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The Central Hudson Zombie: For Better Or Worse, Intermediate Tier Review Survives *Sorrell v. IMS Health*

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Cover Page Footnote

Notes and Articles Editor, Fordham Intellectual Property, Media & Entertainment Law Journal, Volume XXV; J.D. Candidate, Fordham University School of Law, 2015; B.A., Johns Hopkins University, 2009. I would like to thank Professor Andrew Sims for his advice and guidance in writing this Note, as well as teaching me everything I know about the First Amendment. I would also like to thank my family and friends for their constant support.

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Oleg Shik*

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INTRODUCTION

In the recent and relatively unnoticed *Sorrell v. IMS Health, Inc.*,¹ the Supreme Court altered a long-established² standard of commercial speech³ jurisprudence. For more than three decades leading up to *Sorrell*, First Amendment⁴ challenges to state regulation of commercial speech were subject to “intermediate-tier” judicial scrutiny.⁵ The intermediate-tier standard acknowledged that forms of speech proposing a commercial transaction deserved at least some protection against state regulation, albeit secondary in value to core “personal” speech afforded to individuals.⁶ Partly because of its arguably higher “rank” in societal value, core “personal” speech is protected against governmental regulation on a stringent “strict-scrutiny” basis.⁷ The government needs to justify its restriction on personal speech by showing that the restriction has a compelling purpose, and that the regulation is narrowly tai-

¹ 131 S. Ct. 2653 (2011).

² See Jennifer L. Pomeranz, *No Need To Break New Ground: A Response To The Supreme Court's Threat To Overhaul The Commercial Speech Doctrine*, 45 LOY. L.A. L. REV. 389, 394 (2012) (“[I]t would be dangerous to depart from well-established precedent applying intermediate protection to commercial speech . . .”).

³ Famously defined as speech that does “no more than propose a commercial transaction.” *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 776 (1976) (Stewart, J., concurring).

⁴ U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech. . .”).

⁵ See, e.g., 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996); *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 475 (1989); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 564 (1980).

⁶ See generally Pomeranz, *supra* note 2, at 395. (“[A]t the core of the First Amendment is the protection of ideas and most often takes the form of political and religious speech.”). Professor Pomeranz quotes Justice Breyer: “Because virtually all human interaction takes place through speech, the First Amendment cannot offer all speech the same degree of protection. Rather, judges must apply different protective presumptions in different contexts, scrutinizing government’s speech-related restrictions differently depending upon the general category of activity.” *Garcetti v. Ceballos*, 547 U.S. 410, 444 (Breyer, J., dissenting); see also *Sorrell*, 131 S. Ct. at 2674 (Breyer, J., dissenting) (“[O]ur cases make clear that the First Amendment offers considerably less protection to the maintenance of a free marketplace for goods and services.”).

⁷ The Court’s “strict scrutiny” analysis of governmental action is often heralded as “strict in theory, fatal in fact.” See, e.g., Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection*, 81 HARV. L. REV. 1, 8 (1972).

lored to achieve that purpose.⁸ Meanwhile, in order to regulate or restrict commercial speech, the government needs only to show that the restriction directly advanced a “substantial” purpose, and, more importantly, that the regulation was not “more extensive than necessary” to serve that purpose.⁹ In theory, this disparate judicial treatment of core and commercial speech persists even after *Sorrell*: while states seeking to restrict various marketing or advertising techniques need to have a “substantial” reason for doing so, it does not need to be “compelling.”

In practice, however, some have contended that the combination of *Sorrell*'s new “heightened judicial scrutiny” standard, along with the increasingly business-friendly¹⁰ ideological makeup of the Court, has pushed the standard towards a de facto strict scrutiny standard.¹¹ Critics believe that this is a mistake—there are substantive and important differences between core and commercial speech, and a strict scrutiny standard would blur those differences, in effect demeaning the higher-value personal speech in the process.¹² Others see no reason for a different standard of scrutiny at all.¹³ Yet the confusion surrounding the new *Sorrell* standard, along with Justice Kennedy's own application of *Central Hudson*, has made lower courts very cautious in abandoning, or even altering, the established intermediate-tier analysis.¹⁴

⁸ See, e.g., *Texas v. Johnson*, 491 U.S. 397, 407 (1989) (striking down Texas statute criminalizing the desecration of the American Flag); *Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969) (holding that racist political speech by Ku Klux Klan member is protected under the First Amendment).

⁹ See, e.g., *Cent. Hudson*, 447 U.S. at 564–66.

¹⁰ See Adam Liptak, *Pro-Business Decisions Are Defining This Supreme Court*, N.Y. TIMES, May 4, 2013, <http://www.nytimes.com/2013/05/05/business/pro-business-decisions-are-defining-this-supreme-court.html?pagewanted=all&r=0>.

¹¹ See, e.g., Samantha Rauer, *When The First Amendment and Public Health Collide: The Court's Increasingly Strict Constitutional Scrutiny of Health Regulations That Restrict Commercial Speech*, 38 AM. J. L. & MED. 690, 691 (2012) (“Despite the conceptualization of *Central Hudson* as an intermediate standard, when examining public health regulations, the Court has been increasingly strict in its level of scrutiny.”).

¹² See Pomeranz, *supra* note 2, at 391–412.

¹³ See generally Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627 (1990) (arguing that the distinction between commercial and noncommercial speech does not warrant divergent levels of constitutional protection).

¹⁴ See *infra* notes 100–04.

This Note argues that until the Court sets forth a clear standard of analysis for its “heightened judicial scrutiny” language, traditional intermediate-tier review will prevail. Although the court may have, over the years, established a de facto strict scrutiny standard, it has not done so explicitly. Nor have lower courts struck down public health regulations merely due to the fact that the regulations did not pass “heightened judicial scrutiny”; in fact, after *Sorrell*, the fate of almost every commercial speech restriction evaluated by a lower court has come down to whether it passed *Central Hudson*, not the new *Sorrell* standard.¹⁵ This makes sense. If the *Sorrell* Court wanted the constitutional inquiry to end upon a determination that a regulation was discriminatory based on content or speakership, it probably would have said so. Instead, Justice Kennedy opted to take a more familiar path and applied the intermediate-tier standard anyway.

Part I of this Note outlines the modern commercial speech doctrine, including the applicability of the *Central Hudson* standard to public health regulation. Part II will discuss the facts and relatively novel legal standards introduced in *Sorrell*, as well as provide an analysis of Justice Kennedy’s majority opinion. It will also discuss and analyze Justice Breyer’s intense dissent from Justice Kennedy’s opinion, including his sensitive accusation of the Court wading into *Lochner*¹⁶-era jurisprudence. It will finally summarize how *Sorrell* has changed, if at all, the evaluation of various public health regulations within the lower courts. Part III will gauge the reaction to *Sorrell*, and any impact the majority decision may bring to future evaluation of commercial speech regulation. Finally, in Part IV, I will conclude by arguing that in the absence of a clear mandate for strict scrutiny, lower courts should not treat *Sorrell*’s new “heightened judicial scrutiny” standard as dispositive, and opt instead for the traditional and familiar intermediate-tier analysis.

¹⁵ *Id.*

¹⁶ *See* *Lochner v. New York*, 198 U.S. 45 (1905).

I. THE MODERN COMMERCIAL SPEECH DOCTRINE

Ever since the Court overruled¹⁷ *Valentine v. Chrestensen*,¹⁸ thus granting commercial speech First Amendment protection,¹⁹ courts have had to decide the extent to which governmental regulation can restrict such speech in the name of public health. The landmark *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*²⁰ established a four-pronged, intermediate scrutiny standard²¹ for analyzing the constitutionality of such regulation.²² This framework technically²³ remains the standard by which the Court evaluates public health regulations that infringe on commercial speech rights.²⁴

Nonetheless, commentators note that the *Central Hudson* intermediate-tier standard itself can be a very tough one for the government to meet.²⁵ In fact, the Court has not upheld a commercial

¹⁷ See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748 (1976).

¹⁸ 316 U.S. 52 (1942) (upholding a municipal ban on distributing advertisements in the streets, and more broadly holding that commercial speech is not protected under the First Amendment).

