SORRELL v. IMS HEALTH, INC.

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ABSTRACT: *This article examines the United States Supreme Court's recent opinion IMS Health, Inc. v. Sorrell. It begins with an exploration of Justice Kennedy's majority opinion and Justice Breyer's dissenting opinion. Next, a brief history of the commercial speech doctrine in First Amendment jurisprudence is elaborated. Finally, the author reflects on the merits of the decision and finds that Justice Breyer's approach in the case is preferable as it is more predictable and more closely adheres to the purposes of the commercial speech doctrine.*

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I. The Facts and Procedural History of *Sorrell v. IMS Health, Inc.*

In 2007, Vermont passed the Prescription Confidentiality Law, which included a provision intended to curtail the practice of detailing.[1] "Detailing" is a process through which pharmaceutical companies obtain data on the prescription practices of an individual doctor in order to specifically target him or her with presentations and advertisements.[2] The purpose of these presentations is to give the doctor the opportunity to receive information about the product and to ask questions, with the goal of persuading the doctor to utilize the product.[3] Pharmaceutical providers obtain doctor's prescription practices by purchasing the information from data miners who have purchased the information from pharmacies.[4] Pharmaceutical companies generally only use detailing on new or high-selling drugs because the process can be prohibitively expensive otherwise.[5]

The statute had three central provisions that would eliminate detailing: it barred pharmacies and organizations from selling prescriber-identifying data without the prescriber's consent, it barred health organizations from allowing the data to be used for

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1 Vt. Stat. Ann. 18, V.S.A. §§ 4631 (2007)

2 *Sorrell v. IMS Health Inc.* 131 S. Ct. 2653, 2659 (2011).

3 *Id.*

4 *Id.* at 2660. Pharmacies are obligated under federal law and Vermont state law to receive the medication prescriber's identifying information. 21 U.S.C. § 353(b) (2011); Vt Bd. of Pharmacy Admim. Rule 9.1 (2009); Rule 9.2. After purchasing the prescriber's information from the pharmacy, data miners lease the information to pharmaceutical manufacturers. *Sorrell*, 131 S. Ct. at 2660. The lease is subject to a non-disclosure agreement.

5 *Id.*

marketing purposes without consent, and it barred pharmaceutical companies from using prescriber information for marketing purposes.[6] The statute had several exceptions for alternative uses of prescriber-identifying information, some of which included permitting the sale of prescription practices.[7] The Vermont legislature found that allowing the detailing process was contrary to the state's public policy of trying to control health care costs.[8]

Three Vermont data mining operations and an association of pharmaceutical companies brought separate suits challenging the Prescription Confidentiality Law, which were consolidated.[9] They alleged that Vermont's Prescription Confidentiality Law violated their First Amendment right to free speech as incorporated against the states by the Fourteenth Amendment, calling for an injunction on enforcement of the law.[10] The District Court of Vermont denied relief for the plaintiffs, holding that the state's public policy interest in limiting the cost of prescription drugs was sufficient to permit the legislation.[11] The Court of Appeals for the Second Circuit

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6 *Sorrell*, 131 S. Ct. at 2660

7 *Id.* The statute, *inter alia*, allowed for the information to be used for "health care research;" to ensure that health insurance formularies were followed; for "care management educational communications" given to patients on such topics as "treatment options," for law enforcement and "for purposes otherwise provided by law. *See* VT. STAT. ANN. tit. 18, § 4631(e).

8 *Id. at* 2661. The Prescription Drug Confidentiality Law included legislative findings that the "marketplace for ideas on medicine safety and effectiveness is frequently one-sided in that brand name companies invest in expensive pharmaceutical marketing campaigns to doctors" which included "incomplete and biased information." Vt. Acts No. 80, § 1: § 1(3): § 1 (4).

9 *Sorrell*, 131 S. Ct. at 2661

10 VT. STAT. ANN.18.V.S.A. §§.4631; U.S. Const. amend. I.; U.S. Const. amend; XIV. *Sorrell*, 131 S. Ct. at 2661.

11 IMS Health, Inc. v. Sorrell, 631 F.Supp. 2d 434 (D. Vt. 2009), *rev'd*, 630 F.3d 263 (2d. Cir. 2010), *overruled by* 131 S.Ct. 2653 (2011).

reversed and remanded the case, finding that the interests of the state of Vermont did not outweigh the First Amendment infringement upon the pharmaceutical companies.[12] Recognizing a split in the circuit courts in interpreting the constitutionality of this statute and similar statutes, the Supreme Court granted certiorari.[13]

The issues before the Court were whether the text of Vermont's Prescription Confidentiality Law should be subject to increased judicial scrutiny as a restriction upon the First Amendment rights of pharmaceutical companies and, if the statute is found to be a restriction, whether Vermont can provide sufficient justification.[14] Vermont contended that the legislation was a legitimate regulation of commercial speech because it only prevented selling or distributing the prescriber information for the purposes of marketing and that the pharmacies and similar entities could not sell the information for any reason aside from the statutorily enumerated exceptions.[15] The respondents maintained their posi-

12 IMS Health, Inc. v. Sorrell, 630 F.3d 263 (2d. Cir. 2010), *overruled by* 131 S. Ct. 2653 (2010).

13 *Sorrell v. IMS Health Inc.*, 131 S. Ct. 857.

14 *Sorrell*, 131 S. Ct. at 2663.

