices that may only incidentally affect a commercial message. . . . At worst, it reawakens *Lochner's* pre-New Deal threat of substituting judicial for democratic decisionmaking where ordinary economic regulation is at issue.⁶⁶

Justice Breyer's accusation that the majority was seeking to "reawaken *Lochner*" was not well taken. As Justice Kennedy responded for the majority:

Vermont's law does not simply have an effect on speech, but is directed at certain content and is aimed at particular speakers. The Constitution "does not enact Mr. Herbert Spencer's Social Statics." *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting). It does enact the First Amendment.⁶⁷

It is difficult to find support for Justice Breyer's contention that Act 80's effect on the speech of drug manufacturers was "incidental" when the Vermont legislature stated explicitly that Act 80's principal purpose was to impose a burden on manufacturers' speech and thereby interfere with their marketing efforts.⁶⁸ Justice Breyer's only response to those legislative findings was to assert (without citation to case law) that "[w]hether Vermont's regulatory statute 'targets' drug companies (as opposed to affecting them unintentionally) must be beside the First Amendment point."⁶⁹ But Justice Breyer failed to reconcile his assertion with the Court's numerous commercial speech decisions that have concluded that the government may not impose content-based burdens on truthful commercial speech out of fear that listeners may use the information in a manner the government does not approve of.⁷⁰

Indeed, the relaxed standard of review espoused by Justice Breyer (and joined by Justices Ruth Bader Ginsburg and Elena Kagan) appears to be nothing short of a repudiation of the Court's entire

⁶⁶ *Id.*

⁶⁷ *Id.* at 2665 (majority opinion).

⁶⁸ *Id.* at 2663.

⁶⁹ *Id.* at 2679 (Breyer, J., dissenting).

⁷⁰ *W. States Med. Ctr.*, 535 U.S. at 374; *Va. Bd.*, 425 U.S. at 769–70.

body of commercial speech case law. It is difficult to see how any of the Court's commercial speech decisions could have been decided in favor of those challenging government speech regulations if the Court had applied Justice Breyer's relaxed standard of review. Justice Breyer (along with Justice Ginsburg) has dissented in the major commercial speech cases in the past decade,⁷¹ so his disagreement with the Court's majority is not of recent origin.

Nonetheless, by relying on "burdens" imposed on the speech of drug manufacturers, rather than on the direct and substantial regulation of IMS Health's efforts to disseminate physician-identifying information, the majority left itself open to criticism that its First Amendment standards are too open-ended. Few would dispute that Act 80 imposed a substantial, content-based burden on drug manufacturers' truthful speech, but the majority's opinion leaves unanswered how much lower the statute's burden on manufacturer speech would have to be before Act 80 could pass First Amendment muster. A decision striking down Act 80 based on its direct, content-based regulation of IMS Health's speech (regardless of whether that speech was deemed commercial or noncommercial in nature) would have provided clearer guidance to lower courts when asked to address future First Amendment challenges to similar statutes.

Conclusion

Sorrell represents a broad reaffirmation of the Court's commercial speech doctrine and—depending on how its "heightened scrutiny" standard is applied in the future—may mark a substantial expansion in First Amendment protection for commercial speech. It also illustrates just how far apart the Court's conservative and liberal wings are in their approaches to commercial speech. While conservatives appear to be contemplating expanded commercial speech rights, liberals (led by Justice Breyer, whose dissent three times cited Justice Rehnquist's *Central Hudson* dissent) appear ready to abolish the entire commercial speech doctrine. Justice Sotomayor's decision to join the *Sorrell* majority—one of only three times all term that she disagreed with Justice Kagan—suggests that the conservative justices are likely to maintain the upper hand on this issue for the foreseeable future.

⁷¹ *W. States Med. Ctr.*, 535 U.S. 357; *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001).