¹⁹ See *Va. State Bd. Of Pharmacy*, 425 U.S. at 761.

²⁰ 447 U.S. 557, 558 (1980) (striking down a New York state regulation banning utility companies from advertising their services).

²¹ First, the speech cannot be false or misleading, and it must not promote unlawful activity. *Id.* at 563–64. Second, the government must have a “substantial interest” in regulation the speech. *Id.* at 564. Third, the regulation must “directly advance” that interest. *Id.* And finally, the restriction on speech cannot be “more extensive than necessary” to serve this interest. *Id.*

²² *Id.* at 557–58, 561. The Court held that the State had a substantial interest in energy conservation and making sure that utility rates were “fair and efficient” (prong 2). The restriction also “directly advanced” that interest (prong 3). Nonetheless, an outright ban on advertising was “more extensive than necessary.” *Id.* at 571–72. The State, according to the Court, could have considered less drastic alternatives, such as adjusting “the format and content of . . . advertising,” or forcing the disclosure of “relative efficiency and expense” of information. *Id.* at 571.

²³ Though the *Central Hudson* framework has survived *Sorrell*, see *infra* discussion on how *Sorrell* adds a separate “heightened judicial scrutiny” analysis regarding content and speaker neutrality.

²⁴ See, e.g., *Sorrell v. IMS Health, Inc.*, 133 S. Ct. 2653, 2667–68 (2011); 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 504–06 (1996).

²⁵ See, e.g., Luke Dawson, *A Spoonful of Free Speech Helps The Medicine Go Down: Off-Label Speech & The First Amendment*, 99 IOWA L. REV. 803, 815 (2014) (“[T]oday, *Central Hudson* imposes a heavy burden on the government.”); Rauer, *supra* note 11 at 691 (“Despite the conceptualization of *Central Hudson* as an intermediate standard, when

speech restriction in almost two decades.²⁶ The fourth *Central Hudson* requirement, that the regulation cannot be “more extensive than necessary,” can be particularly lethal.²⁷ The Court has had little trouble striking down regulations they deemed to be more extensive than necessary to achieve the government’s purpose. In 2002, for instance, the Court struck down a federal ban on the advertisement of compounded drugs by various pharmacies.²⁸ The Court held that although the government had a “substantial interest” in generally promoting public health and safety, and that the

examining public health regulations, the Court has been increasingly strict in its level of scrutiny.”).

²⁶ Pomeranz, *supra* note 2, at 391 (citing *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618 (1995) (upholding a state bar rule that imposed a thirty-day ban on targeted direct mail solicitations of persons involved in personal injury or wrongful death actions)).

²⁷ See, e.g., *44 Liquormart*, 517 U.S. at 507 (pl. opinion) (striking down a prohibition on advertising the price of alcoholic beverages in part because “alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the State’s goal of promoting temperance”); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 490–91 (1995) (striking down prohibition on beer labels displaying alcohol content in part because of the availability of alternatives “such as directly limiting the alcohol content of beers, prohibiting marketing efforts emphasizing high alcohol strength . . . or limiting the labeling ban only to malt liquors”); *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 647 (1985) (striking down a blanket ban on illustrations in advertisements for attorneys); Robert Post, *Prescribing Records and the First Amendment—New Hampshire’s Data-Mining Statute*, 360 NEW ENG. J. MED. 745, 747 (2009) (“This last requirement is so arbitrary that it constitutes an open invitation for judges to bring political prejudices to bear in resolving cases. Antiregulatory judges will tend to strike down statutes on the basis of this requirement; proregulatory judges will tend to uphold them.”). *But see* *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 477 (1989) (holding that governmental restrictions upon commercial speech need not be the absolute least restrictive means to achieve desired end); *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 534–35 (1987) (upholding Olympic Committee’s right to enforce its trademark in the word ‘Olympics’ against a gay rights group’s promotion of the “Gay Olympic Games.”); *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 338–39 (1986) (upholding blanket ban on gambling casino advertising); *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978) (upholding regulation of commercial activity deemed harmful to the public even if speech is a component of that activity).

²⁸ See *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 360 (2002). Drugs are “compounded” when their ingredients are mixed and tailored to the needs of specific patients. *Id.* at 357. They are exempted from having to obtain FDA approval because of such particularized need. *Id.* at 360–61. The regulation was not a “blanket ban” because exemption from the FDA approval process was itself conditioned on refraining from commercial speech. Providers could still advertise should they choose to go through the approval process. Rauer, *supra* note 11, at 696.

ban “directly advanced” that interest, the government still failed to show that there weren’t alternative ways to advance its goals without infringing on the speech of the pharmacies.²⁹ In fact, Justice O’Connor went so far as to suggest that if *the Court itself* could identify less restrictive means of achieving the government’s ends, the regulation could be found to be too restrictive (emphasis added).³⁰

Indeed, the modern Court has developed a relatively consistent pattern of striking down public health regulations abridging commercial speech, with much of the Court’s analysis focusing on how narrowly tailored the regulations are to the purported interests at stake. Blanket bans on advertising, as seen in *Central Hudson* and *44 Liquormart*,³¹ deserved “special care”³² because they tended to over-inclusively ban entire categories of speech. Yet the Court has treated even more narrowly tailored regulations negatively as well. In *Lorillard Tobacco Co. v. Reilly*, for instance, the Court invalidated two Massachusetts regulations prohibiting the advertising of smokeless tobacco (a) within 1000 feet of a school or playground and (b) lower than five feet from the floor of a store located within 1000 feet of a school or playground.³³ A highly splintered Court conceded that although these regulations did not amount to a blanket ban, they were more extensive than necessary nonetheless, even

²⁹ *Thompson*, 535 U.S. at 371 (“Assuming it is true that drugs cannot be marketed on a large scale without advertising, the FDAMA’s prohibition on advertising compounded drugs might indeed ‘directly advanc[e]’ the Government’s interests.”). Justice O’Connor listed a few examples of less restrictive regulations to advance the government’s interests in public health and safety: for one, the government could have merely banned the use of commercial scale manufacturing or testing equipment for compounding drugs. *Id.* at 372. It could have prohibited pharmacists from “[o]ffering compounded drug products at wholesale to other state licensed persons or commercial entities for resale.” *Id.* (citation omitted). It could have also “limit[ed] the amount of compounded drugs, either by volume or by numbers of prescriptions, that a given pharmacist or pharmacy sells out of state.” *Id.* (citation omitted).

³⁰ See Dawson, *supra* note 25, at 815 (citing *Thompson*, 535 U.S. at 372 (“Another possibility not suggested by the Guide would be capping the amount of any particular compounded drug, either by drug volume, number of prescriptions, gross revenue, or profit that a pharmacist or pharmacy may make or sell in a given period of time.”)).

³¹ See *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 500, 505–07 (1996) (striking down Rhode Island liquor advertisement ban for not promoting the State’s interest in promoting temperance and being more extensive than necessary.).

³² *Id.* “Special care” in this case means more stringent scrutiny.

³³ See 533 U.S. 525, 525 (2001).

if the State's interest in discouraging and preventing youth tobacco use was compelling.³⁴ The statute invalidated in *Thompson* also did not include a blanket ban, instead only restricting advertising for compounding drugs that did not go through FDA approval.³⁵ The Court's hostile treatment of even relatively narrowly tailored public health regulation has drawn repeated critiques of the *Central Hudson* standard itself.³⁶ Some allege that the test's fourth prong essentially pushes the standard of review from intermediate to strict scrutiny.³⁷ Others, like Justice Thomas, would overturn *Central Hudson* altogether and protect commercial speech at the same strict scrutiny standard afforded to personal speech.³⁸

³⁴ *Id.* at 542. The Court found that the regulation was more extensive than necessary because there was evidence that the Attorney General did not "carefully calculat[e] the costs and benefits associated with the burden on speech imposed." *Id.* at 528 (citing *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993)).

