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“A Necessary Cost of Freedom”?
The Incoherence of *Sorrell v. IMS*

Tamara R. Piety*

ABSTRACT: *On June 23, 2011 the Supreme Court decided an important case that has been largely overlooked – Sorrell v. IMS Health, Inc.¹ In Sorrell the Court struck down a Vermont law prohibiting the sale for marketing purposes of physicians’ prescription records without their permission on the grounds that the law was not “content neutral.” The majority found that because the Vermont statute singled out marketing for special treatment the law constituted a form of “viewpoint discrimination.” “The First Amendment,” Justice Kennedy wrote in the majority opinion, requires us to tolerate speech we may not like as a “necessary cost of freedom.”*

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¹ *Sorrell v. IMS Health, Inc.*, ____ U.S. ____, 131 S.Ct. 2653 (2011) <http://www.supremecourt.gov/opinions/10pdf/10-779.pdf>.

This reading of “content neutrality” makes the commercial speech doctrine incoherent. By definition the doctrine only applies to speech which is “commercial” – that is, speech distinguished by its commercial content. After Sorrell any regulation of marketing could potentially fail the content neutrality test. Moreover, by casting the marketer as a “disfavored” speaker by virtue of regulation, Sorrell turns the rationale for the commercial speech doctrine upside down. The doctrine was not created to protect commercial speakers. It was created to carve out a limited area of First Amendment protection for truthful commercial speech in order to protect consumers’ right to receive accurate product information and to thereby promote the public interest in a properly functioning market. There is no indication in the case establishing the doctrine that the Supreme Court intended to protect merchants’ sales pitches as if they were “viewpoints.” Yet this is what Sorrell seems to provide.

This article argues that Sorrell’s content neutrality test is misplaced with respect to commercial speech because it subverts the rationale for protecting some commercial speech and unduly burdens the government’s ability to protect the public from marketing practices which undermine public health, safety and welfare. The notion that unrestrained freedom for commercial speech is a “necessary cost of freedom” is not just wrong, it is dangerously wrong.

Introduction

When the Supreme Court issued its decision in *Citizens United*² in 2010 and cast the corporation into the role of “disfavored” speaker it signaled it was willing to contemplate an extremely muscular vision of corporate “rights” and a radical reconfiguration of the constitutional balance of power. The decision unleashed a firestorm of protest and commentary. In

² *Citizens United v. Federal Election Com’n*, 558 U.S. ___, 130 S. Ct. 876 (2010).

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contrast, the Court's 2011 decision in *Sorrell v. IMS Health*³ which similarly expanded corporate "rights" into an arguably even more dangerous area, one that strikes at the heart of the government's ability to regulate commerce, has generated much less attention.

There were no presidential denunciations *Sorrell* and little of the sort of outraged commentary that characterized the coverage of *Citizens United*. The November 2011 issue of the *Harvard Law Review* does not even mention it as a "leading case" in the important First Amendment decisions from 2011.⁴ Yet in *Sorrell* the Court substantially extended the protection given to commercial speech under something known as the commercial speech doctrine. The doctrine was created in 1976⁵ and the controlling test articulated in 1980 in *Central Hudson Gas & Electric Co. v. Public Service Commission of New York*⁶ and established a limited degree of First Amendment protection to truthful commercial speech. The *Central Hudson* test provided a four-part test for the constitutionality of regulation of commercial speech: (1) speech must "concern a lawful activity and not be misleading," (2) the regulation must be motivated by a "substantial government interest" and (3) directly advance that substantial interest, but do so in a manner "not more extensive than necessary to advance that interest."

Yet ever since the doctrine was created it has been the target of attacks intended not to abolish it and return to the prior status quo under which commercial speech received *no* First Amendment protection, but to abolish it to purportedly eliminate commercial speech's "second class citizen" status and offer it full protection. Although Court has repeatedly declined such

³ *Sorrell v. IMS Health, Inc.*, ____ U.S. ____, 131 S.Ct. 2653 (2011). <http://www.supremecourt.gov/opinions/10pdf/10-779.pdf>.

⁴ See 125 HARV. L. REV. (TOC) (2011). <http://www.harvardlawreview.org/issues/125/november11/index.php>.

⁵ *Va. St. Bd. Of Pharmacy v. Va. Citizens Consumers Council*, 425 U.S. 748 (1976).

⁶ 447 U.S. 557 (1980).

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invitations, most recently in 2003 in *Nike v. Kasky*,⁷ it had interpreted the *Central Hudson* test increasingly strictly so that some commentators observed that what began as an intermediate scrutiny test had evolved into a strict scrutiny test in all but name. With *Sorrell* the Supreme Court finally gave industry most of what it sought in *Nike* by essentially rendering the *Central Hudson* test irrelevant and by engrafting onto the commercial speech doctrine a version of a content neutrality test that will likely make it easier to invalidate any regulation of commercial speech. It may mean that henceforth, in practice, if not explicitly in law, commercial speech will be treated as fully protected.

For this reason *Sorrell* is likely to have far-reaching consequences. I very briefly sketched out some of those consequences in an earlier reaction⁸ to *Citizens United*,⁹ a decision which contained similar anti-discrimination rhetoric and presaged the outcome in *Sorrell*.¹⁰ Here I discuss the intellectual foundations of the commercial speech doctrine, its history and justifications along with the various other forces that led us to the major doctrinal shift in *Sorrell*, a shift which transforms a fairly prosaic regulation of commerce into what sounds like a civil rights case.¹¹

⁷ 539 U.S. 654 (2003).

⁸ Tamara R. Piety, *Citizens United and the Threat to the Regulatory State*, 109 MICH. L. REV. FIRST IMPRESSIONS 16 (2010), <http://www.michiganlawreview.org/assets/fi/log/piety.pdf>.

⁹ *Citizens United v. Federal Election Com'n*, 558 U.S. ___, 130 S.Ct. 876 (2010).

¹⁰ See Defendant AT&T Mobility, LLC's reply in Support of Motion for Reconsideration, *Yeager v. AT&T Mobility*, 2011 WL 3383506, at 4 (E.D. Cal. 2011) (arguing that *Sorrell* is the case I predicted would emerge from the reasoning used in *Citizens United*).

¹¹ In some sense this is not "new" because, as will be discussed in more detail below, these arguments started being made almost at the outset of the creation of the commercial speech doctrine. But it is only since the early 1990s that the case law began reflecting some of this tone and only since 2010 and the *Citizens United* case that the Court seems to be prepared to take the rhetoric to its farthest logical conclusion. On the use of civil rights rhetoric in the service of new and unexpected beneficiaries see Jack M. Balkin, "*Wrong the Day It Was Decided*,"

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Treating 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 outnumbered and relatively powerless and the very notion of civil rights.

Moreover, *Sorrell* completes what has been a decades-long process of turning the rationale for commercial speech doctrine upside down by putting the speaker, rather than the public interest, at the center of the analysis. It completes what I call has been a “bait-and-switch” whereby the protection for commercial speech was offered under one justification but once it was granted has morphed into something completely different.

Sorrell is the case I predicted *Citizens United* might generate. It may have gotten comparatively little attention because the Court in *Sorrell* was less forthright in signaling it was making new law than it was in *Citizens United*; but it may also be because the facts and the background of *Sorrell* seemed complicated or technical and of limited interest if you were not a physician or in pharmaceutical marketing. The case involved Vermont’s attempt to limit the sale of physician-identified prescription records to data-mining companies where that information would ultimately be used for marketing purposes. Data-mining is one of many tools pharmaceutical companies use to market brand name drugs. Heavier use of brand name drugs over generics raises the cost of health care. This is why Vermont wanted to regulate the practice and why the case is ultimately so important.

In what follows I describe the links between the commercial speech doctrine and the emergence of corporate political speech and the vision of the corporation as a legitimate rights holder and participant in the political process and why *Citizens United* in turn influenced the Court’s interpretation of the

Lochner and Constitutional Historicism, 85 BOS. U. L. REV. 677, 697 (2005) (“[T]hey [new generation conservatives] too discovered that they could turn the liberal rhetoric of the Civil Rights Movement and the Rights Revolution to new purposes.”).

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commercial speech doctrine in a way that turned that doctrine on its head. Part I describes the background against which the Vermont legislation was passed and the public health and welfare issues pharmaceutical marketing may raise while Part II focuses specifically on *Sorrell* and how the Supreme Court characterized the dispute as one of disputed “viewpoints,” thereby fundamentally reframing the rights and interests protected under the commercial speech doctrine.

Part III describes the “bait” in this bait-and-switch – the intellectual foundations for the commercial speech doctrine. Part IV describes how the Court took the bait and created the commercial speech doctrine. It follows the doctrine’s development to the present and notes how Chief Justice Rehnquist repeatedly (and presciently) argued that this new doctrine threatened government’s legitimate power to regulate commerce and how, from the beginning, the doctrine was plagued by definitional difficulties which illustrate that the entire doctrine depends on content-based distinctions even if the Court has never offered clear guidance on what makes speech “commercial.”

Part V describes how the “switch” to a more speaker-oriented protection came about, describing the scholarly work which argued that protection for freedom of expression necessarily entailed an equality principle. This notion provided the intellectual foundation for first extending protection to corporate participation in political speech, a development which then migrated back to the commercial speech context so that a doctrine justified on the basis of protection for *consumers* shifted to one which protected *speakers’* interests, even where such speech was at the consumers’ expense or where they did not wish to receive it.

Finally, Part VI brings together these threads and argues that *Sorrell* reasoning cannot be reconciled with the concept of a commercial speech doctrine and is therefore incoherent and that it has troubling implications for a great many areas of heretofore well-settled areas of regulatory authority. To understand the

significance of *Sorrell* we must begin a look at the practice that explains why data-mining is so important for manufacturers – pharmaceutical marketing.

I. Pharmaceutical sales: The devil is in the detailing

“Detailing” is the name given the work done by pharmaceutical sales reps in promoting prescription drugs to doctors to prescribe to their patients. America was introduced to the seemingly no-holds-barred world of detailing in the movie *Love and Other Drugs*¹². In the movie Jake Gyllenhaal plays Jamie Randall, a breezy, cheerful ladies’ man who apparently skates through life on pater and charm rarely staying in one place long enough to have his lies catch up with him. Indeed, the movie opens with his fleeing from his boss at his job selling electronics when his boss discovers Jamie having sex with his wife. Jamie, we learn, is something of an underachiever, a slacker who in his family’s view isn’t living up to his potential and doesn’t really want to. What he seems to want to do is make the maximum amount of money for the minimum amount of effort and to reserve plenty of time for casual sex, recreational drugs and drinking. Jamie has a flexible relationship with the truth and little concern for following rules; this, it turns out, means he is particularly well suited for a career in pharmaceutical marketing.