15 *Id.* at 2662; VT. STAT. ANN. tit. 18 § 4631(e). The Court noted that there was a discrepancy between Vermont's interpretation of the statute at the District Court and Court of Appeals and that presented during oral argument to the Court. *Sorrell*, 131 S. Ct. at 2662. At the court of appeals, Vermont put forth the interpretation that VT STAT. ANN. tit. 18 § 4631(d) allowed companies to sell or distribute the information for any purpose other than marketing..*Id.* During oral argument for the Court, Vermont shifted its interpretation and claimed that VT STAT. ANN § 4631(d) prevented the sale of information by these entities of information for any purpose other than those offered as exceptions in VT STAT. ANN § 4631(e). The majority noted that this discrepancy was prejudicial to the plaintiffs under the rule in *Houston v. Hill*, 482 U.S. 451 (1987)). The difference in interpretation of the statute was ultimately not determinative of the outcome of the case. *Id.*

tion that the law violated their First Amendment rights to make trade speech.[16]

II. The United States Supreme Court Opinions in *Sorrell*

A. *Justice Kennedy's Majority Opinion*

Justice Kennedy, delivering the opinion of the Court, found that Vermont's law imposed both content and speaker-based prohibitions upon selling and using prescriber information.[17] The majority noted that entities that fall within the scope of the exceptions set forth in the Prescription Confidentiality Law, such as educational organizations, could buy and use prescriber information, amounting to speaker-based discrimination against the plaintiffs.[18] By preventing the use of the information for marketing, the Court found that Vermont targeted a specific type speech for its content.[19] Justice Kennedy observed that the discriminatory purpose of the legislation was completely supported by the record of the legislative findings of the Vermont legislature.[20]

The Court noted that in any situation where a law has content-based speech restrictions a heightened level of judicial scrutiny is warranted.[21] While the First Amendment does allow for certain

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16 *Sorrell*, 131 S. Ct. at 2662.

17 Justice Kennedy's opinion was joined by Chief Justice Roberts and Justices Scalia, Thomas, Alito, and Sotomayor. *Id.* at 2659.

18 *Id.*

19 *Id.*

20 *Sorrell*, 131 S. Ct. at 2663. Vermont's legislature found that the mission of detailers to sell expensive drugs "[is] often in conflict with the goals of the state" to control healthcare costs. *See* 2007 Vt. No. 80, § 1(3).

21 A content-neutral speech regulation is one in which it is "*justified* without reference to the content of the regulated speech" (emphasis in the original). *Sorrell*, 131 S. Ct. at 2663; Renton v. Playtime Theatres, 475 U.S. 41, 48

limited exceptions where the restriction upon speech is incidental to the larger purpose of the law, Justice Kennedy observed that the Vermont statute's purpose expressed in its language and practical application directly regulates speech based upon the content and speaker.[22] The Court noted that the basis for much of the speech individuals engage in—like that regulated in this statute—has an economic basis and discrimination premised merely upon economic purpose lacked justification.[23]

Vermont took the position that the Prescription Confidentiality Law does not act to regulate speech; rather, it acts to limit access to prescriber information, and, since the information is generated by government mandate, it should be viewed as government-produced information.[24] Justice Kennedy noted that Vermont's position was somewhat supported by *Los Angeles Police Department v. United Reporting Publishing Corp.*, 528 U.S. 32 (1999) where the Court found that the plaintiff could not raise a facial challenge where the government instituted a content-based restriction upon government-held information.[25] However, the majority of

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(1986). The First Amendment also requires increased scrutiny whenever content-based restrictions are placed upon speech because the government does not agree with its purpose. *See Sorrell*, 131 S. Ct. at 2664 and *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1991). Justice Kennedy noted that a law can be unconstitutional, even if it uses language that on its face is neutral toward speakers or content, if its purpose is to suppress speech and its burdens are not outweighed by its benefits.

22 *Sorrell*, 131 S. Ct. at 2664-65, one such example is antitrust laws would prohibit agreements in restraint of trade. *See* Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949).

23 *Id.*

24 *Id.*

25 *Los Angeles Police Department vs. United Reporting Publishing Corps*, 528 U.S. 32 (1999).

the Court distinguished *United Reporting* from the present case, because the plaintiffs in *United Reporting* were suing for access to information that the government had exclusive control over, whereas the Vermont statute at issue here attempted to prevent pharmaceutical companies from using information that pharmacies already have dominion over and can otherwise exchange.[26] The Court noted that there is a general invocation of free speech rights whenever information that an individual is in possession of is subjected to restraint.[27]

The Court also distinguished *United Reporting* from the instant case on the grounds that the plaintiff in that case had not yet applied for access to the information and therefore had not yet sustained a First Amendment injury and would have to make a facial challenge premised on injuries to others.[28] The Court found support for the respondents' argument here that their free speech rights have been restricted by not having access to government-held information similar to that discussed in Justice Scalia's concurring opinion in *United Reporting*, which indicates that a restriction upon access to information held by others can constitute a free speech violation.[29] As a result, the Court indicated that the respondents were not required to make a facial attack upon the legislation because their own free speech rights are directly at

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26 *Sorrell*, 131 S. Ct. at 2665.

27 *Id.*

28 *Los Angeles Police Department vs. United Reporting Publishing Corps*, 528 U.S. 41 (1999).

29 Justice Scalia observed that a restriction upon access to information that has been revealed to the press but is restricted based upon the intended use of another party constitutes a restriction upon free speech. *Id.* at 42.

issue.[30]

The Court next addressed Vermont's argument that heightened scrutiny is not required because selling, using, and exchanging prescriber information should be viewed as conduct, rather than speech.[31] Justice Kennedy noted that this argument is supported by the findings of the First Circuit; however, the Supreme Court has consistently held that production and distribution of information fall within the scope of the First Amendment because facts are the necessary starting point for all speech.[32] The Court also declined to accept Vermont's argument that separate standards should be used for commercial speech cases than in other speech cases.[33]

The Court moved to the commercial speech inquiry, indicating that Vermont, as the State actor, has the burden of proof of establishing that the law is within the constitutional scope of the First Amendment by showing that the statute puts forward a substantial governmental interest and that it is targeted to fulfill that interest.[34] Justice Kennedy articulated the standard for establishing the constitutionality of the statute is *Board of Trustees of the State University of New York v. Fox*, which indicates that the purpose of

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30 *Sorrell*, 131 S. Ct. at 2666.