³⁵ See *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 361-63 (2002). The government argued that because compounded drugs were designed to meet unique, individualized needs, restrictions on their advertisements served substantial governmental interests in public health and safety. *Id.* at 368. The Court nonetheless concluded that because the government did not even consider less restrictive alternatives, the statute abridged speech more extensively than necessary. *Id.* at 373 ("If the First Amendment means anything, it means that regulating speech must be a last—not first—resort. Yet here it seems to have been the first strategy the Government thought to try.").

³⁶ See Rauer, *supra* note 11, at 693 (citing Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1 (2000) (arguing that the *Central Hudson* test is abstract and unhelpful)); Brian J. Waters, *A Doctrine in Disarray: Why the First Amendment Demands the Abandonment of the Central Hudson Test for Commercial Speech*, 27 SETON HALL L. REV. 1626 (1997) (critiquing the test's uneven application, which results in "confusing jurisprudence"); Tamara R. Piety, "A Necessary Cost of Freedom"? *The Incoherence of Sorrell v. IMS*, 64 ALA. L. REV. 1, 4 (2012) (arguing that attacks on *Central Hudson* for the most part urge the Court not to go back to the *Cherstensen* doctrine, but rather to "eliminate commercial speech's purportedly 'second-class citizen' status and to offer it full First Amendment protection").

³⁷ See Rauer, *supra* note 11, at 692-93 ("Public health regulations subjected to the *Central Hudson* analysis are almost always invalidated. Although the government has attempted to more narrowly tailor its legislative means to substantial interests, the Court consistently fails to find that even the more narrowly-tailored regulations can satisfy . . . the *Central Hudson* standard.").

³⁸ See *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 522 (1996) (Thomas, J., concurring) (arguing that there is no "philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than 'noncommercial' speech"); Kozinski & Banner, *supra* note 13, at 634 ("The first amendment's text and history don't provide us with any explanation of the distinction between commercial and noncommercial speech.").

II. *SORRELL* AND THE ROAD TO STRICT SCRUTINY

Although Justice Thomas' concurrence in *44 Liquormart* may have seemed outlandish at the time, the recent and relatively unnoticed *Sorrell v. IMS Health* may have moved the evaluation of public health regulation of commercial speech ever closer to a strict scrutiny standard.³⁹

In *Sorrell*, the Court considered whether a Vermont law curbing a drug company's ability to solicit physician prescriptions violated the company's First Amendment rights to truthful and lawful commercial speech.⁴⁰ In enacting the Prescription Confidentiality Law (known as Act 80), Vermont sought to limit a marketing practice by pharmaceutical companies called "detailing." "Detailing" is when a sales representative for a pharmaceutical company (a "detailer") visits a doctor's office in order to persuade the doctor to prescribe a particular pharmaceutical.⁴¹ Pharmaceutical sales agents are much more successful in their marketing efforts if they receive "prescriber-identifying information" (PII)⁴² before visiting a doctor's office. PII is invaluable to pharmaceutical companies because it allows detailers to quickly target doctors most willing to purchase their drug.⁴³ How do pharmaceutical companies get this information? In *Sorrell*, they bought it from pharmacies that were, by Vermont law, required to receive and record PII when processing prescriptions.⁴⁴ Most pharmacies then elect to sell the PII to "data miners,"⁴⁵ who in turn produce reports on physicians' prescribing "behavior."⁴⁶ Pharmaceutical companies then buy these reports in order to refine their marketing tactics and increase sales.⁴⁷

³⁹ 131 S. Ct. 2653 (2011).

⁴⁰ *Id.*

⁴¹ *Id.* at 2659. ("Detailers bring drug samples as well as medical studies that explain the 'details' and potential advantages of various prescription drugs.")

⁴² PII is incredibly valuable because it gives the detailer specific knowledge ("details") of a physician's prescription patterns. *Id.*

⁴³ *Id.* at 2659–60.

⁴⁴ *Id.* at 2660.

⁴⁵ Or: firms that analyze prescriber-identifying information and produce reports on prescriber information.

⁴⁶ *Id.* at 2656.

⁴⁷ *Id.* at 2660.

The main provision of Vermont's Act 80, § 4631(d),⁴⁸ did three things: first, it banned pharmacies (among others) from selling PII, absent the prescriber's consent. Second, it banned pharmacies (among others) from allowing PII to be used for "marketing,"⁴⁹ unless the prescriber consented, which in effect barred pharmacies from disclosing the information for marketing purposes at all.⁵⁰ Finally, and most importantly, it outlawed pharmaceutical companies specifically from using PII for marketing, absent the prescriber's consent.⁵¹ These prohibitions were subject to a few exemptions. For instance, PII could have been disseminated or used for "health care research"; to enforce "compliance" with health insurance formularies or preferred drug lists; for "educational communications" provided to patients for "treatment options"; for law enforcement operations; and for purposes "otherwise provided by law."⁵² Finally, the Act also created a drug-education program, designed to "counter-detail," or persuade doctors to prescribe generic drugs, instead of costlier brand-name drugs.⁵³ As such, counter-detailers *could* use PII, but regular detailers could not.⁵⁴

A. Sorrell: *Majority Analysis*

The first and perhaps most contentious part of Justice Kennedy's majority opinion went beyond the typical *Central Hudson* analysis. Indeed, unlike almost any commercial speech case preced-

⁴⁸ VT. STAT. ANN. tit. 18, § 4631(d) (West 2010) ("[A] pharmacy . . . shall not sell, license, or exchange for value regulated records containing prescriber-identifiable information, nor permit the use of regulated records containing prescriber-identifiable information for marketing or promoting a prescription drug, unless the prescriber consents Pharmaceutical manufacturers and pharmaceutical marketers shall not use prescriber-identifiable information for marketing or promoting a prescription drug unless the prescriber consents.").

⁴⁹ *Sorrell*, 131 S. Ct. at 2660. "Marketing" is defined in the Act as including "advertising, promotion or any activity" that is "used to influence sales or market share of a prescription drug." *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* (citing § 4631(e) of the Act).

⁵³ *Id.* at 2661.

⁵⁴ *Id.*

ing *Sorrell*,⁵⁵ Justice Kennedy began his analysis by discussing how Act 80 on its face implemented speech restrictions based on the content of the speech and the identity of the speaker.⁵⁶ The provision's exceptions allowed those in "educational capacities" to purchase and use PII, while prohibiting pharmacies and pharmaceutical companies from doing the same for marketing purposes. The Court held that this was discrimination based on the speaker. Moreover, because the Act prohibited the purchase of PII for the specific purpose of directly marketing brand name pharmaceuticals, the statute thus "disfavored" speech with a particular content.⁵⁷

Unequivocally and forcefully, Justice Kennedy held that "heightened judicial scrutiny" is warranted whenever a "content-based burden" is imposed on commercial speech.⁵⁸ As stressed by Richard Samp, the adoption of the "heightened" scrutiny standard had never been applied in a commercial speech case, although Kennedy suggests otherwise.⁵⁹ Kennedy cites Court precedent⁶⁰ to

⁵⁵ Richard Samp, *Sorrell v. IMS Health: Protecting Free Speech Or Resurrecting Lochner?*, 2011 CATO SUP. CT. REV. 129, 133 (2011) ("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.").

⁵⁶ See *Sorrell*, 131 S. Ct. at 2663. ("On its face, Vermont's law enacts content and speaker-based restrictions on the sale, disclosure, and use of prescriber-identifying information. The provision first forbids the sale subject to exception based in large part of the content of a purchaser's speech. For example, those wish to engage in certain 'educational communications' may purchase the information. The measure then bars any disclosure when recipient speakers will use the information for marketing. Finally, the provision's second sentence prohibits pharmaceutical manufacturers from using the information for marketing. The statute thus disfavors marketing, that is, speech with a particular content. More than that, the statute disfavors specific speakers, namely pharmaceutical manufacturers."). As Jennifer Pomeranz points out, the respondents' brief urged the Court to adopt Justice Thomas' strict scrutiny standard for all forms of speech, whether commercial or personal. Pomeranz, *supra* note 2, at 393 (citing Brief for Plaintiffs-Appellants, at 23 ("Justice Thomas repeatedly has called for abandonment of intermediate scrutiny '[i]n cases such as this, in which the government's asserted interest is to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace.' Publishers agree with this reasoning . . .")) (citations omitted)).