While ostensibly being about a romance between a pharmaceutical sales rep and a young woman diagnosed with Parkinson’s disease, *Love and Other Drugs* is most interesting as an exposé of the way pharmaceutical companies market prescription drugs. In the movie the “detailers” are ruthless competitors who will use any means, fair or foul to get their

¹² LOVE AND OTHER DRUGS (Twentieth Century Fox (2010)) <http://www.imdb.com/title/tt0758752/> based on the book *Hard Sell: The Evolution of a Viagra Salesman* by Jamie Reidy. JAMIE REIDY, *HARD SELL: THE EVOLUTION OF A VIAGRA SALESMAN* (2005).

product into the right doctors' hands. They accost doctors in the parking lot, offer free pens, umbrellas, lunch, and – most importantly – free samples of their drugs.¹³ Our hero, Jamie, uses all manner of snooping and skullduggery to attempt to worm his way into the relevant doctors' good graces. The doctors are portrayed as cynically putting up token resistance, but ultimately extracting the maximum benefit from the drug rep's desperation to have them adopt and prescribe his company's drug. The fictional Jamie steals competitors' drugs, lies to obtain patients' records, woos members of the staff of the physicians he visits and engages in all sorts of other behavior of questionable ethics in order to gain a competitive advantage.

Real life isn't that different from fiction it seems. The movie was based on *Hard Sell: The Evolution of a Viagra Salesman*,¹⁴ the memoir of Jamie Reidy, a former Viagra sales rep. (The main difference between the book and the movie was that there was no love story in the book). In *Hard Sell* Reidy recounts a plethora of tactics he used to try to get doctors to adopt his employer's drugs. Among them was the marketing tactic at issue in *Sorrell* – using data mining to track which drugs doctors prescribe. Just as in all sales, Reidy says, “closing” is a critical part of

¹³ One of the hazards of writing about the pharmaceutical industry is that it is fairly volatile. The practice is in decline and indeed the practice of detailing itself is undergoing a shift as, if employment figures are any indication, pharmaceutical companies are cutting back on detailing. See, e.g., Ed Silverman, *Pfizer Cuts Employee Severance Packages*, Pharmalot blog (April 6, 2012), <http://www.pharmalot.com/2012/04/pfizer-cuts-employee-severance-packages/>. This does not mean they are cutting back on marketing; merely that some spending is shifting to other areas. See also Ed Silverman, *The Death of the Sales Rep is Greatly Exaggerated*, Pharmalot blog (Dec. 5th 2011) <http://www.pharmalot.com/2011/12/the-death-of-the-sales-rep-is-greatly-exaggerated/>.

¹⁴ *Id.* See also Timothy Stoltzfus Jost, *Oversight of Marketing Relationships Between Physicians and the Drug and Device Industry: A Comparative Study*, 36 AM. J. OF LAW & MEDICINE 326, 333-34 (2010) (describing detailing practice).

pharmaceutical marketing.¹⁵ But unlike other sales contexts in which a sales pitch is concluded when the customer signs a contract or walks out with the product, in pharmaceutical sales it is difficult to know whether your sales pitch was effective because the sale is only complete when the doctor writes a prescription for your drug.¹⁶ So, using a time tested selling technique, the detailer tries to get the doctor to make a commitment to prescribing X drug for the next 10 patients who present with the condition for which the drug is marketed. Perhaps because people prefer to view themselves as persons who honor commitments, if you get an explicit commitment from a doctor that she will prescribe a drug in the future, she is more likely to do so than if no promise is extracted.¹⁷ But to measure the effectiveness of this tactic, detailers need to know if the doctor has actually *kept* that promise.

Here is where data mining comes in. “Pharmaceutical companies pay hundreds of thousands of dollars to third-party firms that gather sales data from the nation’s pharmacy chains; reps get detailed reports informing them how many prescriptions – of their own drugs, as well as those of their competitors – each doctor has written in a particular week.”¹⁸ This allows the rep who discovers that a promise hasn’t been honored to police the promise: “*Now, Doctor, last month you agreed to try Zithromax in your next ten otitis media patients. What stopped you from doing so?*”¹⁹

If it is true, as the research and the practices of the industry suggest, that an initial promise to prescribe a particular drug will generate more compliance than a sales encounter that does *not* end in a promise because people care about keeping their promises, it would seem to follow that the ability to *follow-up* on that promise and (in effect) ask people, “why didn’t you *keep* your promise?”,

¹⁵ REIDY, *supra* note 12 at 32.

¹⁶ *Id.*

¹⁷ ROBERT B. CIALDINI, INFLUENCE: THE PSYCHOLOGY OF PERSUASION 57-113 (revised ed. 2007) (Chapter 3 – Commitment and Consistency).

¹⁸ REIDY, *supra* note 12 at 32.

¹⁹ *Id.* 32-33 (italics in the original).

would be even *more* effective. The “third-party” data miners who make this follow-up possible are called prescription drug information intermediaries (PDII).

IMS Health, Inc. the plaintiff in the *Sorrell* case, is one such prescription drug information intermediary. It gathers information from pharmacies about the prescriptions doctors write. Although the patients’ names in the data are protected in accordance with the Health Insurance Portability and Accountability Act of 1996 [HIPPA], prescribers names are not scrubbed. Thus, IMS and other PDII can organize the data by physician and by drug so it is possible to see what and how much each doctor is prescribing. Companies like IMS Health then buy lists of licensed physicians from the AMA and cross-reference these records against the records obtained from the pharmacies, analyze and summarize all of this data and then sell it back to interested parties. Although some purchasers are universities, government and law enforcement, the primary market for this data is made up of pharmaceutical companies.

Armed with this information, the pharmaceutical company’s detailer can go into the sales call with more knowledge about the doctor’s prescribing practices than the doctor herself may have.²⁰ “Sales representatives can use this information to identify physicians who are high or low prescribers and early or late adopters, to decide which points to emphasize in their presentations, and to assess how effective their visits have been in modifying prescribing behavior.”²¹

²⁰ Reidy notes that “[m]any physicians are unaware that their reps have access to [their prescription] information.” *Id.* at 32.

²¹ Michelle M. Mello and Noah A. Messing, *Restrictions on the Use of Prescribing Data for Drug Promotion*, 365 N ENGL. J. MED. 1248, 1248 (Sept. 29, 2011).

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Predictably many doctors feel this practice is incredibly intrusive.²² As one witness testified, having the detailer know so much information about his prescription practices “puts me at a disadvantage that I’m not comfortable being in.”²³ Moreover, the evidence adduced in the cases litigating statutes like that of Vermont demonstrates that the *purpose* of data mining is to stimulate the sales of brand name drugs.²⁴ And studies suggest that detailing has “a significant effect on physician prescription practices.”²⁵ Presumably, at least in the industry’s view, data-mining contributes to that success.

On the surface this practice seems relatively benign because it enables companies to measure their results and thus to pitch drugs more effectively and efficiently and to minimize the waste of doctors’ time by, for example, reserving pitches for drugs to control diabetes to those doctors who have a great many patients with diabetes and not bothering to pitch it to those who don’t. Yet, as noted above, doctors often feel it impinges on their privacy. Data-mining gives the detailer insight into the physician’s practice that he might prefer the detailer not have, not to mention that it permits the rep to manipulate the doctor’s response through the tactics of the “hard sell.” Data-mining creates an asymmetry of information between the rep and the doctor that makes many doctors feel uncomfortable.

²² Although as noted above some survey evidence suggests that overall many doctors still find sales reps visits “very useful and of value” or “somewhat useful and of value.” See Silverman, *The Death of the Sales Rep*, *supra* at note 13.

²³ *IMS Health, Inc. v. Ayotte*, 550 F.3d 42, 90 (Lipez, J. concurring and dissenting) (testimony of Dr. Gary Sobelson a family practice physician).

²⁴ *Id.*

²⁵ *Id.*, 550 F.3d at 71 (Lipez, concurring and dissenting) (quoting Puneet Manchanda and Elisabeth Honka, *Symposium – Pharmaceutical Innovation and Cost: An American Dilemma: The Effects and Role of Direct-to-Physician Marketing in the Pharmaceutical Industry: An Integrative Review*, 5 *YALE J. HEALTH POL’Y, L. & ETHICS*, 785, 809 (Summer 2005)).

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One doctor has proposed that it is like going to buy a new car. You go to the salesroom and make an offer. At some point in the negotiation the salesman goes to “see the manager” to discuss your offer and leaves you and your spouse alone in his office. While alone you discuss the car, your real bottom line, all the issues you are concerned about, what you really liked and what you are willing to give on. Imagine if, unbeknownst to you, the room is bugged so that the salesman has heard everything you said. He can now come back into the room and seem to magically know what you want and how far you can be pushed. Many doctors feel that having detailers know so much about their prescribing practices is like having that salesman listening in on your private conversation; it is an invasion of privacy that tilts the scales toward the seller.

This is not all. Detailers are trying to promote their drugs for use in the widest possible population of patients, sometimes without proper regard for patient well-being. “Products that doctors prescribe in response to marketing may or may not be the most appropriate for particular patients. Patients who are prescribed inappropriate drugs may, of course, suffer side effects or experience no remediation or even an aggravation of their medical condition.”²⁶ So anything that artificially inflates the prescription of brand name drugs may be jeopardizing patients’ health to the extent that they receive “new drugs for which safety and effectiveness data are limited.”²⁷ “Several widely-publicized incidents in recent years have involved heavily marketed drugs such as Vioxx that turned out to be dangerous or ineffective.”²⁸

²⁶ T.S. Jost, *Oversight of marketing relationships between physicians and the drug and device industry: a comparative study*, 36 AM. J. OF LAW & MED. 326, 334 (2010).

²⁷ Mello & Messing, *supra* note 21 at 1248: *See also* David Orentlicher, *Prescription Data Mining and the Protection of Patients’ Interests*, 38 J.L. MED. & ETHICS 74 (2010).