31 *Id.*

32 Evaluating a statute similar to Vermont's Prescription Confidentiality Law, the Court found that commodities like information are subject to no greater protection than the term "beef jerky." *Sorrell v. IMS Health Inc.*, 131 S.Ct. 2653, 2682 (2011); *Sorrell*, 131 S. Ct. at 2667.

33 The Court noted that the outcome of previous cases has not been altered where a commercial speech inquiry or a heightened standard is utilized. *See Sorrell*, 131 S. Ct. at 2667. *See Greater New Orleans Broadcasting Assn., Inc. v. United States*, 527 US. 173, 184 (1994)).

34 *Id.* at 2667-68.

the legislature and the methods of the statute must coincide.[35] Justice Kennedy further noted that the purpose of this standard is to ensure that the state's interest is proportional to the harm inflicted to speech rights contained within the law.[36] Vermont offered two justifications for the Prescription Confidentiality Law: the law is necessary to ensure the privacy of medical professionals, doctor-patient privilege, and to prevent doctors from being harassed by drug companies, and the statute promotes the state's public policy objectives of overall public health promotion and limiting health-care costs.[37] Justice Kennedy rejected both of these arguments.[38]

The Court found that the statute failed to protect doctors' privacy rights because it only limited the use of their prescribing information in the specific context of marketing and allowing others, such as the state, journalists, and educators, access to the information without the doctor's consent.[39] The Court observed that Vermont's law may have been found constitutional had it contained more well-defined goals for addressing the problem of physician confidentiality.[40] However, as written, the information is available to too wide of an audience without sufficient justifica-

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35 492 U.S. 469, 480 (1989).

36 *Sorrell*, 131 S. Ct. at 2668.

37 *Id.*

38 *Id.*

39 The Court also rejected Vermont's argument that other laws provide additional protections, finding that they are insufficient to justify the specificity of § 1439(b). *Id.*

40 The Court specifically cited the Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d-2 (2010). The difference between Vermont's legislation and this legislation is that the Act operates within narrow limits and has only limited and well-articulated exceptions to its prohibition in contradistinction of VT. STAT. ANN., tit. 18 § 1439(b). *Id.*

tion for the limit upon the respondents' access. Justice Kennedy also rejected Vermont's argument that the statute's requirement of consent by the doctor avoids a First Amendment issue, citing the lack of a real choice for the doctor because of the broad state-sanctioned audience that can obtain the information without the consent of the doctor.[41] The Court found that the limited privacy options available to the doctor evidences the State's actual goal is to restrict the speech of the respondents.[42] The Court also rejected the State's goal of protecting doctors from being harassed by salespeople from drug companies as insufficiently justified by the record, and as a disproportional remedy, because a doctor can simply decline to meet with a sales representative.[43] The majority also rejected the argument that the patient-doctor relationship was corroded by the intervention of drug marketers, because the State targets the drug companies merely because they are persuasive and their speech is disfavored.[44]

The majority also rejected Vermont's argument that the Prescription Confidentiality Law promoted the State's public policy objectives of reducing healthcare costs and the general promotion

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41 Justice Kennedy referred to the choice as "contrived" by the Vermont state legislature. *Sorrell*, 131 S. Ct. at 2668, 2669.

42 *Id.*

43 Vermont legislature's found that "a few" doctors felt that they had been "coerced and harassed" by marketers. *Id.* The Court saw no reason to extend greater privacy protections to doctors than is available to the average citizen, who can decline to meet with anyone he so chooses. *Sorrell*, 131 S .Ct. at 2669-70.

44 The State presented evidence that some doctors and patients were uncomfortable with the practices of detailing, but the Court found that the State's argument was based more upon the persuasiveness of marketers and the State's obvious bias against their message. *Id.*

of well-being, finding that the statute does not achieve these goals in a constitutional fashion.[45] The Court's analysis revealed that the State's efforts were predicated upon the assumption that the public would make poor healthcare decisions if presented with the factually correct information revealed through marketing, which constituted a content-based burden on speech that did not directly serve the state's interest.[46] Further undermining the State's argument was the finding that some doctors like the detailing process, believing it to be instructive for making medical decisions, which the majority saw as evidence that the state targeted marketers specifically for the content of their message.[47]

The Court outlined situations where state regulation can be justified due to a neutral policy justification or, on related grounds, to prevent false or misleading statements.[48] The Court indicated that the State can have a legitimate interest in the regulation of the content of otherwise protected speech where there is a commercial harm upon consumers susceptible to neutral observation.[49] The majority found no indication that the statements made by the

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45 The Court noted that there was a discrepancy between the legislative findings that joined the statute and the argument set forth by the State at oral argument—the State seemed unwilling to defend this argument; Nevertheless, the Court addresses the argument in its entirety. *Id.*

46 the court cites to language in *44 Liquormart*, stating "[t]he 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." *Id.* at 2671.

47 *Id.*

48 *Id.* at 2672.