⁵⁷ *Sorrell*, 131 S. Ct. at 2663. It's not clearly established whether *either* content-based *or* speaker-based statutory language triggers "heightened judicial scrutiny," or whether both are necessary.

⁵⁸ *Id.* at 2664.

⁵⁹ Samp, *supra* note 55, at 133; *Sorrell*, 131 S. Ct. at 2663-64.

support his contention that content and speaker-based governmental regulation deserves a stricter scrutiny analysis, even in a purely commercial speech context.⁶¹ Yet almost none of these cases involved public health regulation of commercial speech, and in none of those decisions did the Court “suggest that its call for heightened scrutiny extended to commercial speech cases.”⁶² In fact, the only commercial speech case that considered a regulation’s content neutrality, *Cincinnati v. Discovery Network, Inc.*,⁶³ did not, contrary to Kennedy’s assertion, apply his so-called “heightened scrutiny” standard. It applied *Central Hudson*, and Justice Stevens’ opinion explicitly rejected having to decide whether a more exacting scrutiny should be applied to content or speaker-based regulations.⁶⁴ In *Sorrell*, Justice Kennedy may well have decided for us.⁶⁵

Yet even after strongly implying that a public health regulation’s content and speaker-based discrimination were enough to

⁶⁰ *E.g.*, *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803 (2000) (striking down a section of federal statute prohibiting cable stations from providing sexually explicit programming except during late-night hours); *Turner Broad. Sys. Inc. v. FCC*, 512 U.S. 622 (1994) (upholding federal “must-carry” statute requiring cable service operators to carry the signals of over-the-air television stations); *Simon & Schuster, Inc. v. Member of N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991) (striking down New York’s “Son of Sam” laws prohibiting convicted criminals from profiting off of books published about their crimes).

⁶¹ *Sorrell*, 131 S. Ct. at 2663–66.

⁶² Samp, *supra* note 55, at 134 (“In noncommercial speech cases, the issue of ‘heightened’ scrutiny usually arises in the context of determining whether time-place-or-manner doctrine applies to a challenged speech restriction.”); Pomeranz, *supra* note 2, at 391 (“[T]he majority departed from precedent establishing the commercial speech doctrine and confusingly infused core speech cases within its proposed commercial speech analysis.”).

⁶³ 507 U.S. 410 (1993) (striking down Cincinnati’s ban on the distribution of a particular magazine from newsracks located on public property).

⁶⁴ *Id.* at 416 n.11 (“Because we conclude that Cincinnati’s ban on commercial newsracks cannot withstand scrutiny under *Central Hudson* and *Fox*, we need not decide whether that policy should be subjected to more exacting review.”).

⁶⁵ See Samp, *supra* note 55, at 135 (“*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.”); see also *Sorrell*, 131 S. Ct. at 2667 (“In the ordinary case it is all but dispositive to conclude that law is content-based and, in practice, viewpoint-discriminatory.”) (citing *R.A.V. v. St. Paul* in supporting the contention that “content-based regulations are presumptively invalid.” 505 U.S. 377, 391–92 (1992)).

presumptively invalidate the law, Justice Kennedy proceeded to evaluate Act 80 under *Central Hudson* anyway.⁶⁶ First, because the regulation targeted truthful speech with respect to a legal activity (“detailing”), the first *Central Hudson* prong was not relevant.⁶⁷ The Court thus evaluated whether Vermont “directly advance[d] a substantial governmental interest and that the measure [was] drawn to achieve that interest.”⁶⁸ Vermont’s purported interests in the Act were twofold: first, it was necessary to protect a physician’s reasonable expectation of privacy, including his or her confidentiality, avoidance of harassment, and the integrity of the doctor-patient relationship.⁶⁹ Second, the Act was said to be integral for public policy objectives, particularly to improve overall public health and lower healthcare costs.⁷⁰

The Court was not persuaded, holding that neither reason, even if substantial, was sufficient to survive the intermediate tier standard.⁷¹ In addressing the State’s privacy argument, the Court held that the Act’s broad exemptions (i.e., for “educational communications”) permitted widespread distribution of PII, thus undermining (and not “directly advancing”) the State’s interest in protecting physician confidentiality.⁷² While Kennedy suggested

⁶⁶ *Sorrell*, 131 S. Ct. at 2667 (arguing that the outcome would be the same “whether a special commercial speech inquiry or a stricter form of judicial scrutiny applied”); *see also* *Greater New Orleans Broadcasting Ass’n, Inc. v. United States*, 527 U.S. 173, 184 (1999). Yet, again, nowhere in the *Greater New Orleans* case—which struck down a regulation banning advertising of legal gambling—did the Court condone a “stricter form of judicial scrutiny” than *Central Hudson*. *See Greater New Orleans*, 527 U.S. at 184 (“In this case, there is no need to break new ground. *Central Hudson*, as applied in our more recent commercial speech cases, provides an adequate basis for decision.”). Nor did the Court equate a more stringent “heightened scrutiny” standard with the *Central Hudson* test, as Kennedy blankly states. *See id.* Still, Kennedy’s formulation raises the obvious question: if the outcome is the same regardless of the standard applied, then why introduce a brand new standard into the commercial speech doctrine at all?

⁶⁷ *See Samp*, *supra* note 55, at 132.

⁶⁸ *Sorrell*, 131 S. Ct. at 2667–68 (citations omitted).

⁶⁹ *Id.* at 2668.

⁷⁰ *Id.*

⁷¹ *See id.*

⁷² *Id.* (“The explicit structure of the statute allows the information to be studied and used by all but a narrow class of disfavored speakers. Given the information’s widespread availability and many permissible uses, the State’s asserted interest in physician confidentiality does not justify the burden that § 4631(d) places on protected expression.”)

the possibility that data-mining presented “serious and unresolved issues with respect to personal privacy and the dignity it seeks to secure,”⁷³ Vermont still could not engage in “content-based discrimination to advance its own side of a debate.”⁷⁴ And while the first rationale (privacy) failed the third *Central Hudson* prong, the second rationale (public health) failed the fourth. The Court held that even if Vermont’s interests in improving public health and reducing health costs were substantial, Act 80 did not advance those interests “in a permissible way.”⁷⁵ Justice Kennedy held that a state may never justify regulating truthful commercial speech based on a fear of how people may react to the speech.⁷⁶ In other words, Vermont may not regulate truthful speech by detailers out of fear that successful marketing of that speech would lead physicians and consumers to purchase their products. This was especially true, Kennedy stressed, when the targets of the marketing, physicians, were “sophisticated and experienced consumers.”⁷⁷ The majority concluded that although some restrictions on commercial speech or conduct are permissible under the First Amendment, when a statute imposes “more than an incidental burden on protected expression” and does so based on the content of the speech or identity of the speaker, it will be subject to “heightened scrutiny.”⁷⁸ So without explicitly abandoning the *Central Hudson* approach, the Court has adopted an additional standard of analysis for laws burdening commercial speech. This additional “judicial scrutiny” standard does not attach an evaluative level of scrutiny, which, as seen later on in this section, will drive lower courts to fall back on *Central Hudson* as the dispositive test.

⁷³ *Id.* at 2672.

⁷⁴ *Id.*

⁷⁵ *Id.* at 2670.

⁷⁶ *Id.* at 2670-71 (“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 its opposition. The State may not burden the speech of others in order to tilt public debate in a preferred direction.” (citing *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 374 (2002)).

⁷⁷ *Sorrell*, 131 S. Ct. at 2671.

⁷⁸ *Id.* at 2664; *see also* Samp, *supra* note 55, at 139.