²⁸ Jost, *supra* note 26 at 334.

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Critics of the practice argue that detailing generally boosts the sales of brand name over generic drugs, thus driving up health care costs. Cost is a particularly important issue for state governments which must reimburse for drugs prescribed to citizens covered by governmental medical plans. “Marketing [] increases the cost of health care by leading to overprescribing of drugs and probably over-diagnosis of illnesses. In this way marketing drives up health care costs, which are often not directly borne by the patient because of public or private insurance.”²⁹ “Markets...generally fail to keep [drug] prices low because of low elasticity of demand driven by moral hazard. Because high prices are often coupled with low production costs, drug and device companies can expand their income by expanding their markets.”³⁰ They largely accomplish this through a wide variety of marketing practices, like detailing, many of which the FDA attempts (with only limited success) to regulate.

For all these reasons (and others) the states of Maine, New Hampshire and Vermont passed laws limiting the sales of prescription records for this purpose. In all three states IMS Health, Inc. brought lawsuits seeking to have enforcement of the laws enjoined and the statutes struck down as unconstitutional. In Maine and New Hampshire the company lost. But in Vermont the company struck pay dirt – it got a decision striking down the Vermont law. These outcomes paved the way for IMS Health to take its case to the Supreme Court pointing out the circuit split as to the constitutionality of these three, relatively similar laws.³¹ In *Sorrell* the Supreme Court resolved that split by declaring that

²⁹ *Id.*

³⁰ *Id.* For a critique that excessive cost is endemic to the health care system in general see David A. Hyman, *Follow the Money: Money Matters In Health Care, Just Like In Everything Else*, 36 AM. J. OF LAW & MED. 370 (2010).

³¹ As discussed more fully in the text which follows the laws were not exactly the same. And these differences might have made a difference to a Court interested in doing a finer grained analysis under the *Central Hudson* test discussed *infra*. However, the *Sorrell* Court painted instead with a very broad brush and announced a standard that virtually ignored the *Central Hudson* test.

Vermont's statute was unconstitutional, but its reasoning was sufficiently sweeping to render all three unconstitutional.

II. *Sorrell v. IMS Health, Inc.*: Regulation of marketing as viewpoint discrimination?

Although motivated by similar concerns for doctor and patient privacy, health care costs and patient safety, the statutes in passed in Maine and New Hampshire differed slightly from that of Vermont. The Maine statute allowed for the sale of data unless the physician opted *out*³² and the New Hampshire statute banned the sale of prescribing data altogether.³³ The Vermont statute struck a position in-between these two and forbade the sale of prescribing data unless the physician opted *into* the practice.³⁴ In other words, the Vermont statute allowed the doctor to decide whether he would permit the sale of information about his prescription practices for this purpose, but the default was that sales for marketing purposes would be proscribed.³⁵ William H. Sorrell, the Attorney General for the State of Vermont, confirmed that this was one of the purposes of the Vermont law; to permit “doctors – not the government – to decide whether their prescribing information may be sold and used for marketing purposes.”³⁶

The specific language of the Vermont statute, §4631(d), was as follows:

A health insurer, a self-insured employer, an electronic transmission intermediary, a pharmacy,

³² *IMS Health, Inc. v. Ayotte*, 550 F.3d 42 (1st Cir. 2008).

³³ *IMS Health, Inc. v. Mills*, 616 F.3d 7 (1st Cir. 2010).

³⁴ *IMS Health, Inc. v. Sorrell*, 630 F.3d 263, 269 (2010) (“The statute adopts an opt-in approach allowing prescribers to opt in to allow the use of their PI data for marketing purposes.”)

³⁵ See RICHARD H. THALER AND CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 83-87 (2008) (discussing importance of defaults).

³⁶ Brief for Petitioner’s Brief at 1, *Sorrell v. IMS Health, Inc.*, ___ U.S. ___, 131 S.Ct. 2653 (2011).

or other similar entity 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....³⁷

Subsection (d) was a part of a larger statute entitled “confidentiality of prescription information.” Section 4631 was itself just one part of a larger enactment, Chapter 19 of the Vermont statutes, entitled “Prescription Drug Cost Containment.” The statute reflected the legislators’ judgment that limiting the use of prescribing information for marketing purposes would increase the proportion of generic drugs prescribed, thereby enabling the State to hold down reimbursements costs for drugs.³⁸

The pharmaceutical companies, in contrast, believed obtaining this prescribing information would boost sales of *brand name* drugs, which is why they troubled to buy the data in the first place. They have no incentive to promote generics. When a drug’s patent expires other companies are free to develop generic versions of the same drug. If doctors prescribe generics it cuts into brand name sales. Once a drug becomes very popular companies vie to develop drugs which are fairly similar to the original. These are known as “me too” drugs. “Me-too” drugs are re-tooled versions of older drugs which they replace.³⁹

As Dr. Marcia Angell, former editor of the *New England Journal of Medicine*, has observed, “[T]he drugs that are the most heavily promoted are me-too drugs like Nexium and Lipitor and Paxil.”⁴⁰ Because the FDA regulations do not require that a drug company prove that a new drug is necessarily *better* than an older

³⁷ 18 V.S.A. §4631(d).

³⁸ *IMS Health, Inc. v. Sorrell*, 630 F.3d 263, 269, 275-79 (2010).

³⁹ MARCIA ANGELL, *THE TRUTH ABOUT DRUG COMPANIES*, 74-76 (2004, 2005).

⁴⁰ *Id.* at 132.

one, just that it is “effective,” it is possible to get FDA approval for a new drug that is pretty much like the old one.⁴¹ The chief advantage of doing so is that the drug company can sell it exclusively and at a higher price. If the seller can convince doctors to prescribe the new, patented drug rather than the older generic form of drug, this is of obvious financial benefit to the drug company which manufactures it. The benefits to the patient are *much* less clear. And the sale of more “me-too” brand name drugs where a generic would be effective unmistakably drives up health care costs. Such increases are bad enough in recessionary time, but they are particularly hard to justify where there is no accompanying increase in the effectiveness of drugs.

The *Sorrell* majority in the Supreme Court saw this as a dispute over “viewpoints.” It declared the Vermont statute unconstitutional on the grounds that the statute violated the First Amendment’s guarantee that “Congress shall make no law...abridging the freedom of speech...”⁴² Justice Kennedy writing for the majority,⁴³ asserted that the Vermont statute “disfavor[ed] marketing, that is, speech with a particular content”⁴⁴ and therefore it needed to be subjected to “heightened judicial scrutiny.”⁴⁵ According to Kennedy, a statute like Vermont’s which treated marketing differently than other types of speech, is not content-neutral and as such must show that its “discrimination” on the basis of content is justified.

Vermont could not, in the majority’s view, do this, and thus the Court held the statute violated the First Amendment. Throughout the opinion Justice Kennedy characterizes Vermont’s attempt to regulate the marketing of prescription drugs as discriminatory. The opinion is replete with words like “disfavor”

⁴¹ *Id.* at 75.

⁴² U.S. CONST. AMEND. I

⁴³ The majority included Chief Justice Roberts, Justices Scalia, Thomas, Alito and Sotomayor in addition to Justice Kennedy.

⁴⁴ *Sorrell v. IMS health, Inc.*, ___ U.S. ___, 131 S.Ct. 2653, 2656 (2011).

⁴⁵ *Id.* at 2657.

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or “disfavored,” “discrimination,” “unwanted,” “identity,” “side,” “viewpoint” and “content.” “The law on its face,” Justice Kennedy declared, “burdens *disfavored* speech by *disfavored speakers*.”⁴⁶ Reading the opinion one might be forgiven for thinking that this was a civil rights case rather than an issue of regulated pharmaceutical sales practices.

This is – to say the least – a curious way to frame the issue given that *any* regulation of commercial speech (and presumably “marketing” is encompassed within the definition of commercial speech)⁴⁷ could, applying this analysis, fail the content neutrality test because it “singles out” commercial speech for distinct treatment on the basis of its content – that is, *because* it is commercial.⁴⁸ This reasoning makes a hash of the commercial

⁴⁶ *Id.* at 2663 (emphasis added).

⁴⁷ One of the persistent problems in this area is the conflation of “advertising” as synonymous with “commercial speech.” As discussed below and in the accompanying notes, there has never been a very good definition for what makes commercial speech “commercial” and little recognition that there is a great deal of what might be called “commercial speech” which is not advertising and some advertising which is not “commercial.” This shortcoming was pointed out very early on. See Steven Shiffrin, *The First Amendment and Economic Regulation: Away From A General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1216 (1983-84). However, once the focus of the doctrine moved from listener-oriented protection to content neutrality and the rationale in the political speech cases merged with that of the commercial speech cases (as I discuss more fully below) this issue of the definition was “solved,” albeit indirectly and without much in the way of analytical justification that directly took on the problems raised by Professor Shiffrin. Indeed, the mantle of content neutrality allowed the Court to side-step offering a justification for what is now (at least potentially) a threat of unconstitutionality over a very large swath of regulation that has, heretofore, “been thought to be economic regulation of speech that is beneath the protection of the first amendment.” Shiffrin, 78 NW. U. L. REV. at 1215. Much of the remainder of this article is intended as a forensic examination of how the doctrine evolved in a manner that permitted this question to be sidestepped.

⁴⁸ For a very long time the commercial speech doctrine has been understood to represent a form of content regulation. See, e.g., Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM & MARY L. REV. 189, 194 (1983) (identifying commercial speech as one in a list of examples of content-based

speech doctrine and effectively (but not explicitly) overrules *Central Hudson*.⁴⁹

The available evidence suggests in creating the commercial speech doctrine the Court never intended to allow marketers to assert the same freedom from governmental regulation of their sales pitches as political protesters may assert.⁵⁰ Yet that is what *Sorrell* establishes. The *Sorrell* decision, with its antidiscrimination rhetoric, is the culmination of a prolonged “bait-and-switch” in which First Amendment protection for commercial speech *originally* justified to protect consumers’ access to truthful commercial information, has become, over time, a doctrine which considers commercial speech from the speaker’s standpoint, as if the speaker was promoting a viewpoint rather than a product. However, the Court obscures the degree to which its analysis elevates the speaker’s rights over the listeners and perverts the rationale of protection for commercial speech by invoking content neutrality.