49 The Court offered the example of *R.A.V. v. City of St. Paul, Minnesota* where it was held that the State may regulate the price of a particular industry over another industry where there is a significant risk of fraud not present in other industries. *Id.*

pharmaceutical marketers in this instance fall within the scope of false or misleading statements that are not entitled to First Amendment protection, finding instead that the expression of the detailers was merely being restricted because of a conflict of viewpoints with the State.[50]

B. Justice Breyer's Dissenting Opinion

Justice Breyer, dissenting from the opinion of the Court, rejected the majority's use of a heightened standard of judicial scrutiny, because the State's action was tantamount to an ordinary attempt at commercial regulation.[51] Justice Breyer drew a distinction between speech that is at the "core" of the First Amendment and commercial speech, arguing that the standard for commercial speech is not as strict as that for core speech.[52] The dissent contended that the evaluations of commercial speech should be very deferential to the legislature. In so doing, the dissent advocated following the standard proposed in Justice Brandeis' dissent in *New State Ice Co. v. Liebmann,* 285 U.S. 262 (1932) assess-

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50 *Id.*

51 Justice Breyer was joined in dissent by Justices Ginsburg and Kagan.

52 *Snyder v. Phelps*. 131 S. Ct. 1207, 1220 (2011), (distinguishing between speech at the "core" of the First Amendment, which expresses ideas that contribute to the "marketplace of ideas" and speech with lesser protections, like that which proposes a commercial transaction). *Id.* at 2673. In his dissent, Justice Breyer notes that the Court drew a distinction between promoting a vibrant "marketplace of ideas," which warrants significantly more protection, and a free marketplace for goods and services. *Sorrell*, 131 S .Ct. at 2672. In *Ohralik v. Ohio State Bar Association*, the Court applies an "intermediate" test in order preserve the "commonsense distinction between speech proposing a commercial transaction, *which occurs in an area traditionally subject to government regulation*, and other varieties of speech." *Ohralik v. Ohio State Bar Association,* 436 U.S. 447, 455-56 (1978).

ing only if the legislature had effectively determined there was an issue that required regulatory intervention.[53] Justice Breyer expressed fears that applying the "heightened scrutiny" of the Majority would open the door to returning to the era of *Lochner v. New York*, where judges arbitrarily substituted their own policy preferences when hearing cases about economic issues.[54]

In Justice Breyer's view, this regulatory action by the State of Vermont does not fall outside of the scope of typical state action.[55] The dissent argues that imposing restrictions upon the use of data to which vendors have access is a common regulatory practice, substantiated by sound public policy.[56] In order to be effective, Justice Breyer notes that regulations must differentiate based on content and speaker.[57] If a heightened level of judicial scrutiny was employed for free speech concerns, Justice Breyer argued that a wide sphere of widely-recognized regulation would suddenly be subject to judicial evaluation.[58] To Justice Breyer, regu-

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53 Justice Brandeis said that "Our function. . . is only to determine the reasonableness of the legislature's belief in the existence of evils and in the effectiveness of the remedy provided." *Crowell vs. Benson*, 285 U.S. 262, 286-87 (1932).

54 *Lochner vs. New York*, 198 U.S. 45, (1905).*Sorrell*, 131 S. Ct. at 2675 (Breyer, J., dissenting).

55 *Id.*

56 Justice Breyer uses the example of car dealers, who are permitted to use credit scores when evaluating customers but are not permitted to acquire and use credit scores to pursue new customers. *Id.*

57 Justice Breyer noted that regulators must regularly make speaker-based evaluations based upon the composition of the industry, even where other actors in an industry are permitted to speak with less restriction. *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761- 62 (1976);
Sorrell, 131 S.Ct. at 2678.

58 *Id.*

latory activity necessarily reflects a policy evaluation about the given subject, and the task of the Court should be to evaluate only whether that policy ground is sufficient, not evaluate its content.[59]

The dissent found that the goals of the Vermont legislature of promoting public health and cutting healthcare costs were both sufficient to justify this legislation under the intermediate speech evaluation standard for commercial speech.[60] Justice Breyer observed that the reports produced by the Vermont legislature about the ills of the detailing process were more persuasive than the majority allowed.[61] Additionally, prescriber information was not as widely distributed as the majority's opinion reflects. Further, allowing the information to be used for detailing purposes constitutes a major expansion of the accessibility of information that would otherwise be confidential.[62] The dissent noted that this demonstrated a compelling privacy interest for the State to ground its actions upon.[63]

III. The Precedent Leading to *Sorrell*

A. The Rejection of the Commercial Speech Exemption and Nascent Balancing Test

Although some states independently articulated commercial speech protections under their own constitutions, commer-

59 Justice Breyer observed that "[t]he related statutes, regulations, programs, and initiatives almost always reflect a point of view, for example, of the Congress and the administration that enacted them and ultimately the voters." *Id.* at 2679.

60 *Id.* at 2681.

61 *Sorrell*, 131 S.Ct. at 2682 (Breyer, J. dissenting).

62 *See* Vt. Stat. Ann., 18, V.S.A.§§.4631(e) (2010).

63 *Sorrell*, 131 S.Ct. at 2683 (Breyer, J., dissenting).

cial speech did not exist as a unique category of protected speech under the First Amendment until 1975 in *Bigelow v. Virginia*, 421 U.S. (809).[64] The Supreme Court of Virginia had rejected the appellant's contention that the statute was a violation of his First Amendment rights.[65] Instead, it was held that, as a commercial advertisement not entitled to First Amendment protection, the material was within the scope of the State's police power.[66]

The issue before the Court in *Bigelow* was whether the Commonwealth of Virginia's statute making it a criminal offense to advertise abortion services constituted a restriction upon free speech rights in violation of the First Amendment.[67] Justice Blackmun, in his majority opinion, rejected the Supreme Court of Virginia's assumption that commercial speech was not entitled to First Amendment protection merely by virtue of its financial

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64 *See e.g.* Pennsylvania State Bd. of Pharmacy v. Pastor, 272 A.2d 487 (Pa. 1971). The *Pastor* Court noted that Pennsylvania had a long history of applying due process in a more stringent way than the Supreme Court of the United States would. The Pennsylvania Supreme Court employed the due process clause to create a balancing test not dissimilar from those later adopted by the Supreme Court of the United States (discussed *infra*) to find that a ban on advertising the price of pharmaceuticals was unconstitutional incommensurate with the Commonwealth's objective of limiting access to dangerous prescription drugs. *Id.* at 494; *Bigelow v. Virginia* , 421 U.S. 809 (1975).