B. Breyer's Dissent: Creeping Toward Lochner

In a searing dissent, Justice Breyer stressed that the problem was not about a burden on corporate speech, but rather commercial conduct.⁷⁹ He argued that the Court, in deference to legislative judgment, has traditionally applied a very lenient standard to regulating ordinary commercial transactions⁸⁰ indirectly affecting speech.⁸¹ In doing so, he warned the Court about wading into *Lochner*⁸² waters (though using the First Amendment instead of the Fourteenth) to evade a rational basis standard when evaluating “ordinary economic regulatory programs.”⁸³ Furthermore, al-

⁷⁹ Indeed, as various commentators have pointed out, the sale of prescription patterns and practices by physicians does not automatically make one think of a speech issue. *See* Rauer, *supra* note 11, at 709 (citing Brief For New England Journal of Medicine et al. as Amici Curiae Supporting Petitioners (arguing that selling private health information is not about speech, but privacy and confidentiality)).

⁸⁰ *See* United States v. Carolene Prods. Inc., 304 U.S. 144, 152 (“[R]egulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless . . . it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.”); *see also id.* at n.4 (“[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities . . . may call for a correspondingly more searching judicial inquiry.”).

⁸¹ *Sorrell*, 131 S. Ct. at 2675 (Breyer, J., dissenting) (“‘Our function’ in such cases, Justice Brandeis said, ‘is only to determine the reasonableness of the legislature’s belief in the existence of evils and in the effectiveness of the remedy provided.’” (quoting *New States Ice Co. v. Liebmann*, 285 U.S. 262, 286–87 (1932) (Brandeis, J., dissenting))).

⁸² *See* *Lochner v. New York*, 198 U.S. 45, 59 (1905). *Lochner v. New York* was a landmark case in which the Court struck down a New York statute maximizing the number of hours worked by bakers because the statute violated a “freedom to contract” implicit in the Due Process Clause of the Fourteenth Amendment. *Id.* The ruling was seen by many as the highlight of an era in which state laws regulating ordinary commercial conduct were struck down as unconstitutional, leading many to accuse the Court of “judicial activism.” *See* Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. CHI. L. REV. 483, 493 (1997) (attacking the decision as “illegitimate judicial activism”).

⁸³ *See Sorrell*, 131 S. Ct. at 2675 (“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.”). Breyer also cited Justice Rehnquist’s dissent in *Central Hudson*, predicting that judges would use the standard to effectuate a “return to the bygone era of *Lochner v. New York*, in which it was common practice for this Court to strike down economic regulations adopted by a State based on the Court’s own notions of the most appropriate means for the State to

though the action at hand did implicate the regulation of corporate speech, Breyer stressed that while commercial speech has an “informational function” and is not “valueless” in the marketplace of ideas,⁸⁴ it is still afforded much less judicial scrutiny than “higher-value” social and political speech at the core of First Amendment protection.

C. *The Glickman Analysis*

Throughout his dissent Breyer made repeated references to another commercial speech case, *Glickman v. Wileman Bros. & Elliot, Inc.*,⁸⁵ which he felt was more similar to the case at hand. In *Glickman*, a group of fruit growers challenged regulations by the Department of Agriculture requiring them to collectively pay for the advertising and marketing of their products.⁸⁶ The issue in the case was the standard of review afforded to the regulations. The Ninth Circuit, in striking down the requirements, applied the traditional intermediate-tier standard (*Central Hudson*) because it believed that the regulation infringed on the growers’ First Amendment right to market their own products.⁸⁷ The rule was struck down on *Central Hudson*’s fourth prong, holding that the government failed to prove that collective advertising was a better alternative to the government’s purported interest behind the regulation—increasing consumer demand in tree fruits—than allowing the growers to market their products themselves.⁸⁸ The Supreme Court, with Justice Kennedy in the majority, overruled the Ninth Circuit on a 5–4 vote, holding that not only does the regulation not violate the First Amendment, but that it was a mistake to apply *Central Hudson* altogether, opting instead for the low-tier rational-basis test afforded to ordinary economic regulation.⁸⁹

implement its considered policies.” *Id.* (citing *Cent. Hudson Gas & Elec. Corp. v. Pub Serv. Comm’n of N.Y.*, 447 U.S. 557, 589 (1980) (Rehnquist, J., dissenting)).

⁸⁴ *Sorrell*, 131 S. Ct. at 2674 (Breyer, J., dissenting) (citing *Central Hudson*, 447 U.S. at 563; *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975)).

⁸⁵ 521 U.S. 457 (1997).

⁸⁶ *Id.* at 460.

⁸⁷ *Id.* at 457.

⁸⁸ *Id.* at 458.

⁸⁹ *Id.*

The *Glickman* Court held that three characteristics of the generic advertising scheme distinguished it from laws the Court had found to abridge free speech. First, the marketing orders imposed no restraint on the respondents' freedom to communicate any message to any audience. Second, they did not compel anyone to engage in any actual or symbolic speech. Third, they did not compel anyone to endorse or finance any political or ideological views.⁹⁰ Would *Sorrell* have turned the other way had *Glickman* analysis been applied? Breyer suggests *Glickman* (and thus, a rational-basis test) should have applied here,⁹¹ and that neither *Central Hudson* nor "heightened scrutiny" analyses were appropriate⁹² because § 4631(d) was part of Vermont's "traditional, comprehensive regulatory regime."⁹³ Further, Breyer pointed out that because PII *in itself* was the result of Vermont's requirement for pharmacies to maintain a "patient record system" (and thus a state-created right), the state should have logically been able to "create tailored restrictions" on its use.⁹⁴

Yet it is not clear (or at least not as clear as Breyer may have conveyed) that the Act could have even passed the three *Glickman* prongs in the first place. With respect to the first prong, Act 80 does seem to restrain (at least somewhat) the respondents' freedom to communicate with their target audience.⁹⁵ Nonetheless, it is true, as Breyer points out, that the Act only bans them from selling and using PII *without the physician's consent*, and not entirely.⁹⁶ Further, the pharmaceutical companies themselves do not need PII to market their drugs, so Act 80 does not "impose a restraint," or at least an insurmountable restraint, on their freedom to communi-

⁹⁰ *Id.*

⁹¹ See *Sorrell v. IMS Health*, 131 S. Ct. 2563, 2676 (2011) (applying *Glickman*'s three factors to the facts at hand, "Vermont's state neither forbids nor requires anyone to say anything, to engage in any form of symbolic speech, or to endorse any particular point of view, whether ideological or related to the sale of a product.").

⁹² Even though he ended up applying *Central Hudson* nonetheless. See *id.* at 2679–80; see also *infra* note 97 (summarizing Breyer's *Central Hudson* analysis).

⁹³ *Sorrell*, 131 S. Ct. at 2676.

⁹⁴ *Id.* As an example, he cites a federal statute (15 U.S.C. § 1681(b)) prohibiting car dealerships from using existing customers' credit scores to search for new customers.

⁹⁵ The respondents could even argue that the Act would deprive them of reaching their target audience at all.

⁹⁶ VT. STAT. ANN. tit. 18, § 4631 (d) (West 2010).

cate their message to their audience. Second, the Act does not compel the respondents to do engage in actual or symbolic speech—rather, the statute is purely a restrictive measure. However, the third prong may also be problematic because the Act does seem to favor non-for-profit “counter-detailers” using PII to spread the word about generic drugs, over for-profit corporations. Thus, by taking away the respondents’ right to use PII, respondents could argue that their lost profits will fund the State’s ideological and political interests behind the regulation.

Nonetheless, even assuming the corporations’ First Amendment rights were implicated (i.e., they passed *Glickman* and were thus entitled to more than rational tier review), the ultimate irony was that Breyer, like Kennedy, applied *Central Hudson* anyway.⁹⁷ In fact, while both Breyer and Kennedy’s opinions suggested aversions to *Central Hudson*, they nonetheless applied the test instead of abandoning it.