Yet it is precisely on the basis of its content – its commercial character – that commercial speech has historically *not* been treated like fully protected speech. The commercial speaker

regulation of speech); Jeffrey M. Shaman, *The Theory of Low Value Speech*, 48 S.M.U. L. REV. 297, 317-19 (1995) (identifying commercial speech as in the category of “low value” speech and subject to intermediate scrutiny); ROBERT C. POST, *DEMOCRACY, EXPERTISE, ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE* 42-43 (2012) (“Commercial speech doctrine authorizes the state to engage in content discrimination to suppress misleading information, and it empowers the state to compel the disclosure of information.”)

⁴⁹ *Central Hudson Gas & Elec. Corp. v. Public Serv. Com’n of N.Y.*, 447 U.S. 557 (1980).

⁵⁰ *Cf., e.g., Schneider v. State*, 308 U.S. 147 (1939) (anti-littering statute insufficient to permit government to suppress persons wanting to distribute political leaflets) *with Valentine v. Chrestensen*, 316 U.S. 52 (1942) (government may suppress on the grounds of an anti-littering statute, distribution of advertising leaflets, even where a political protest was appended to them).

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does not speak for the “development of the mind”⁵¹ or express beliefs or opinions⁵² -- except to the extent that “Please buy my product” can be construed as a “viewpoint.” The commercial speaker, no matter what it is *appears* to be talking about, and *in no matter what form* that communication is delivered, is *always* attempting to promote a business. The seller’s “viewpoint” is *always* that its product is superior or ought to be purchased, even when that “viewpoint” is demonstrably false, as in the case of cigarettes, or highly dubious, as in the case of “me too” drugs. Even an individual speaking who is speaking on behalf of the commercial speaker may not actually personally believe that the product he is promoting is the best or will perform as portrayed. He is not required to. We understand that people engaging in promotion may also engage in puffery,⁵³ that they may be insincere in that they personally do not believe all the claims made for a product.

It is axiomatic much of what sellers *wish* to say in aid of selling a product is little use to the public and a good deal of it may threaten grave harm. So it is not surprising that when the Court created the commercial speech doctrine and extended only limited protection to commercial speech, that it justified this protection on the basis of the *listeners’* not the sellers’ interests.

Yet the doctrine had scarcely been announced before it began a subtle process of shape-shifting under a ceaseless and increasingly powerful barrage of arguments that the new doctrine

⁵¹ THOMAS I. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 4-5 (1966).

⁵² *Id.* at 5.

⁵³ Puffery is a doctrine that seems to apply only to advertising whereby a statement, intentionally made and intended to cause reliance and which does cause such reliance to the detriment of the buyer does not result in liability because the theory is that the buyer should not have believed it or relied upon it as it was obviously exaggerated. *See, e.g.,* In re Gen. Motors Corp. Anti-Lock Brakes Prods. Liab. Litig., 966 F. Supp. 1525, 1531 (E.D. Mo. 1997), *aff’d*, 172 F.3d 623 (8th Cir. 1999).

was inherently illegitimate and antithetical to notions of freedom of speech because it gave commercial speech less protection than other protected speech.⁵⁴ For the past decade or so the industry has regularly raised the First Amendment as a defense to a number of important governmental attempts to rein in false, deceptive or harmful commercial speech. And they have been winning. But until now they had not succeeded in doing away with the doctrine altogether and obtaining a declaration that commercial speech is fully protected. For all practical purposes this is what *Sorrell* provides.

III. “Bait” -- The intellectual foundations of the commercial speech doctrine

The commercial speech doctrine was created in 1976.⁵⁵ Prior to that date most judges and scholars did not think that

⁵⁴ The proponents of this position cast their arguments in a way that makes every victory for commercial or corporate speech a victory for the First Amendment, a proposition that is only true if you agree that the First Amendment is properly extended to these categories. This can result in the feeling when you are reading some of this work that you have entered into some sort of strange parallel universe when you read the output of organizations such as the Washington Legal Foundation which describes Justice Kennedy’s opinion in *Sorrell* as a “sweeping, pro-First Amendment” decision. Richard Samp, *Sorrell v. IMS Health: Protecting Free Speech or Resurrecting Lochner?*, 2011 CATO SUP. CT. REV. 129, 129 (2010-2011). Proponents of this argument seem to be epistemically indifferent to whether protection for commercial and corporate speech actually will ensure quantitatively more speech or a greater variety of viewpoints. In fact, because of the wide disparity in resources, coupled with parallel intellectual property protection, there is some reason to believe that First Amendment immunity from regulation will result in commercial and corporate speech drowning out other speakers. See, e.g., C. Edwin Baker, *Paternalism, Politics and Citizen Freedom: The Commercial Speech Quandary in Nike*, 54 CASE WES. RES. U. L. REV. 1161, 1176-77 & 1182-83 (2004).

⁵⁵ There is actually some ambiguity about what the phrase “commercial speech doctrine” refers to as the Supreme Court in *Pittsburgh Press* had identified *Chrestensen* as the genesis of the “commercial speech doctrine.” *Pittsburgh Press Co. v. Human Rel. Comm’n*, 413 U.S. 376, 384 (1973) (“The commercial speech doctrine is traceable to the brief opinion in *Valentine v. Chrestensen* ...”). Presumably what the Court in *Pittsburgh Press* meant by this phrase was

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commercial speech had any First Amendment protection at all because in 1942 the Supreme Court had rather unceremoniously rejected the idea that the First Amendment had any application whatsoever to advertising.⁵⁶ In *Valentine v. Chrestensen* the owner of a submarine docked at a wharf on the East River in New York had sought permission to distribute a handbill advertising the opportunity to tour the submarine for a fee.⁵⁷ He was told that this handbill would violate the city sanitation code meant to address littering but that handbills involving informational matters or protests were not covered by this ordinance.⁵⁸

After receiving this advice Chrestensen came up with a plan to reprint his flyers so that on one side they contained a protest against the City Dock Department for refusing to permit him to dock his submarine at the city pier for exhibition purposes.⁵⁹ On the other side was the essentially the same ad that had been rejected before (minus information about the fee), urging the public to come tour his submarine.⁶⁰ Chrestensen attempted to distribute the handbills but was restrained by the police.⁶¹ In response, he brought an action seeking an injunction on the grounds that the ordinance violated the Constitution.⁶² The trial and appellate courts agreed with him that the ordinance was

the *exclusion* of advertising from First Amendment coverage. See Burt Neuborne, *A Rationale for Protecting and Regulating Commercial Speech*, 46 BROOK. L. REV. 437, 438 n. 3 (1980). That is not how the phrase is used today. Today that phrase is generally used to refer to the casework from *Virginia Pharmacy* forward, except by those who argue that it was *Valentine* itself which newly (and inappropriately) established the subordinate status of commercial speech. See, e.g., Alex Kozinski and Stuart Banner, *Who's Afraid of Commercial Speech*, 76 VA. L. REV. 627 (1990) ("In 1942, the Supreme Court plucked the commercial speech doctrine out of thin air.")

⁵⁶ *Valentine v. Chrestensen*, 316 U.S. 52 (1942).

⁵⁷ *Chrestensen*, 316 U.S. at 53

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 54.

⁶² *Id.*

inconsistent with the First Amendment but the Supreme Court reversed noting that although the Constitution provided that “the streets are the proper places for the exercise of the freedom of communicating information and disseminating opinion” and that the states had limited powers when it came to restraining such activities, this was *not* the case with respect to commercial speech. “We are ... clear that the Constitution imposes no such restraint on government as respects purely commercial advertising.”⁶³

And this is where the matter lay for the next couple of decades.

A. *Harbingers of change*

By the early 1970’s the way legal scholars thought about advertising in connection with the First Amendment was changing. A number of prominent academics⁶⁴ (and not so prominent law students)⁶⁵ had argued that the distinctions between fully protected speech and commercial speech were difficult to sustain. Thus, in 1965, a student note in the *Harvard Law Review* observed that the First Amendment was relevant to commercial advertising because of its informational functions.⁶⁶ Nevertheless, one anonymous author concluded that “[t]he possibly desirable objectives furthered by advertising would not seem to *require* its protection by the first amendment, *particularly since the primary purpose of commercial advertising is to advance the economic welfare of business enterprises, over which state and federal governments enjoy wide powers of regulation.*”⁶⁷

⁶³ *Id.*

⁶⁴ See Martin A. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429 (1971).

⁶⁵ See, e.g., Note, *Freedom of Expression in a Commercial Context*, 78 HARV. L. REV. 1191 (1965); Comment, *Developments in the Law, Deceptive Advertising*, 80 HARV. L. REV. 1005 (1967)

⁶⁶ Note, *Freedom of Expression*, 78 HARV. L. REV. at 1194.

⁶⁷ *Id.* at 1195 (emphasis added). The author of this note was concerned primarily with the constitutional status of shareholder voting and labor disputes and

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Two years later, 1967, the *Harvard Law Review*, in its “Developments in the Law” section, published an enormous comment entitled *Deceptive Advertising*.⁶⁸ This comment argued that the distinctions between protected non-commercial and unprotected commercial speech rested on shaky intellectual foundations. “Commercial advertising,” its authors⁶⁹ proclaimed, “might well be called the stepchild of the first amendment.”⁷⁰ Still, those authors were not prepared to say that *no* restraint on commercial speech was appropriate. And, like the earlier note, the comment identified “information” as one of the social benefits of advertising. Advertising, the comment observed, “serves to facilitate” the process of matching producers and willing consumers.⁷¹ In addition, the authors noted that advertising stimulated demand⁷² (an important function in cases of over-

mentioned commercial advertising only by way of example and it was clear that the author took for granted governmental power to regulate commercial speech.

⁶⁸ Comment, *Developments in the Law, Deceptive Advertising*, 80 HARV. L. REV. 1005 (1967).

⁶⁹ According to knowledgeable sources the “Developments” feature usually involved multiple authors and like all the student work in the *Harvard Law Review*, it is unattributed. (email communications from editorial board members from the period on file with the author).

⁷⁰ Comment, *Deceptive Advertising*, 80 HARV. L. REV. at 1027.

⁷¹ *Id.* at 1008.