65 Bigelow was a newspaper publisher who published an advertisement for a New York-based abortion provider offering services in New York. *Bigelow v. Virginia*, 421 U.S. 809, 812 (1975).

66 *Id.* at 814.

67 VA. CODE ANN. §§.18.1-63 (1960), the statute provided, inter alia, that "If any person, by publication, lecture, advertisement, or by the sale or circulation of any publication, or in any other manner, encourage or prompt the procuring of abortion or miscarriage, he shall be guilty of a misdemeanor." Numerous abortion issues that arose in light of the *Roe v. Wade*, 410 U.S. 113 (1973) and *Doe v. Bolton*, 410 U.S. 179 (1973) decisions coming down during the appeal of this case are not relevant to the speech inquiry here. *Bigelow*, 421 U.S. at 815.

motivation.[68] Declining to determine the precise level of regulation that a state may engage in with regard to commercial speech, Justice Blackmun articulated a balancing test between protecting the First Amendment rights of the commercial speaker against the legitimate state interest motivating the regulation.[69]

The Court held that Virginia's statute clearly failed to satisfy the balancing test.[70] Virginia's asserted interest in passing the statute was to regulate the health of its citizens, which the Court agreed was a legitimate interest upon which to ground State regulatory activity.[71] However, because the material in question was an advertisement of services both available in and provided in New York State, the Court found that Virginia's interest in regulating the content of the commercial speech was outweighed when balanced against the speaker's First Amendment rights.[72]

The Court had the opportunity to expand upon its commercial speech determinations in the next term with *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).[73] The plaintiff in *Virginia Citizens Consumer Coun-*

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68 Justice Blackmun cited *Ginzburg v. United States*, holding that "[t]he existence of commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment. *Bigelow*, 421 U.S at 818; *Ginzburg*, 383 U.S. 463, 474 (1966).

69 *Bigelow*, 421 U.S at 818.

70 Justice Blackmun noted that this outcome was so obvious that the matter need not be remanded to the Virginia Supreme Court. *Id.* at 827.

71 *Id.*

72 The Court noted that the advertisement's indication that abortion services were legal in New York could also be viewed as informative speech, highlighting the hybrid commercial-informative nature commercial speech can possess. *Id.* at 827, 828

73 *Virginia Pharmacy Board vs. Virginia Consumer Council*, 425 U.S. 748, (1976).

cil was a private citizens' organization which challenged, on First Amendment grounds, a Virginia statute barring pharmacists from engaging in any prescription price advertising.[74] The first issue before the Court was whether First Amendment protection could be extended to the plaintiffs as those in receipt of the speech.[75] Justice Blackmun, again writing for the majority, noted that the Court had recognized in previous cases that the First Amendment naturally includes a general right to "receive information and ideas."[76]

Virginia argued that, even if listeners had a right to receive information, there should be a commercial speech exception to First Amendment protection.[77] Citing *Bigelow*, Justice Blackmun indicated that the time had come for the Court to rule on the issue of whether purely commercial speech devoid of any informational value, is protected under the First Amendment.[78] The Court found that economic information can be just as important, if not more so, than information regarding political debates.[79] Additionally, society has a distinct interest in making commercial information as

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74 VA. CODE ANN. §§54-524.35 (1974); *Va. Citizens Consumer Council, Inc.*, 425 U.S. at 755.

75 *Id.*

76 *Kleindiesnt v. Mandel*, 408 U.S. 753, 763, (1972); *Va. Citizens Consumer Council, Inc.*, 425 U.S. at 757.

77 Justice Blackmun noted that several past cases indicated that commercial speech was entitled to very little protection. *Va. Citizens Consumer Council, Inc.*, 425 U.S. at 758-59. *See* Valentine v. Chrestensen, 316 U.S. 52, 54, (1942) (holding ban on handbill and circular advertising does not infringe upon First Amendment rights).

78 *Id.* at 761.

79 Justice Blackmun argued that limitations upon the availability of pharmacy prices will disproportionately affect the poor and elderly, whose incomes are tighter and would benefit more from the savings. *Id.* at 763.

freely available as possible.[80] However, the Court recognized, as it did in *Bigelow*, that a legitimate state interest can overcome the commercial speech protection. Following the *Bigelow* example, the Court once again found that the state interest claimed to be protected in the statute was invalid.

B. The Development of a Full Balancing Test

Both *Bigelow* and *Virginia Citizens Consumer Council, Inc.* indicated that a balancing of the state interest and First Amendment protection must be used, and the Court had the opportunity to develop the criteria for the balancing test in *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York.*[81] The *Central Hudson* Court devised a four-pronged test to evaluate whether commercial speech could be regulated: first, the speech must have a lawful activity as its purpose and not be misleading; second, the government must have a substantial interest in engaging in regulating the speech; third, the government interest must actually be advanced by the regulation; finally, the regulation must be as narrow as possible to satisfy the government's objective.[82]

Applying this test to the ban on power company advertising instituted by the Public Service Commission of New York, the Court found the regulation unconstitutional.[83] Finding no issue

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80 *Va. Citizens Consumer Council, Inc.*, 425 U.S. at 764. Availability of price information is generally important in a free enterprise economy in order to make informed economic decisions. *Id.*

81 *Central Hudson Gas and Electric vs. Public Service Commission of New York*, 447 U.S. 557, (1980).

82 *Id. at* 564-66.