Still, Breyer’s reaction to Kennedy’s introduction of “content and speaker-based” analysis bordered on contemptuous. “Until today,” Breyer stressed, “this Court has *never* found that the First Amendment prohibits the government from restricting the use of information gathered pursuant to a regulatory mandate Nor has this Court *ever* previously applied any form of ‘heightened scrutiny’ in any even roughly similar case.”⁹⁸ The absence of such precedent within the context of commercial speech regulation,

⁹⁷ Breyer found the State’s interest in protecting Vermonters’ public health and the privacy of its physicians to be important. See *Sorrell*, 131 S. Ct. at 2681. He then argued that the Act “directly advanced” each of these interests by discouraging direct marketing techniques, which did nothing but encourage a particular doctor to buy a certain drug without comparing the drug to more beneficial and cost-effective generic drugs. *Id.* at 2682. He also cited expert testimony suggesting that drug companies manipulated data mining to “cover up information that is not in the best of light of their drug and to highlight information that makes them look good.” *Id.* With respect to a narrow tailoring, Breyer argues that the entire statute is in effect an “opt-in” provision—meaning, there is no burden on speech whatsoever so long as a doctor consents to having his name being a part of a PII list. *Id.* So in effect it *is already* narrowly tailored. Breyer further rejects the respondents’ contention that simply informing physicians that their information could be used for marketing purposes would be a less restrictive alternative by stressing that this would not achieve Vermont’s interests in creating a “fair balance” of information in pharmaceutical marketing sought by Vermont. *Id.* at 2684.

⁹⁸ *Id.* at 2677.

Breyer argued, is understandable: “regulatory programs *necessarily* draw distinctions on the basis of content.”⁹⁹ The dissent argued that any standard evaluating such regulations on a “heightened scrutiny” basis was “danger[ous],” threatening to unravel “widely accepted regulatory activity.”¹⁰⁰ It further criticized Kennedy’s umbrage with the Act “targeting” pharmacies and pharmaceutical companies as somehow violating the First Amendment.¹⁰¹ To Breyer, the “targeting” of a particular industry was, first and foremost, a legislative act that was owed legislative deference.¹⁰² To subject such “targeting” in the name of public health to a level of “heightened scrutiny” would bestow upon courts a power unseen since “a happily bygone era when judges scrutinized legislation for its interference with economic liberty.”¹⁰³ By the end of his dissent, Breyer flatly accuses the majority of resurrecting *Lochner*-era substantive due process jurisprudence:

⁹⁹ *Id.* (emphasis added) (“If there is a kind of commercial speech that lacks all First Amendment protection, . . . it must be distinguished by its content.” (citing *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976))). For example, Breyer cites “electricity regulators” who regulate “company statements, pronouncements, and proposals, but only about electricity. The Federal Reserve Board that 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.” *Sorrel*, 131 S. Ct at 2677.

¹⁰⁰ *Sorrel*, 131 S. Ct. at 2676–77 (“The ease with which one can point to actual or hypothetical examples with potentially adverse speech-related effects at least roughly comparable to those at issue here indicates the danger of applying a ‘heightened’ or ‘intermediate’ standard of First Amendment review where typical regulatory actions affect commercial speech (say, by withholding information that a commercial speaker might use to shape the content of a message).”).

¹⁰¹ *Id.* (“Nothing in Vermont’s statute undermines the ability of persons opposing the State’s policies to . . . pursue a different set of policy objectives through the democratic process. Whether Vermont’s regulatory state “targets” drug companies (as opposed to affecting them unintentionally) must be beside the First Amendment point.”).

¹⁰² *Id.* (“The 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. And they often aim at, and target, particular firms that engage in practices about the merits of which the Government and the firms may disagree.” (citing H.R. DOC. NO. 75-225, at 4 (1937), request from President Franklin Roosevelt for legislation to ease the plight of factory workers)).

¹⁰³ *Id.* (“History shows that the power was much abused and resulted in the constitutionalization of economic theories preferred by individual jurists.”).

At best the Court opens a Pandora's Box of First Amendment challenges to many ordinary regulatory practices that 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.¹⁰⁴

D. How Have Public Health Regulations Actually Fared Under Sorrell?

So far, there seems to be a consensus among lower courts that *Sorrell* did not impose a strict scrutiny standard, insofar as the Court was not clear in establishing whether "heightened judicial scrutiny" made a content or speaker-based commercial speech regulation presumptively invalid.¹⁰⁵ The Fourth Circuit, in striking down a regulation banning advertisements of alcohol in college newspapers, read *Sorrell* to establish a tiered approach: only if the regulation passes *Central Hudson* will it need to be tested for content and speaker discrimination under "heightened judicial scrutiny," and the reason the latter standard was not tested in *Sorrell* is because Vermont failed *Central Hudson*.¹⁰⁶ The Ninth Circuit fol-

¹⁰⁴ *Id.* at 2685.

¹⁰⁵ *See, e.g.,* R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1226 n.4 (D.C. Cir. 2012) ("Notwithstanding any intimations it may have made in cases such as *Sorrell v. IMS Health Inc.*, the Supreme Court has continued to apply the more deferential framework of *Central Hudson* to commercial speech restrictions." (citations omitted)); N.J. Dep't of Labor & Workforce Development v. Crest Ultrasonics, 82 A.3d 258, 268 (N.J. App. Div. 2014) (refusing to apply strict scrutiny to, and upholding, fine for violation of statute prohibiting employer from publishing an advertisement stating that a job applicant must be currently employed in order for application to be considered); King v. Gen. Info. Servs., Inc., 903 F. Supp. 2d 303, 308 (E.D. Pa. 2012) (affirming intermediate scrutiny analysis under *Sorrell*) ("By the Court declaring that 'the outcome is the same' whether a special commercial speech inquiry or a stricter form of judicial scrutiny (strict scrutiny) is applied, GIS asserts that *Sorrell* marks a substantial shift in the protection afforded to commercial speech and, consequently, overhauls the well-embedded *Central Hudson* test. This Court disagrees.").

¹⁰⁶ *See* Educ. Media Co. at Va. Tech v. Insley, 731 F.3d 291, 297-98 (4th Cir. 2013) ("The College Newspapers . . . argue that, like the regulation at issue in *Sorrell*, the challenged regulation here involves both content-based and speaker-based discrimination. Based on this alleged discrimination, the College Newspapers argue that strict scrutiny applies. However, like the Court in *Sorrell*, we need not determine whether strict scrutiny

lowed suit, striking down under *Central Hudson*'s fourth prong a statutory provision prohibiting day laborers from soliciting employment in the streets for public safety reasons.¹⁰⁷ The Second Circuit held, in striking down FDA regulations prohibiting truthful off-label promotion of pharmaceuticals, that content and speaker-based regulations *were* presumptively invalid under *Sorrell*, but that the regulation needed to be evaluated under *Central Hudson* regardless.¹⁰⁸ Judge Chin hinted that *Central Hudson* was not a threshold to the "heightened judicial scrutiny" standard, but just the opposite: a way for the government to *overcome* the presumptive invalidity of a content-or speaker-based regulation.¹⁰⁹ Almost none of the post-*Sorrell* challenges to public health regulations have both passed *Central Hudson* and failed "heightened judicial scrutiny," or vice versa. In fact, in consonance with the Court's already stringent (some say hostile)¹¹⁰ evaluation of governmental infringement on commercial speech, circuit courts interpreting *Sorrell* have mostly struck down the challenged regulation under *Central Hudson* regardless.¹¹¹ The one exception recently came from the Eighth Circuit, which, amidst a rather complicated set of facts,¹¹² upheld a Minnesota statute restricting advertising that targets car accident victims. The *Otto* court held that while various parts of the statute applied both speaker-and-content-based restrictions on commercial

is applicable here, given that, as detailed below, we too hold that the challenged regulation fails under intermediate scrutiny set forth *Central Hudson*.").

¹⁰⁷ *Valle Del Sol, Inc. v. Whiting*, 709 F.3d 808, 829 (9th Cir. 2013) ("Whether *Sorrell* intended to make the commercial speech test more exacting for the state to meet is a question that we need not decide, because we conclude plaintiffs are likely to succeed even under *Central Hudson*'s formulation of the standard and our cases interpreting it.").

¹⁰⁸ *See generally* *United States v. Caronia*, 703 F.3d 149 (2d Cir. 2012).

¹⁰⁹ *See id.* ("To determine whether a government regulation unconstitutionally restricts speech, courts engage in a two-step inquiry, first considering whether the regulation restricting speech was content- and speaker-based, so that it is subject to heightened scrutiny and is presumptively invalid, and then considering whether the government has shown that the restriction on speech was consistent with the First Amendment under the applicable level of heightened scrutiny.").