⁷² *Id.* The argument that advertising stimulates demand is somewhat controversial since the tobacco companies (among others) have argued that advertising only stimulates brand *switching* not *demand*. See, e.g., JOHN E. CALFEE, FEAR OF PERSUASION: A NEW PERSPECTIVE ON ADVERTISING AND REGULATION, 75 (Agora in connection with American Enterprise Institute, 1997) (claiming there is no “substantial effect from advertising on consumption...”). On the other hand, it strains credulity to claim that advertising has no impact on demand when advertisers, professionals in the field and academic source claim advertising is essential to creating demand. See, e.g., TERENCE A. SHIMP, ADVERTISING, PROMOTION & SUPPLEMENTAL ASPECTS OF INTEGRATED MARKETING COMMUNICATIONS, 14 (2003) (“The objective [of marketing]...is to move people to action.”) (emphasis added). Moreover, the justification for a tax deduction for advertising expenditures is that they are “ordinary and necessary” business expenditures under the tax code. 26 U.S.C.A. 162(a) (2011). How could they be “necessary” if it is not as generative of

production which some have note characterized the post-WWII American economy)⁷³ and “enriche[d] mass culture; the images and methods used by advertisers comprise a significant source for humor, satire, and the graphic arts.”⁷⁴ Furthermore, advertising was what supported much of broadcast television, newspapers and magazines.⁷⁵ Despite these early signs that perhaps the categorical treatment of advertising under the First Amendment was about to undergo a major shift, it is clear from both of these works that the authors took for granted the legitimacy of some governmental regulation of marketing and advertising.

Indeed, the legitimacy of governmental regulation of commercial speech was so well-settled that the great First Amendment scholar Thomas Emerson could, in 1970, write his magisterial general theory attempting to categorize all of the various grounds for protecting freedom of expression and the purposes the First Amendment serves and barely touch the question of commercial speech. Emerson said explicitly that “the principles governing commercial speech, and the relation between this sector and the area of free expression, have never been worked out. ...That task is not attempted here. *Up to the present, the*

income? Indeed, some argue that because advertising generates long term goodwill which is an intangible asset these expenditures ought to be capitalized not treated as a deduction (which essentially turns them into a tax credit). See Mona L. Hymel, *Consumerism, Advertising and the Role of Tax Policy*, 20 VA. TAX REV. 347, 414-22 (2000).

⁷³ I am not aware of any serious dispute about whether the end of WWII meant that American businesses experienced a serious sudden surplus of productive capacity. The evidence suggests that the prevailing wisdom, reflected also in the Harvard Law Review Comment above, was that advertising was an important stimulus for consumption of this excess capacity. See, e.g., LIZABETH COHEN, *A CONSUMERS’ REPUBLIC: THE POLITICS OF MASS CONSUMPTION IN POST WAR AMERICA* (2003).

⁷⁴ Comment, *Deceptive Advertising*, 80 HARV. L. REV. at 1016.

⁷⁵ *Id.*

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*problem of differentiating between commercial and other communication has not in practice proved to be a serious one.”*⁷⁶

He was right; it had *not* been a serious problem before. It was about to become one. Those student authors were onto something. The ground was shifting under Emerson’s feet and what had only been worth a passing mention in 1970 would become, by the end of the decade, represent a distinct and developed body of law based on a new theory about what the First Amendment protects.⁷⁷

B. The first developed theory for protection

In 1971 Professor Martin Redish published an extended argument for the proposition that commercial speech ought to be afforded greater First Amendment protection than it currently enjoyed entitled *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*.⁷⁸ It is, as he would be happy to tell you,⁷⁹ apparently the first sustained argument for first amendment protection for commercial speech outside of the student pieces mentioned above. However, like those pieces, Redish focused his argument for the protection for

⁷⁶ THOMAS I. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 105 N.46 (1970) (internal citation omitted) (emphasis added).

⁷⁷ See Burt A. Neuborne, *A Rationale for Protecting and Regulating Commercial Speech*, 46 BROOK. L. REV. 437 (1980). Note the words “and Regulating” in this title. *Sorrell* suggests that there will be rather more protection than regulation going forward.

⁷⁸ Redish, *supra* note 64.

⁷⁹ Martin H. Redish, *First Amendment Theory and the Demise of the Commercial Speech Distinction: The Case of the Smoking Controversy*, 24 N.KY L. REV. 553, 553 (1997) (“Honest, I really was the first one...Five years before the Supreme Court held that commercial speech was deserving of First Amendment protection, long before any scholarly commentator had even intimated that commercial speech was worthy of consideration as ‘speech’ for purposes of the constitutional guarantee, there I was, arguing that because commercial speech ‘advances [the individual] toward the intangible goal of rational self-fulfillment, it was properly characterized as protected expression.”) (footnotes omitted).

commercial speech largely on the grounds of the listeners' interests in receiving information⁸⁰ and in their concomitant interest in self-determination through the exercise of choices with this information.⁸¹

Although he acknowledged that “[a] cursory examination of current television and periodical advertising reveals that in practice, comparatively little commercial promotion performs ... a purely informational function,” he thought this was not an insurmountable obstacle to recognizing the informational and indeed, *educational*,⁸² function of advertising since it may often be the case that consumers needed the extraneous entertainment aspects of advertising to know what they *really* wanted. Some advertising he observed serves “to develop an entirely new set of wants on the part of consumers...”⁸³ Moreover, “entertainment techniques frequently must be employed to effectively attract potential consumers to the information conveyed.”⁸⁴ “Information received in the commercial context ... is specifically designed to assist the individual in the decision-making process.”⁸⁵ “[W]e should require an open exchange of ideas and information in the marketplace that will help the individual govern his personal life.”⁸⁶

Indeed, the entire article is an extended encomium on the pride of place of self-fulfillment and self-determination in what he describes as “generally accepted ... Western thought.”⁸⁷ Relying heavily on Alexander Meiklejohn and Thomas Emerson, Redish argued that “[s]elf government... is premised on a belief in the

⁸⁰ Redish, *supra* note 64 443 and *passim*.

⁸¹ *Id.* at 445 and *passim*.

⁸² *Id.* at 432-33.

⁸³ *Id.* (quoting PIGOU, *THE ECONOMICS OF WELFARE* 198 (4th ed. 1962)).

⁸⁴ *Id.* at 434.

⁸⁵ *Id.* at 445.

⁸⁶ *Id.* at 445.

⁸⁷ *Id.* at 438.

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integrity of the individual intellect.”⁸⁸ Nevertheless, he wrote, “extensive behavioral research [shows that] the modern individual apparently spends little time and effort concerning himself with affairs of the political process.”⁸⁹ Despite this disjunction between aspiration and reality, Redish observed that our system of protection for political speech commits us to trusting this often uninformed individual with political decision-making. It would be paradoxical Redish argued, to offer less protection where the citizen’s decision-making is arguably more keenly animated by the concerns of his daily life – to wit, purchasing in his decisions.⁹⁰

What is significant about this argument is that it is focused almost exclusively on the *listener’s* interests in hearing the speech rather than on the speaker’s interest in speaking – even as to that aspect of human experience which might naturally seem to describe *speakers’* rather than listeners’ interests – self-fulfillment. The bulk of the article focuses on the ways in which advertising and (other commercial speech) contributes to the self-fulfillment of

⁸⁸ *Id.* Note that this argument is manifestly employing terms like “self-government” and “rational faculties” to refer to human beings who live and breathe, not to corporate persons.

⁸⁹ *Id.* at 440. The reference and reliance on behavioral research is interesting because there is now a great deal more of this type of research, and not just consumer behavior, than there was in 1971. And many observers have argued that the fruits of this research support arguments for more regulation of advertising/marketing rather than less. For a review of the arguments with respect to just one area, food marketing see Pierre Chandon and Brian Wansink, *Is Food Marketing Making Us Fat? A Multi-disciplinary Review*, INSEAD WORKING PAPER COLLECTION, SSRN <http://ssrn.com/abstract=1854370> (forthcoming in *Foundations and Trends in Marketing*, Now Publishers); Adam Benforado, Jon Hanson and David Yosifon, *Broken Scales: Obesity and Justice in America*, 53 EMORY L. J. 1645 (2005); Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 HARV. L. REV. 1420 (1999). This point is also made by a prominent behavioral economist, Dan Ariely, although he couches it with the maximum ambiguity about just how much governmental intervention he is proposing by referring to “public policy.” DAN ARIELY, *PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS*, 238-244 (2008).

⁹⁰ Redish, *supra* note 64 at 442-43.

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listeners. Respect for human self-fulfillment, Redish argued, requires protection of this category of speech which (in his view) demonstrably contributed to that self-fulfillment.

He hardly discuss the self-fulfillment commercial speech might offer speakers. This was apparently deliberate. Indeed, he wrote, “Since advertising performs a significant function for its recipients, its values are better viewed with the consumer, rather than the seller, as the frame of reference.”⁹¹ He did not make a sustained argument for the “expressive” interests of commercial speakers.

I do not believe this was accidental. The idea that we ought to protect commercial speech because of the speaker’s interest in speaking would have probably been a non-starter. Certainly it would have been far less appealing. Consider what that argument would have looked like. Instead of arguing that human beings’ self-expression finds *one* outlet in consumption decisions, therefore the ability to receive truthful information on which to

⁹¹ One of the notable exceptions is his observation that “[m]uch advertising which does not convey concrete information nevertheless represents the artistic creation of an individual, and as such deserves recognition as first amendment speech.” *Id.* at 446-47. This is a curious example for a couple of reasons. In the first place, there is no “author” in advertising (outside of trade publications which attribute particular campaigns to particular ad agencies or even “creatives”). Second, this is not surprising since all advertising is work for hire in which the “artist” has no proprietary interest. See Catherine Fisk, *The Modern Author at Work on Madison Avenue*, in MODERNISM AND COPYRIGHT 173, 183-84 (Paul Saint-Amour, ed., 2010) available via SSRN at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1693973. It is a curiosity to say the least to use the artistic nature of the endeavor to justify first amendment protection but to use copyright to deny the “artist” the fruits of her labor. Query, whose rights are being protected in this construction? If it is really the artist’s then one would think these interests would similarly extend to copyright. And if they don’t, they suggest that copyright law’s supremacy in this regard reveals advertising as principally property not expression. For more speaker-oriented arguments see also *id.* at 461-68 and accompanying footnotes (discussing distinguishing between speakers on the basis of their financial interests and the specific case of tobacco regulation).