83 *Id.* at 567.

with legality or misleading information, the Court moved to the second prong of the test, rejecting the Commission's argument that Central Hudson's speech had minimal value.[84] The Commission asserted that its goal was energy conservation, and that Central Hudson's advertisements would serve to increase energy utilization, an interest which the Court agreed was substantial.[85] The Court further agreed that the ban on advertising was a means through which to advance the interest of the state, and therefore the third prong of the test was satisfied.[86]

The central issue for the commercial speech inquiry was the final prong of the test: whether a complete ban on advertisements generally protected by the First Amendment was as narrow as was required to further the State's interest in energy consumption.[87] Justice Stewart placed the burden to satisfy this prong squarely on the state actor to establish that the means used was the narrowest way through which to satisfy the regulatory objective.[88] The Court found that the broad-based nature of this regulation, while certainly able to achieve the State's objective, went beyond the

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84 The Commission argued that Central Hudson, as a monopolistic corporation, could not meaningfully influence consumers with its advertisements. *Id.* The Court rejected this argument, finding that "[e]ven in monopoly markets, the suppression of advertising reduces the information available for consumer decisions. . . . [a] consumer may need information to aid his decision about whether or not to use the monopoly service at all, or how much of the service he should purchase." *Id.*

85 *Id.* at 568.

86 The Court observed that "[t]here is an immediate connection between advertising and demand for electricity. Central Hudson would not contest the advertising ban unless it believed that promotion would increase its sales." *Id.* at 569.

87 *Id.* at 569.

88 *Id.* at 570.

most limited scope possible and forecloses information that could be beneficial to the state's goal.[89] As a result, the regulation was found to be unconstitutional.[90]

The fourth prong of the *Central Hudson* underwent significant scrutiny and was distinguished to be more permissive for state action.[91] Justice Scalia, writing for the majority, noted in *Bd. of Tr. of the State Univ. of New York v. Fox,* 492 U.S. 469 (1989) that the narrowness requirement in *Central Hudson* had been applied unevenly due to the "substantially excessive" nature of the violations.[92] Additionally, in cases where the regulation was upheld, the Court was more lenient than the holding in *Central Hudson* would seem to have allowed.[93] Justice Scalia's analysis concluded that the "necessary" language of the forth prong of the *Central Hudson* test must be interpreted to require that the means chosen by the state must have a "reasonable fit" with the objectives of policy.[94] Other cases decided by the Court further restricted State action to limit commercial speech where there was a clear alternative that

89 The Court observed that Central Hudson would be unable to advertise its energy-saving products due to the overbroad nature of the regulation. *Id.*

90 *Id.* at 572.

91 *Bd. of Tr. of the State Univ. of New York v. Fox,* 492 U.S. 469 (1989) (addressing ban on advertising at state college campuses).

92 *Board of Trustees at State University of New York vs. Fox*, 492 U.S. at 469.

93 *Id.* at 478. *See* Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989), stating that "we have not insisted that there be no conceivable alternative, but only that the regulation not burden substantially more speech than is necessary to further the government's legitimate interests."

94 *Fox*, 492 U.S. at 480-81. Justice Scalia noted the great difficulty that would accompany a least-restrictive means test, finding that this reading of *Central Hudson* relieves some of the burden of proof on the legislative and executive branches. *Id.*

would achieve the objective without requiring any restrictions on speech.[95]

C. Central Hudson *Called into Question*

The essential holding in *Central Hudson* established the basic framework within which evaluation of commercial speech cases occurred over the course of the next 20 years without major changes.[96] However, the potentially subjective nature of the test caused some critics to view it as generating anomalous results, leading to unpredictability in commercial speech jurisprudence.[97] The groundwork for potentially reevaluating the *Central Hudson* test was established with the Court's divisions in *44 Liquormart v. Rhode Island*.[98]

Before the Court were two statutes barring advertisement of alcohol prices in Rhode Island. 44 Liquormart, an alcohol distributor, was charged with violating the statutes by preparing an advertisement including cheap food generally consumed with alcohol and images of alcoholic beverages.[99] The issue before the Court

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95 *See e.g.* Rubin v. Coors Brewing Co., 514 U.S. 476, 490-91 (1995).

96 Daniel E. Troy, *Advertising: Not "Low Value" Speech*, 16 Yale L.J. on Reg. 85 (1999).

97 Troy, *supra* note 128, at 129-38. The author particularly noted the confusion engendered in lower courts, where varying levels of deference was given to state legislatures. *Id.*

98 *44 Liquormart vs. Rhode Island*, 517 U.S. 484 (1996). Although the Court unanimously agreed with the ruling, only a plurality decision was issued, with three separate concurrences (discussed *infra*). *Id.*

99 R.I. GEN. LAWS § 3-8-7 (1987); R.I. GEN. LAWS § 3-8-8.1 (1987). The State argued that including the alcoholic beverages with an advertisement for cheap products, such as potato chips and drink mixers, implied that the alcoholic products were also sold at a discounted price and therefore violated the advertising ban even though no prices had been listed. *44 Liquormart vs. Rhode Island*, 517 U.S 484, 492-93 (1996).

was whether the broad ban upon the advertising of alcohol was a violation of vendors' First Amendment rights to engage in commercial speech.[100] Justice Stevens, speaking for the Court's plurality, opened his opinion with a discussion of the United States' general history of protecting commercial speech.[101] After taking stock of the case law, Justice Stevens determined that the mere fact that proposals for commercial engagements are included within a regulation does not dictate what sort of constitutional analysis is appropriate, signaling openness to potentially depart from *Central Hudson*.[102] However, the plurality noted that there was clearly no departure from a commercial transaction in the present case, and therefore the *Central Hudson* test was the appropriate form of analysis.[103]

Finding that temperance, as Rhode Island's stated goal, was a compelling enough state interest, the plurality moved to analyze whether the means of achieving this objective were commensurate with the regulatory goal.[104] Justice Stevens, applying the

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100 *44 Liquormart*, 517 U.S. at 495-96. Because the case involved the sale of alcohol, Rhode Island raised the Twenty-Fourth Amendment as a shield against federal intervention in the case. *Id.* This issue is not relevant to the present inquiry and will not be discussed.