¹¹⁰ *See Pomeranz, supra* note 2.

¹¹¹ *See, e.g., supra* notes 105–08.

¹¹² *See 1-800-411-Pain Referral Serv., LLC v. Otto*, 744 F.3d 1045 (8th Cir. 2014) (upholding a Minnesota statute mandating that advertising for medical treatment eligible for coverage under the state's no-fault auto insurance statute be undertaken only by, or at the direction of, a healthcare provider).

speech, the ads in question were misleading.¹¹³ Because *Central Hudson* explicitly denies constitutional protection for speech that concerns unlawful activity or is “inherently misleading,” the statute was upheld.¹¹⁴

III. THE AFTERMATH: WHAT DOES *SORRELL* MEAN FOR FUTURE PUBLIC HEALTH REGULATION?

Is *Sorrell* a narrow decision chiding a liberal Vermont legislature gone awry, or a de facto establishment of a strict scrutiny standard for commercial speech regulation? The controversy may lie within the liberal-conservative disconnect behind the actual definition of “commercial speech.” Justice Breyer sees the Court using the precept of “commercial speech” as a potential end-run around *Carolene Products* and its progeny¹¹⁵—a laissez-faire Court striking down perfectly reasonable regulation of ordinary transactions.¹¹⁶ Justice Kennedy disagrees, pointing to the Vermont legislature’s

¹¹³ See *id.* at 1055–58. One of the plaintiffs’ advertisements promised a possible entitlement of “up to \$40,000 in injury and lost wage benefits,” which the court found inherently misleading to consumers because it implied that consumers would receive a “floor” of benefits, potentially up to \$40,000, when many could in fact receive nothing. *Id.* (citing 1-800-411-Pain Referral Serv., LLC v. Tollefson, 915 F. Supp. 2d 1032, 1051–52 (D. Minn. 2012)). Other advertising (hiring paid actors to appear as cops) also implied an endorsement of 411-Pain by law enforcement, which was also inherently misleading, even though there was a disclaimer in the advertisement that the “cop” was a paid actor.

¹¹⁴ “Inherently misleading” speech is speech that “inevitably will be misleading” to consumers. See *Otto*, 744 F.3d. at 1056 (citing *Bates v. State Bar of Ariz.*, 433 U.S. 350, 372 (1977)).

¹¹⁵ See *supra* text accompanying note 80. The “end” run is merely using one amendment (the First) instead of another (the Fourteenth) to achieve the same result, which is to strike down the regulation of ordinary commercial transactions on a stricter level of review (“intermediate” or “strict” instead of “rational”) than is warranted.

¹¹⁶ Cf. Erin E. Bennett, *Central Hudson Plus: Why Off-Label Pharmaceutical Speech Will Find Its Voice*, 49 HOUS. L. REV. 459, 460 (2012) (“[D]oes speech that would be fully protected as scientific and/or educational speech become transformed into commercial speech, with its reduced level of protection, by the mere fact that a commercial entity seeks to distribute it in order to increase its sales of the product addressed in the speech?”). This question gets at the heart of why Breyer and Kennedy see the question at hand so differently: in Breyer’s mind, this is a perfectly reasonable regulation of an economic transaction. To Kennedy, this is the government preventing a company from educating physicians simply because they don’t like the outcome.

explicit purpose behind the Act,¹¹⁷ which was to interfere with the manufacturers' marketing efforts.¹¹⁸ How, Kennedy wonders, is Act 80's complete ban on drug manufacturers' ability to effectively advertise "incidental" to the infringement of commercial speech?¹¹⁹ Richard Samp is not impressed by Breyer's reaction to Vermont's pharmaceutical "targeting" as simply being "beside the First Amendment point."¹²⁰ Further, Breyer's urging of *Glickman*-type rational basis analysis seemed to repudiate *Central Hudson* and its progeny altogether, perhaps harking back for the doctrine of *Chrestensen*, when commercial speech essentially equaled non-speech.¹²¹ Yet Samp seemed dissatisfied with the majority opinion as well, noting that its application of both "heightened judicial scrutiny" and *Central Hudson* left open challenges to public health regulation without a clear standard of analysis.¹²²

How will *Sorrell* affect future regulation of commercial speech? For one, until the Court considers a similar regulation, there is bound to be a bifurcation of analyses in the lower courts, first analyzing whether a regulation is content- or speaker-based, and then whether that regulation passes *Central Hudson* (or vice versa).¹²³ It

¹¹⁷ A possible analogy could be made to the upcoming battle over gay marriage rights. See Adam Liptak, *Opinion May Pose Obstacle for Same Sex Unions*, N.Y. TIMES, July 28, 2014, <http://www.nytimes.com/2014/07/29/us/politics/ruling-poses-potential-obstacle-at-supreme-court-for-same-sex-marriage.html>. As Liptak stresses, Justice Kennedy seemed to be swayed in the *Windsor* decision by evidence of Congress's animus towards homosexuality in its passing of the Defense of Marriage Act. *Id.* A similarly discriminatory purpose could have offended Kennedy in Act 80.

¹¹⁸ See *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2663 (2011) (reciting the legislative history behind Act 80).

¹¹⁹ *Id.* at 2680 ("The statute threatens only modest harm to commercial speech.").

¹²⁰ Samp, *supra* note 55, at 147 (noting that this assertion was made without support or citation to case law).

¹²¹ *Id.* ("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.") Samp adds that because Breyer and Ginsburg had dissented in major commercial speech cases like *Thompson* and *Lolliard*, their distaste for the majority's opinion and *Central Hudson* itself is not surprising. *Id.* at 148.

¹²² *Id.*

¹²³ See, e.g., *Educ. Media Co. at Va. Tech v. Insley*, 731 F.3d 291, 297-98 (4th Cir. 2013) (testing *Central Hudson* without even applying or testing content or speaker basis); *United States v. Caronia*, 703 F.3d 149 (2d Cir. 2012) (striking down an FDA regulation

is not entirely clear from Kennedy's opinion whether a public health regulation is presumptively invalidated once shown to be speaker- and content-based, or even whether the "heightened" standard is harsher or more intense than *Central Hudson*. Both Kennedy and Breyer seem to think that this is the case, but Kennedy mentions that the outcome in *Sorrell* would have been the same under either standard.¹²⁴ Similar outcomes don't necessarily imply that the tests are similar in their evaluative rigor. Still, Kennedy's application of *Central Hudson* may have been a signal to lower courts that a content or speaker-based commercial speech regulation was *not* presumptively invalid under the new heightened scrutiny standard. Though, judging by the application (or lack thereof) of *Sorrell* by the circuit courts, this interpretation seems unlikely.

Lyle Denniston, reading the ruling narrowly,¹²⁵ believes that the acrimony of Breyer's dissent is unwarranted due to Kennedy's suggestion that had Vermont just been "less aggressive (and less candid) in declaring its commitment to reducing the sales of pharmaceutical companies," the law may have survived.¹²⁶

Others, however, believe *Sorrell* could have far-reaching consequences.¹²⁷ Professor Tamara Piety contemptuously compares the

prohibiting truthful promotion of off-label drug use as both content and speaker-based, then under the third and fourth prongs of *Central Hudson*).

¹²⁴ See *supra* note 66.

¹²⁵ Lyle Denniston, *Opinion Analysis: Like Ships Passing in the Night . . .*, SCOTUSBLOG (June 23, 2011, 5:14 PM), <http://www.scotusblog.com/2011/06/opinion-analysis-like-ships-passing-in-the-night/> ("If the soaring language is put aside, what might be concluded about what emerged on Thursday is, basically, a decision that Vermont simply botched the job of promoting the availability of cheaper, generic drugs by over-reaching.").