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make those decisions should be protected, the argument would have to be that engaging in commerce is *itself* an expressive activity warranting First Amendment protection. In other words, instead of the argument being, “The consumer has a right to hear about Colgate because *choosing* a toothpaste is an expressive activity” (already a somewhat dubious proposition), it would be, “Colgate has a right to try to pitch toothpaste because *selling* toothpaste is an expressive activity.” This construction confuses expression with commerce.

While commerce and expression are obviously by no means mutually exclusive, most artists for instance want to sell their work not give it away, it cannot be said, without collapsing the Commerce Clause into utter irrelevance, that they are identical. And it is difficult to imagine how the government can regulate commercial speech if it cannot regulate commerce.

This is true at both the institutional and the individual level. All work, whether running a business or working as an employee, no matter how menial, routine or repetitive, offers the worker some opportunity to express herself through how she performs it. But that is different from saying that the *principal* reason for these activities is rooted in their expressive content. To conclude that all work, all business constitutes expressive activity would be wildly over-determined. It would sweep all work into the ambit of expression.

On its face such a construction sets the First Amendment and the Commerce Clause at odds with one another since the latter delegates to Congress broad powers to regulate commerce, while the former forbids Congress to make laws which encroach on freedom of expression. Without doing a lengthy exegesis into unsolved (and probably unsolvable) problems of proper Constitutional interpretation, suffice it to say that it seems implausible that many people would think that the proper resolution to any conflict would be to read Congress’ power to regulate commerce out of the Constitution on the grounds that

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- (1) The First Amendment says Congress shall make “no law” restricting freedom of speech.
- (2) “Speech” = “expression”,
- (3) People express themselves through commerce
- (4) Therefore commerce = expressive activity which Congress may not regulate.

The resolution of this conflict more consistent with our *past* understanding of the First Amendment is:

- (1) Congress may regulate commerce
- (2) Commercial speech is a part of “commerce”
- (3) Therefore, commercial speech is a part of commerce which may be regulated as a matter of power under the Commerce Clause.

Even if one concludes that the First Amendment, because it is an amendment, somehow trumps the Commerce Clause, a reading as broad as the first would render the Commerce Clause a nullity.

It is easy to see though how framing the interests at stake as those of the listener present both a limiting and an equalizing element into the proposition that commercial speech ought to be protected. Listeners are set against big government that would paternalistically keep them ignorant. And there is nothing about empowering consumers with information that suggests a corollary right on the part of the speaker to be free of government regulation. Framed this way it is easy to understand the appeal of the listeners’ rights argument and why the Court was persuaded to conclude that *some* commercial speech deserved First Amendment protection.

Although not everyone was persuaded by this argument, some prominent scholars vigorously objected that the First Amendment had no place for commercial speech,⁹² the majority of

⁹² Victor A. Brudney, *Business Corporations and Stockholders’ Rights Under the First Amendment*, 91 YALE L.J. 235 (1981); Thomas I. Emerson, *First*

the legal community appeared to embrace, if somewhat more reservedly than Redish himself, the proposition that consumers ought to enjoy some First Amendment right to receive information. And even before the Supreme Court created the commercial speech doctrine, a few scholars seemed prepared to agree that commercial speech ought to receive *some* protection,⁹³ although even supporters were not prepared to say that it ought to enjoy full First Amendment protection.⁹⁴

IV. The Court takes the bait

A. Nibbling around the edges

We should not be surprised that those Harvard Law students focused on advertising and its regulation in the late sixties. Advertising had become a significant driver of cultural content and a handful of important cases had, at least nominally, involved advertising. In *New York Times v. Sullivan*⁹⁵ the defendants who had taken out an ad in the *New York Times* in support of Dr. Martin Luther King and the civil rights marchers in the South, were sued for libel and defamation over factual inaccuracies in the ad. The advertisement was what is known in the

Amendment Doctrine and the Burger Court, 68 CAL. L. REV. 422 (1980); Thomas H. Jackson & John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 85 VA. L. REV. 1 (1979). See also Richard M. Alderman, *Commercial Entities' Noncommercial Speech: A Contradiction in Terms*, 1982 UTAH L. REV. 731, 731-32 n.4 (1982) (extensive survey of the literature following the Virginia Pharmacy decision including these as well as other articles).

⁹³ See, e.g., Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI L. REV. 20 (1975).

⁹⁴ See Richard M. Alderman, *Commercial Entities' Noncommercial Speech: A Contradiction in Terms*, 1982 UTAH L. REV. 731, 731-32 n. 4 (1982) (discussing reaction to *Virginia Pharmacy*). Note that the Alderman article seems to have been among the first to link the commercial and corporate speech cases.

⁹⁵ *New York Times v. Sullivan*, 376 U.S. 254 (1964).

advertising business as an “issue ad.”⁹⁶ Issue ads are ad spaces purchased to promote social or political causes. The Court found for the defendants and created a new standard for libel and defamation cases involving public figures and issues of public concern. Henceforth, plaintiffs would need to show that the defendants’ misstatements were not just erroneous, but that they were made with “actual malice.” That the statements were contained in an ad was not the focus of the opinion and the Court observed that the mere fact that money was paid to run the ad did not make it “commercial” (and hence subject to the “no First Amendment protection at all” standard under *Chrestensen*.)⁹⁷

A few years later the Court heard a case involving a challenge to the practice of dividing the help-wanted ads into categories like “Jobs-Male Interest” and “Jobs-Female Interest.”⁹⁸ The National Organization for Women had filed a complaint with the Pittsburgh Commission on Human Relations against the *Pittsburgh Press* complaining that this practice was in conflict with a Pittsburgh city ordinance forbidding discrimination on the basis of sex.⁹⁹ The Commission held a hearing and enjoined the practice and the *Pittsburgh Press* appealed.¹⁰⁰ When the case came before the Supreme Court the Court supported the Commission and ruled that the city ordinance did not violate the First Amendment. It

⁹⁶ TERENCE A. SHIMP, *ADVERTISING, PROMOTION & SUPPLEMENTAL ASPECTS OF INTEGRATED MARKETING COMMUNICATION*, 286 (6th Ed., 2003). Shimp actually just describes issue advertising in the context of corporate issue advertising, but because the ad in *Sullivan* was paid for by plaintiffs, it fit the definition of advertising even though it was not “commercial.” Shimp defines “advertising” as “[a] form of either mass communication or direct-to-consumer communication that is non-personal and is paid for by various business firms, nonprofit organizations, and individuals who are in some way identified in the advertising message and who hope to inform or persuade members of a particular audience.” SHIMP at 621.

⁹⁷ *Sullivan*, 376 U.S. at 266.

⁹⁸ *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376 (1973).

⁹⁹ *Pittsburgh Press*, 413 U.S. at 376-79.

¹⁰⁰ *Id.* at 380-81.

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nominally upheld the principle announced in *Chrestensen*, but it also observed that *New York Times v. Sullivan* had made clear that “speech is not rendered commercial by the mere fact that it relates to an advertisement.”¹⁰¹

Two years later, in a third case, *Bigelow v. Virginia*,¹⁰² the Court was confronted with a challenge to a Virginia law which made it illegal to advertise the availability of abortions. Abortions were illegal in Virginia but the ad announced that abortions were legal in New York, that there was no residency requirement, all inquires would be “strictly confidential” and that counseling and other information about the termination of unwanted pregnancies was available at the location and number provided.¹⁰³ The prohibition on the advertising was premised on the state’s power to restrict the promotion of abortion services given that abortion was illegal in the state. The State of Virginia had prosecuted the publisher of a newspaper under a criminal statute making it a misdemeanor to “encourage or prompt the procuring of abortion or miscarriage.”¹⁰⁴

The Court struck down the law. In so doing it expressly limited the holding in *Chrestensen* observing that “[t]he fact that the particular advertisement in appellant’s newspaper had commercial aspects or reflected commercial interests did not negate all First Amendment guarantees.”¹⁰⁵ *Chrestensen*’s holding, the majority wrote, “is a distinctly limited one” relating to “the manner in which commercial advertising could be distributed.”¹⁰⁶

¹⁰¹ *Id.* at 384. Some date the development of First Amendment protection to commercial speech from this case. Burt Neuborne, *A Rationale for Protecting and Regulating Commercial Speech*, 46 BROOK. L. REV. 437, 437 n. 2 (1980).

¹⁰² *Bigelow v. Virginia*, 421 U.S. 809 (1975).

¹⁰³ *Bigelow*, 421 U.S. at 812

¹⁰⁴ *Id.* at 812-13.

¹⁰⁵ *Id.* at 818.

¹⁰⁶ *Id.* at 819-20.

*“The case obviously does not support any sweeping proposition that advertising is unprotected per se.”*¹⁰⁷

This proposition was not obvious at all to the dissenting Justices. In a dissent written by Justice Rehnquist and in which Justice White concurred, Rehnquist argued that, contrary to the majority’s interpretation, *Chrestensen* had heretofore stood for the proposition that the exclusion of commercial speech from First Amendment protection was, if not total, at least broad enough to encompass regulation of the sort Virginia sought to enforce.¹⁰⁸ The majority, Rehnquist wrote, did not “confront head-on the question which” the case posed, but instead made “contact with it only in a series of verbal sideswipes.”¹⁰⁹

Because the *Bigelow* decision came so closely on the heels of the Court’s landmark decision in *Roe v. Wade*¹¹⁰ it was initially unclear to observers whether the decision rested on the content of the ad, that is, whether it was the fact that the ad was for abortion services that justified the decision, or whether it reflected a more general turn to offer greater protection for commercial speech. The former proposition seemed likely to some but this interpretation would seem to violate the precept that First Amendment protection should not vary on the basis of content. As the dissent noted, “we have always refused to distinguish First Amendment purposes on the basis of content...”¹¹¹

Yet, the majority opinion explicitly stated: “We need not decide in this case the precise extent to which the First Amendment permits regulation of advertising that is related to activities the State may legitimately regulate or even prohibit.”¹¹² Like *Bigelow*, both the *New York Times v. Sullivan* and the

¹⁰⁷ *Id.* at 820 (emphasis added).

¹⁰⁸ *Id.* at 830-32 (Rehnquist, J. dissenting)

¹⁰⁹ *Id.* at 829-30.