101 *Id.* Justice Stevens noted that Benjamin Franklin, in his work *An Apology for Printers*, defended freedom of speech using an advertisement for voyages to Barbados. *Id.* It is this history of protection that Justice Stevens believes colored the Court's protection of commercial speech as a distinct class of speech in *Bigelow* and other foundational cases. *Id.*

102 *Id.* at 501. Justice Stevens drew a distinction between regulations targeting truthful, informative speech and those proposing a mere commercial transaction, with state action being more justified in the latter rather than the former, and suggesting that the former would require a more stringent test. *Id.* at 501-06.

103 *Id.* at 501.

104 *Id.* at 505.

fourth prong of *Central Hudson* to analyze whether the regulation of speech was too broad, determined that other forms of regulation could have been pursued by Rhode Island that would not have included bans on speech,[105] even when considering legislative discretion.[106] Justice Stevens noted that it can be even more detrimental to regulate speech rather than conduct, making him all the more skpetical of regulations enforcing bans on speech.[107] As a result, Justice Stevens found the Rhode Island provisions unconstitutional.[108]

Justice Scalia's concurring opinion voiced his displeasure with the *Central Hudson* test as well as paternalistic regulation regimes.[109] Justice Scalia argued that the history of First Amendment jurisprudence, as well as freedom of speech provisions in place at the time of the First and Fourteenth Amendments were helpful in adjudicating these issues.[110] Although he had reservations with *Central Hudson*, he was unwilling to explicitly reject

105 The plurality indicated that the facts in the record actually would tend to support that the ban on speech would not have the intended effect of reducing temperance. *44 Liquormart*, 517 U.S. at 506-07. Although lack of advertising could raise prices, theoretically making alcohol less affordable, there is no indication that alcoholics would be deterred from purchasing alcohol in any way. *Id.* Additionally, an expert from the State conceded that taxation or price controls would have been just as effective as Rhode Island's regulation. *Id.*

106 Justice Stevens specifically rejected broad legislative discretion, instead embracing a more strict regulation where "paternalistic" purposes on the part of the legislature are in play. *Id.* at 509.

107 Justice Stevens cites the old proverb that it is better to teach a man to fish than it is to catch him one, noting that speech restrictions prevent the teaching from occurring. *Id.* at 511.

108 *Id.* at 516.

109 *44 Liquormart*, 517 U.S. at 517 (Scalia, J., Concurring).

110 *Id.*

the test or to propose an alternative in its place.[111]

Justice Thomas was less reserved in his dissenting opinion, finding that any interest the state purports to have that is intended to keep otherwise legal information from the general public in an effort to keep them in the dark about their options in a market is a *per se* First Amendment violation regardless of any distinctions between commercial and non-commercial speech.[112] Justice Thomas strongly rebuked the Court for even adopting a distinction between commercial and non-commercial speech, as he found it both historically and philosophically indefensible.[113] However, he nevertheless applauded both Justices Stevens and O'Connor, as he viewed the plurality and Justice O'Connor's concurring opinion as adopting a much more stringent version of the fourth prong of *Central Hudson*, which would bring future cases more in line with his own reasoning.[114] Only Justice O'Connor's concurring opinion endorsed the traditional *Central Hudson* test, although she also called for a stricter application of the fourth prong test requiring regulation to be as narrow in scope as possible.[115]

D. Continuing Use of the Central Hudson *Test*

Although *44 Liquormart* called the viability of the *Central Hudson* test into question, the Court has thus far continued to rely

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111 *Id.*

112 *Id.* (Thomas, J., concurring).

113 *Id.* at 522.

114 *44 Liquormart*, 517 U.S. at 524

115 Justice O'Connor suggests that a more stringent approach to the fourth prong of *Central Hudson*, although this case does not require it as Rhode Island's statute is clearly violates even a generous reading of the prong. *Id.* at 532.

upon *Central Hudson* in commercial speech cases.[116] The majority and dissenting opinions in *Thompson v. Western States Medical Center* clearly articulated the divergent positions that the justices have applied in using the test. The issue in *Western States* was whether a federal regulation barring pharmacists from advertising drug compounding was in violation of the First Amendment.[117] The majority opinion, authored by Justice O'Connor, was critical of the State's position that regulating compounding was a substantial state interest, finding that the State also had a competing interest in protecting the practice of compounding.[118] The majority applied the fourth prong of the *Central Hudson* test stringently, particularly focusing upon alternative policies that would avoid speech regulation with a general wariness of allowing government to engage in "paternalistic" regulatory practices.[119]

Justice Breyer's dissenting opinion was more deferential to the legislature, giving more weight to the substantiality of the government's stated policy objectives.[120] The dissent's applica-

116 *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002).

117 *Id.* at 377. Not all of the Justices believed the test should be used—Justice Thomas, while joining with the majority's decision, authored a concurring opinion rejecting the *Central Hudson* test generally, or at least where there is an issue of limiting information available to the public. *Id.* at 377. Compounding is a process where a pharmacist formulates a drug specifically for a patient who is unable to use a mainstream drug for health reasons. *Id.* at 361. The individualized nature of these drugs puts them outside of regulation by the Food and Drug Administration. *Id.*

118 *Id.* at 369.

119 Justice O'Connor suggested that placing warning labels on compounded drugs would satisfy the State's goal of patient safety without having to restrict speech. *Id.* at 376.