¹²⁶ *Id.*

¹²⁷ See, e.g., Piety, *supra* note 36, at 4, 50 ("What is most at risk is the government's ability to regulate fraud because the strict scrutiny standard of review is often said to be strict in theory and fatal in fact.") (internal quotations omitted); Ashutosh Bhagwat, *Sorrell v. IMS Health: Details, Detailing, and the Death of Privacy*, 36 VT. L. REV. 855, 856 (2011) (arguing that this decision may bring about troubling implications for state enforcement of privacy); Andrew J. Wolf, *Detailing Commercial Speech: What Pharmaceutical Marketing Reveals About Bans on Commercial Speech*, 21 WM. & MARY BILL RTS. J. 1291, 1291 (2013) ("Sorrell pushes the commercial speech doctrine ever closer to that used to analyze noncommercial speech."). Another possible legislative solution would have been for Vermont to simply close the "loophole" excepting "counter-detailers" from having an unfair advantage in using PII. This fix could have neutralized

majority opinion in *Sorrell* to *Citizens United*,¹²⁸ where the Court used similar “anti discrimination rhetoric”¹²⁹ in striking down public welfare regulation detrimental to large corporations.¹³⁰ Jennifer Pomeranz points out that the last commercial speech case in which the Court ruled for the government, *Fla. Bar v. Went For It, Inc.*,¹³¹ may not be upheld under *Sorrell* because the statute at issue, barring attorneys from advertising to accident victims within 30 days of the accident, is both content- and speaker-based.¹³²

A. Court Majority’s Business-Friendly Ideology Pushes Standard Towards Strict Scrutiny

Professor Pomeranz also seems to suggest that because the ideological makeup of the Court today is much more business and corporate friendly¹³³ than it was even a decade before *Sorrell* was handed down, *Central Hudson*’s fourth prong on its own might be enough to lift the commercial speech doctrine to a strict scrutiny standard.¹³⁴ She may be onto something,¹³⁵ for when it comes to

the contention that the State preferred its policy objectives over First Amendment concerns.

¹²⁸ *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

¹²⁹ See Piety, *supra* note 36, at 4 (“[T]reating global pharmaceutical companies as if they were embattled, under-represented minorities risks trivializing the real life-and-death struggles of plaintiffs who are in fact relatively powerless and elides the Court’s exercise of its counter-majoritarian power on behalf of the powerful.”).

¹³⁰ *Id.* (arguing that the Court views corporations as “legitimate rights holders” and participants in the political process, and that *Citizens United* influenced the Court’s interpretation of the commercial speech doctrine “in a way that turned that doctrine on its head”).

¹³¹ 515 U.S. 618 (1995). Not surprisingly, Breyer was in the majority in upholding the regulation, while Kennedy wrote the dissent.

¹³² Pomeranz, *supra* note 2, at 423–24.

¹³³ See Liptak, *supra* note 10.

¹³⁴ Pomeranz, *supra* note 2, at 431–32 (discussing the holding of Massachusetts’ anti-tobacco regulations in *Lorillard*, Pomeranz says: “One has to wonder if a five-hundred-foot radius would have sufficed in 2001, or if one hundred feet would have passed in 2011.”); see also Post, *supra* note 27, on *Central Hudson*’s fourth prong: (“This last requirement is so arbitrary that it constitutes an open invitation for judges to bring political prejudices to bear in resolving cases. Antiregulatory judges will tend to strike down statutes on the basis of this requirement; proregulatory judges will tend to uphold them.”).

¹³⁵ See generally, Adam Liptak, *For Justices, Free Speech Often Means ‘Speech I Agree With’*, N.Y. TIMES, May 5, 2014, <http://www.nytimes.com/2014/05/06/us/politics/in-justices-votes-free-speech-often-means-speech-i-agree-with.html> (“[T]he votes of both

First Amendment jurisprudence, jurists of liberal and conservative ideologies tend to encompass entirely separate universes. It is in fact not uncommon for a liberal and conservative judge to look at the same set of facts, yet apply completely opposite legal standards to evaluate those facts.¹³⁶ This ideological divide persists when the Court evaluates public health regulation of commercial speech, and *Sorrell* nicely exemplifies this divide. Justice Kennedy, pointing to Vermont's preference for nonprofit organizations using the very marketing techniques it prohibits for-profit corporations from using, believes that the law is a clear violation of these companies' commercial speech rights. On the other hand, Justice Breyer is convinced that the case is not about "speech" at all, but a run-of-the-mill privacy and public health regulation restricting large corporations from sharing allegedly unauthorized, private data. How is it that two veteran judges can evaluate the same statute, with one claiming that it's a blatant First Amendment violation, and the other asserting that it barely concerns the First Amendment at all?

Somewhat paradoxically, it seems that both Kennedy and Breyer intensely dislike *Central Hudson*, and, like Robert Post,¹³⁷ believe the test is unwieldy and subject to the whims of individual judges. In his heart, Kennedy probably wants to get rid of *Central Hudson* (which has been a strict scrutiny standard all but in name only) and elevate commercial speech to the high tier, but he didn't know how to do it without overturning an entire doctrine of law. Breyer also probably wants to get rid of *Central Hudson*, and instead instill

liberal and conservative justices tend to reflect their preferences toward the ideological groupings of the speaker.").

¹³⁶ See, e.g., *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1025 (5th Cir. 1987) (granting motion for summary judgment on First Amendment grounds to defendant magazine for publishing an article titled "Orgasm of Death" on autoerotic asphyxiation which inspired a child to unintentionally commit suicide). The dissenter, conservative Edith Hollis Jones, believed this article to constitute "pornography," and thus owed a much lesser standard of constitutional protection. *Id.* See also *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (striking down ordinance banning, among other things, burning crosses). Here, the liberal justices believed that the ordinance was over-inclusive because it seemed to ban abstract speech otherwise protected by the First Amendment. Scalia and some of the conservatives, however, believed the ordinance to be under-inclusive for failing to protect against certain type of speech (anti-conservative speech). The conservatives thus deemed the fighting words statute at issue not content-neutral. See *id.*

¹³⁷ See *supra* notes 27, 36.

Glickman or perhaps even *Chrestensen*. This would also be a radical change from a lot of established precedent. Regardless, until the Court clarifies the exact weight behind “heightened judicial scrutiny,” the standard of review will continue to be, for better or worse, *Central Hudson*.

CONCLUSION

First Amendment challenges to the regulation of business advertising have been adjudicated for many decades. The debate has not, notably, fallen on predictably ideological lines, with conservatives urging full protection for corporate or business speech and liberals protecting government regulation thereof.¹³⁸ This dynamic has only been a relatively recent phenomenon, when the Court began to take an increasingly hostile view of such regulation.¹³⁹ As stressed earlier, the Court has not upheld a regulation of business advertising for almost two decades.¹⁴⁰ The Court’s suspicion of governmental regulation of commercial speech could very well be attributed to a more business-friendly ideology shared by a majority of the Justices.¹⁴¹

Yet the *Sorrell* Court was nonetheless not ready to give commercial speech the same level of protection given to personal speech. This Note does not address the wisdom of such a transformation, but merely to stress that if the court wishes to depart from *Central Hudson*, it should say so explicitly. Assigning no value to a new standard of analysis can confuse the lower courts, turning lower court judges into amateur prognosticators of what an ambiguous standard meant, instead of letting them to apply clear standards of law to the facts at hand.

Until the Court speaks more clearly, it would probably be best for courts to continue to judge commercial speech challenges against the traditional *Central Hudson* model, while taking into account the heightened scrutiny analysis outlined in *Sorrell*. A regulation’s speaker or content-based discrimination should not in itself

¹³⁸ See *supra* note 83 and accompanying text.

¹³⁹ See *supra* note 36.

¹⁴⁰ See *supra* note 26.

¹⁴¹ See *supra* notes 10, 135.

invalidate the law under *Sorrell*, because the *Sorrell* court probably would not have even bothered going through the *Central Hudson* factors if the analysis ended at the speaker and content discrimination inquiry.

In the end, the *status quo* satisfies neither those advocating for the expansion of commercial speech rights nor those who wish to sensibly regulate them. With an intermediate standard of analysis, however, the Court's skeptical viewpoint towards commercial speech regulation could easily shift along with the Court's ideological makeup. This could potentially make it tempting for the current Court's majority to consider scrapping *Central Hudson*, but there has been no sign that the Court is actually willing to do so.