¹¹⁰ *Roe v. Wade*, 410 U.S. 113 (1973).

¹¹¹ *Bigelow*, 421 U.S. at 831 (Rehnquist, J. dissenting).

¹¹² *Bigelow*, 421 U.S. at 825.

Pittsburgh Press cases clearly involved civil rights issues which had economic aspects and so were also not clearly just commercial.

B. Hooked: The commercial speech doctrine born

All doubts about whether *Bigelow* signaled more expansive protection for commercial speech were dispelled a year later with the decision that is often credited for creating the commercial speech doctrine, one that ironically also involved pharmacies and prescription drugs – *Virginia State Board of Pharmacy v. Virginia Consumers Citizens Council* (hereafter *Virginia Pharmacy*).¹¹³ There a consumers’ group challenged a Virginia law which prohibited pharmacies from engaging in price advertising. The State defended the law on the grounds that permitting price advertising might lead pharmacies to engage in price wars which if could decrease pharmacies’ profit margins, possibly leading them to cut back on services to consumers. Since accurate and complete information about prescription drugs could have an obvious impact on public health, the State argued that good service, for example, in the form of individualized attention from pharmacists, was of sufficient importance to warrant suppression of price advertising.

The Court disagreed. Instead it found that, “As to the particular consumer’s interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day’s most urgent political debate.”¹¹⁴ And it unequivocally announced that commercial speech enjoyed First Amendment protection.¹¹⁵ This announcement tracked almost to the letter the recommendations made 5 years earlier by Professor Redish. However, as in that early Redish article, Supreme Court spent almost none of its discussion justifying this new protection for commercial speech on the basis of the *speaker’s* interests.

¹¹³ *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

¹¹⁴ *Virginia Pharmacy*, 425 U.S. at 763.

¹¹⁵ *Id.* at 770.

Instead, the Court's focused almost exclusively¹¹⁶ on the benefits of freedom for truthful commercial speech for the *listeners*.

This focus on the consumer's interest highlighted a curious aspect of the case. The case was brought by *consumers*, not pharmacists, and thus did not engage with the question of the speakers' interests.¹¹⁷ Therefore, there was a serious question as to whether the consumer group had standing to challenge the statute since the Virginia law did not prohibit *consumers* from publishing information about prescription drug prices, just pharmacies.¹¹⁸ Indeed, the bulk of the opinion is given over to discussing this standing issue and then analyzing the question from the perspective of the listeners.

Advertising, however tasteless and excessive it may sometimes seem, is nonetheless dissemination of information as to who is selling what product for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of resources in large measure will be made through numerous private economic decisions. *It is a matter of public interest that those decisions, in the aggregate, be intelligent and well*

¹¹⁶ The Court actually assumed away the very question that might be said to have been before it – whether commercial speakers have a First Amendment right to speak – since the Court assumes, without offering any rationale, that “of course” speakers have these rights and if speakers do, so must listeners. This sleight of hand was assisted by the fact that it was the consumers who were bringing the suit and thus there was a standing problem. As the Court noted, the earlier precedent did not unequivocally establish protection for commercial speech. Indeed, *Chrestensen* did the opposite. But in order to get to the listeners the Court had to find a right for speakers. It did so not by analysis but simply by fiat, announcing it had found such a right and the remainder of the opinion is devoted to outlining why *listeners* might have a protectable First Amendment right as well.

¹¹⁷ See Alan B. Morrison, *How We Got the Commercial Speech Doctrine: An Originalist's Recollections*, 54 CASE WES. RES. U. L. REV. 1189 (2004).

¹¹⁸ *Virginia Pharmacy*, 425 U.S. at 782 (Rehnquist, J. dissenting)

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informed. To this end the free flow of commercial information is indispensable.¹¹⁹

These were the Court's justifications for offering expanded protection to commercial speech: the consumer's interest in commercial information; the notion that consumer decisions might be more personal, more relevant to their self-fulfillment in their everyday lives than political speech; the relentless focus on the listeners' interests and the proposal that listeners had cognizable rights under the First Amendment to receive information as much as speakers had to speak, and the proposition that good decisions were related to good information, advertising provided at least some information therefore it aided good decision-making and could be said to supply a public benefit. All these arguments were raised by Redish in his 1971 article.

There was, however, at least one critical difference between the argument set forth by the Court that offered by Redish. Although Redish had acknowledged in passing, without much elaboration, that his proposal would not eliminate the government's ability to regulate false speech or speech that threatened national security, the Court in *Virginia Pharmacy*, perhaps because it was moving out of the realm of theory and into the creation of actual law, was at some pains to make clear how governmental regulation of commercial speech could essentially continue, if not as before, certainly without losing anything essential. In footnote 24 the Court noted:

In concluding that commercial speech enjoys First Amendment protection, we have not held that it is wholly undifferentiable from other forms. There are commonsense differences between speech that does "no more than propose a commercial transaction," ...and other varieties. Even if the differences do not justify the conclusion that commercial speech is

¹¹⁹ 425 U.S. at 765 (emphasis added).

valueless, and thus subject to complete suppression by the State, *they nonetheless suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired.* The truth of commercial speech, for example, may be more easily verifiable by its disseminator than, let us say, news reporting or political commentary, in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else. Also, commercial speech may be more durable than other kinds. Since advertising is the sine qua non of commercial profits, there is little likelihood of its being chilled by proper regulation and forgone entirely.

Attributes such as these, the greater objectivity and hardiness of commercial speech, *may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker.* They may also make it appropriate to require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive. ...They may also make inapplicable the prohibition against prior restraints.¹²⁰

Footnote 24 makes unequivocal at least two points relevant to the Court's most recent decision in *Sorrell*: first, that *as conceived*, the protection that the Court was extending in *Virginia Pharmacy* was more limited than that given to fully protected speech and would require a content-based inquiry into whether speech was commercial before applying this new intermediate

¹²⁰ *Id.* at 771-72 n.24 (citations omitted)(emphasis added).

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level of scrutiny, and second, that this intermediate level of scrutiny was not merely *permissible*, it was “*necessary*.” The *Sorrell* Court’s content-neutrality analysis is completely at odds with both of these limiting principles.

Justice Rehnquist wrote a dissent to the *Virginia Pharmacy* majority opinion. He thought this decision “which elevates commercial intercourse between a seller hawking his wares and a buyer seeking to strike a bargain to the same plane as has been previously reserved for the free marketplace of ideas,”¹²¹ was likely to have “far reaching consequences” which the majority did not, perhaps, sufficiently appreciate. Moreover, he was not persuaded by the argument that the public interest in information in a free market necessarily meant this interest was of a constitutional dimension. “While there is again much to be said for the Court’s observation [about the preservation of a properly functioning free market] as a matter of desirable public policy, *there is certainly nothing in the United States Constitution which requires the Virginia Legislature to hew to the teachings of Adam Smith in its legislative decisions regulating the pharmacy profession.*”¹²²

In Justice Rehnquist’s view, the argument that the First Amendment protected the right to receive information as well as to disseminate it was related to protection for political, social and artistic expression and matters of public concern, not purely private ones. “It is undoubtedly arguable that many people in the country regard the choice of shampoo as just as important as who may be elected to local, state, or national political office, *but that does not automatically bring information about competing shampoos within the protection of the First Amendment.*”¹²³ He predicted that the Court’s new interpretation would be difficult to cabin and might well apply be used to challenge the laws regulating the professions, the sale of securities, cigarettes, alcohol and other products the

¹²¹ *Virginia Pharmacy*, 425 U.S. 781, 781 (Rehnquist, J. dissenting).

¹²² *Id.* at 784 (emphasis added).

¹²³ *Id.* (emphasis added).

promotion of which, like prescription drugs, the government had legitimate interests in regulating. His concerns would prove prescient but it would take some time for the seeds planted by *Virginia Pharmacy* to give rise to *Citizens United* and, ultimately, to *Sorrell*.

C. The Central Hudson Test

Four years after the *Virginia Pharmacy* decision the Court elaborated on the contours of its newly created doctrine by articulating a test which the Court said applied to regulations of commercial speech. In *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*,¹²⁴ the utility company challenged the constitutionality of a regulation that prohibited promotional advertising by the utility. New York sought to decrease consumption of electricity in the interest of energy conservation. The utility objected that the prohibition violated its constitutional rights. In this case, unlike in *Virginia Pharmacy*, it was the speaker who was raising the challenge. And once again the Court struck down the regulation in question, but this time it did so while providing a more detailed template for analyzing future commercial speech cases.

In order for a questioned regulation to survive a First Amendment challenge under the commercial speech doctrine the Court said four elements of the regulation must be assessed.

At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine

¹²⁴ *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of NY*, 447 U.S. 557 (1980).

whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.¹²⁵

Once again the decision was not unanimous. As before, Justice Rehnquist felt the majority had been insufficiently deferential to legitimate state interests, and although he conceded that *Virginia Pharmacy* was now the law and was prepared to accept the new test the Court had devised in *Central Hudson*, he disagreed with its application of that test to the facts in this case.¹²⁶ In declining to give more deference to the Commission's determination of how to best address its energy conservation goals, Justice Rehnquist believed the majority had revived the discredited *Lochner*-era approach to economic regulation.¹²⁷ And he reiterated his view that in creating the commercial speech doctrine the Court had opened a "Pandora's box."¹²⁸

This time, however, Rehnquist was not alone in disagreeing with the majority; except that far from thinking the Court had been too generous in granting First Amendment status to this speech, these other Justices argued that the majority had not been generous *enough* and should have applied a stricter standard. Justices Brennan and Stevens thought that the line between commercial and non-commercial speech presented in the case was blurrier than the majority suggested and they argued that perhaps this should not have been a commercial speech case at all.¹²⁹ Justice Blackmun wrote that the Public Service Commission's regulation was "a covert attempt by the State to manipulate the choices of its citizens,

¹²⁵ *Central Hudson*, 447 U.S. at 566.

¹²⁶ *Central Hudson*, 447 U.S. at 583 (Rehnquist, J. dissenting)

¹²⁷ *Id.* at 589.

¹²⁸ *Id.* at 598 (Rehnquist, J. dissenting)

¹²⁹ See *Central Hudson*, 447 U.S. at 572-73, (Brennan, J. concurring in the judgment) and *id.* at 579 (Stevens, J. concurring in the judgment).