120 Justice Breyer noted that the regulation targets both drugs that are traditionally manufactured by drug companies en masse and preventing those who do not need compounding drugs from receiving them. *Id.* at 379. Justice

tion of the fourth prong of the *Central Hudson* test also would have given the government more leeway to act within a range of acceptable regulatory practices, including the restriction on free speech.[121] Viewing the *Central Hudson* test as flexible, Justice Breyer admitted that some truthful, informative speech would be barred by the statute but found that such restrictions are sufficiently warranted by the government's "substantial interest" in regulating compounded drugs.[122]

IV. Analysis: The Failure of *Sorrell*

A. Preference for Justice Breyer's Dissenting Approach Over the Majority in Sorrell

Although the very nature of the *Central Hudson* test may invite judicial subjectivity into its analysis, the Court has significantly limited the scope of government objectives that are deemed constitutionally permissible under the test over time. In *Sorrell*, Justice Kennedy essentially rejects the legislative findings Vermont used to provide its justification for restricting the detailing process without seriously exploring their ramifications. This

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Breyer further explained that the majority focused only on mass produced drugs and not the policy interest in favor of restricting compounded drugs for patients who do not need them. *Id.* An extensive review of the record was included in this analysis that demonstrated the pernicious effect of allowing compounded drugs to be advertised to the general public. *Id.* at 380-85.

121 *Thompson vs. Western States Medical Center*, 535 U.S. at 386. The dissent engaged in a broad policy analysis of potential alternatives to the free speech restriction and explained why they were insufficient to satisfy the government's objectives. *Thompson vs. Western States Medical Center*, 535 U.S. at 386.

122 *Id.* at 387-88. The dssent observed that the test is necessarily broad because commercial speech is not entitled to absolute protection under the First Amendment. *Id.*

rejection is consistent with the general trend established in *Western States*.[123]

Justice Breyer's deferential approach in his dissenting opinions to *Sorrell* and *Western States* would be a much more consistent means of analysis than the Court's *ad hoc* approach in each of these cases. The merit of Justice Breyer's approach is its predictability—he evaluates only the sufficiency of the evidence, not his personal preference for the policy positions evinced by the legislative findings.[124] The Dissent in *Sorrell* astutely observed that a regulatory scheme *necessarily* articulates a policy position on the part of the legislature.[125] This approach has the benefit of pragmatically recognizing that the burden of proving the "neutrality" of a regulation toward a speaker is only effectively possible where the court evaluates the sufficiency of the evidence and observes that the legislature is responding to an observed problem and wielding its authority to remedy it.

Justice Breyer's analysis would also recognize that the exceptions in the Prescription Confidentiality Law allow doctors' prescribing practices to be used for truly informational purposes, such as by educational institutions and state regulatory agencies. There is no informational aspect for drug companies to use the prescribing practices in order to solicit prescriptions from doctors for more expensive medications.[126] As Justice Breyer noted, the Vermont legislature clearly found that the detailing process was

123 *Id.* at 386.

124 *See supra*, Note 72.

125 *Id.*

126 VT. STAT. ANN.18, V.S.A.§§.4631(e) (2010);

designed to cause doctors to write more prescriptions for more expensive medications than they would otherwise.[127] The goal of drug companies with the detailing process is clearly not to educate the public in any meaningful way. The informational value of their speech would not be hindered by not being aware of the prescribing policies of the doctor. Justice Kennedy's view that detailing information should be available to the public completely ignores the exception in Vermont's Prescription Confidentiality Law that specifically allows prescribing practices to be used to inform patients of their treatment options. In protecting the free speech rights of the drug companies to advance their information, the Court essentially renders it impossible for the State of Vermont to control health care costs in this fashion. These policy arguments should not have been categorically rejected by the majority in *Sorrell* without critical analysis.

B. Undermining the Substantiality of Government Interests in the Majority's Application of the Central Hudson *Test*

The majority's reduction of Vermont's regulatory action to a mere "difference of opinion" with drug companies is an oversimplification which allows the Court to undermine the fourth prong analysis of *Central Hudson*. This renders any action taken by the state as incommensurate with the state's objective, as diminished by the Court. In so doing, the Court can avoid giving the legislature deference under the *Central Hudson* test as modified by Justice Scalia's Opinion in *Fox* to allow the government to argue only

127 *Sorrell v. IMS Health Inc.*, 131 S.Ct. 2653, 2682 (2011).

that the means of regulation is a "reasonable fit" with the objective of the government.[128] Applying the test in such an unbalanced fashion causes the analysis to be tipped significantly further in the favor of the non-state plaintiff without justification. The Court should honestly evaluate the merits of the state actor's objectives in the second prong of the test in order to properly engage in a *Central Hudson* fourth-prong analysis.

If the justices in the majority find very limited circumstances where the means of the regulation can fit with the state actor's selected means, then they should articulate that position during the fourth prong analysis and not through minimization of the impact of the government's objectives. If the majority seeks to overrule *Central Hudson* and articulate a test that is more deferential to the non-state plaintiff than intermediate review, then they should do so directly.

C. *Future Implications of* Sorrell

Referring to data in its raw form as protected commercial speech throws many regulatory schemes into question, and it remains to be seen how the Court will evaluate regulations in unrelated areas in light of the *Sorrell* decision. Businesses challenging regulations as infringements upon commercial speech could have an economically destabilizing effect by thrusting uncertainty into an already fragile marketplace, potentially exacerbating the country's economic woes. Placing mere data under the aegis of First Amendment protection extensively broadens the Supreme Court's

128 *Bd. of Tr. of the State Univ. of New York v. Fox*, 492 U.S. 469, 477 (1989)

commercial speech jurisprudence and has the potential to elevate that status of a tremendous amount of corporate statements to the level of protected speech.

Sorrell also casts doubt upon the ability of the federal government to respond to the health care crisis. Whatever its deficiencies, the Patient Protection and Affordable Care Actis an attempt to remedy these serious problems.[129] Critics of the bill have argued that health care solutions should originate in the states. *Sorrell* could act as a barrier to effective state action at the federal and local level under the guise of protecting "commercial speech." As Justice Breyer fears, this country may be bound for a new *Lochner* era, where justices will substitute their own policy preferences in favor of businesses for fidelity to the law.[130]

129 42 U.S.C.A. § 18001 (2010).

130 198 U.S. 45 (1905).