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not by *persuasion or direct regulation, but by depriving the public of the information needed to make a free choice.*¹³⁰

Once again we see this trope of concern for decision-makers having the information they need to make decisions, even if one is hard-pressed to identify the informational aspects of commercial propaganda. Rather than probe this question the Court seemed content to work with a very loose definition of “information.”¹³¹ So even though the claim was raised by the commercial speaker, the arguments in favor of protecting the speech continued to focus on the ways in which freedom for the speaker meant – as the majority saw it – freedom for the listener as well.

There was little discussion of the expressive interests of the speaker, and this is no surprise. The usual speaker-oriented arguments for protecting freedom of expression, which rely on notions of the importance of autonomy, of using and developing one’s rational faculties and the importance of self-determination, have little or no resonance with respect to a corporation. A corporation is a legal fiction, not a living thing. It does not itself have such needs. As one observer put it,

The barely intelligible idea that corporations could have independent rights of their own, apart from the

¹³⁰ Central Hudson, 447 U.S. at 574-75 (Blackmun, J. concurring in the judgment).

¹³¹ It turns out that industry has very asymmetrical notions of what constitutes “information.” In a case by the tobacco companies attempting to strike down the FDA’s recent graphic warning labels the plaintiffs argued successfully that these graphic pictures are meant as persuasion not as “information” intended to support informed choice and thus are unconstitutional. R.J. Reynolds Tobacco Co., et. al. vs. United States Food and Drug Administration, et. al., (11-1482(RJL) (Memorandum Opinion (Feb. 29, 2012) at 13. Yet these same companies argue that advertising ought to be protected on the basis of its informational content even though virtually everyone acknowledges that there is very little of what could be called “information” in most advertising and its entire *raison d’être* – including the packaging, trade dress, colors, etc. – is intended as persuasion.

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interests of affected persons, might be suggested by judicial decisions establishing that corporations are persons for various legal purposes. But this manner of speaking does not mean that corporations have feelings, interests in self-expression, or other characteristics of human beings that make them persons.¹³²

Central Hudson became a key marker in the development of the doctrine. From that time to this *Central Hudson* has remained the controlling test for assessing challenged regulations of commercial speech. At the time it was announced, and for several years afterwards it appeared to genuinely constitute an intermediate scrutiny test – that is to say, from time to time some governmental regulations would survive review.¹³³ Over time, the test has been applied in a manner closer to strict scrutiny.¹³⁴

¹³² Tom Bennigson, *Nike Revisited: Can Commercial Corporations Engage in Non-Commercial Speech?*, 39 CONN. L. REV. 379 (2006). Similar objections are raised in conjunction with the *Citizens United* decision. See, e.g., Robert Weissman, *Let the People Speak: The Case for a Constitutional Amendment to Remove Corporate Speech From the Ambit of the First Amendment*, 83 TEMPLE L. REV. 979 (2011).

¹³³ Another way of describing the standard was that the Court had characterized commercial speech as “low value” speech and thus subject to intermediate scrutiny or balancing instead of speech designated as “high value.” See Stone, *supra* note 48 at 194-97; Cass R. Sunstein, *Low Value Speech Revisited*, 83 NW. U. L. REV. 555 (1989). For critiques of the high value/low value distinction see Larry Alexander, *Low Value Speech*, 83 NW. U. L. REV. 547 (1989). Taking a slightly different tack but offering a related critique is Steven G. Gey, *The First Amendment and the Dissemination of Socially Worthless Untruths*, 36 FLA. ST. U. L. REV. 1 (2008).

¹³⁴ David Vladeck, *Lessons From A Story Untold: Nike v. Kasky Reconsidered*, 54 CASE WES. RES. U. L. REV. 1049, 1055-59 (2004). Even before *Sorrell* it seemed fair to say that as a practical matter the *Central Hudson* test was intrinsically flawed since prongs (3) and (4) of the test are in tension with one another. Regulation that is effective under prong (3) is likely to be deemed overbroad under prong (4). On the other hand, if regulators attempt to create a law with narrow application to avoid the prong (4) probably, there is a substantial likelihood that it will not survive the prong (3) test for effectiveness.

However, even as the Court became increasingly skeptical of governmental regulations of commercial speech, preservation of the *Central Hudson* framework reinforced the notion that the regulation of commercial speech was subject to a distinct and at least nominally less rigorous level of scrutiny than that of other protected speech – a proposition that is at some odds with the *Sorrell* Court’s content neutrality analysis. Yet a persistent problem has been uncertainty about what made speech “commercial.”

D. The content problem: What makes speech “commercial”?

The *Central Hudson* test starts out with a problem. And it is a content problem. The first prong under the test is whether the speech “concern[s] a lawful activity” and is not misleading.¹³⁵ This is a requirement for the doctrine to apply. Thus, untruthful or misleading commercial speech is not protected at all, nor is commercial speech about a product which is illegal. However, the fact that speech is truthful doesn’t make it “commercial.” And it could not be the case that speech concerning an unlawful activity, for example arguments to legalize marijuana use, would be prohibited by the First Amendment. So there must be some quality by which courts could identify and distinguish commercial from non-commercial speech: a distinction which is obviously content-based. Yet in establishing the doctrine, the Supreme Court in *Virginia Pharmacy* did not provide a very clear definition of what made speech “commercial” and subsequent decisions did not prove much more illuminating.

The *Virginia Pharmacy* majority thought there were “commonsense” differences but it did not elaborate on what those differences might be. Yet as the difference is (was) critical.¹³⁶ As

¹³⁵ *Central Hudson*, 447 U.S. at 566.

¹³⁶ For a discussion of the importance of definition see Erwin Chemerinsky and Catherine Fisk, *What is Commercial Speech? The Issue Not Decided in Nike v. Kasky*, 54 CASE WES. RES. U. L. REV. 1143 (2004); James Weinstein, *Speech Categorization and the Limits of First Amendment Formalism: Lessons From*

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noted above, very early into the development of the new commercial speech doctrine, Professor Steven Shiffrin observed that there was a serious definitional problem.

Each commercial speech case the Court has considered has involved advertising or the proposal of a commercial transaction, and almost all of the commentators have looked at the “commercial speech” problem through the lens of commercial advertising. The collective myopia has distorted something quite important: the commercial speech doctrine that has been beneath the protection of the first amendment for all these years has not been confined to commercial advertising.¹³⁷

Indeed, he wrote, advertising and, more generally, speech that proposes a commercial transaction is “only the tip of the iceberg.”¹³⁸ And that iceberg contained a very large body of law regulating what companies could say to their shareholders, what issuers of securities could say to the public, what employers could say to their employees in the face of union organizing activities, debt collection practices, antitrust laws, laws regulating food and drugs, laws regulating the participation of corporations in the political process, and many others.¹³⁹

The definition the Supreme Court offered for commercial speech in *Virginia Pharmacy* was one it had been previously floated in the *Pittsburgh Press* case: “speech that does no more

Nike v. Kasky, 54 CASE WES. RES. U. L. REV. 1091 92004); Nat Stern, *In Defense of the Imprecise Definition of Commercial Speech*, 58 MD. L. REV. 55, 83-87 (1999) (summarizing critiques).

¹³⁷ Shiffrin, *Away from a General Theory*, *supra* note 47 at 1213 (footnotes omitted).

¹³⁸ *Id.* at 1214 (footnotes omitted).

¹³⁹ *Id.* at 1214-15 (footnotes omitted).

than propose a commercial transaction.”¹⁴⁰ That definition was extremely narrow and was later supplemented (although subsequent commentators sometimes neglect to mention this) in a later case; *Bolger v. Youngs Drug Products Corp.*¹⁴¹ In *Bolger* the Court expanded the definition to cover materials which did more than merely propose a commercial transaction. *Bolger* involved a pamphlet which discussed the role of condoms in preventing sexually transmitted diseases. The pamphlet mixed promotional material with a discussion of a matter of public concern.

This was the tactic that the plaintiff in *Valentine v. Chrestensen* had used to no effect when trying to insulate his flyers from treatment as mere advertising. Of course, in light of *Virginia Pharmacy*, even purely commercial speech would not be deprived of all protection because of its commercial character. But it remained to be seen whether, after *Virginia Pharmacy*, the inclusion of some discussion of a matter of public concern would deprive the speech of its commercial character and thus entitle it to enhanced protection under a strict scrutiny standard, or whether even the inclusion of some *non-promotional* material would fail to completely overshadow its commercial character such that the intermediate scrutiny standard would still apply.

The *Bolger* Court opted for the latter approach: “*Because the degree of protection afforded by the First Amendment depends on whether the activity sought to be regulated constitutes commercial or non-commercial speech, we must first determine the proper classification of the mailings at issue here.*”¹⁴² It noted, citing *New York Times v. Sullivan*, that although the fact that the pamphlet was, (1) concededly an advertisement, that would not be enough to render it commercial speech. However, the combination

¹⁴⁰ *Virginia Pharmacy*, 425 U.S. at 761 (internal quotation marks omitting) (quoting *Pittsburgh Press Co. v. Human Relations Comm’n*, 413 U.S. 376, 385 (1973)).

¹⁴¹ *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983).

¹⁴² *Id.* at 65 (emphasis added).

of that fact along with (2) a reference to a product and (3) an economic motivation on the part of the speaker, could support a finding that the pamphlet was properly categorized as commercial speech.¹⁴³

So, although the Court ultimately held that the brochure in question was protected speech, it came to that conclusion only after it had defined the speech as “commercial” and then applied the *Central Hudson* intermediate scrutiny test for commercial speech. It did not apply the strict scrutiny test which would have been applicable if the brochure was fully protected speech under the First Amendment. Indeed, the entire exercise of parsing the brochure to determine what sort of speech it contained would have been nonsensical if the Court thought that content was irrelevant.

Around 1993 the Supreme Court began interpreting the *Central Hudson* test more rigorously and the notion of content neutrality made its first appearance in a doctrine that by definition presupposed the propriety of a content-based distinction between commercial and non-commercial protected speech. The case was *City of Cincinnati v. Discovery Network, Inc.*¹⁴⁴. There the Court struck down an attempt to regulate the presence of news racks containing commercial flyers differently than those containing traditional newspapers. Here, perhaps is the first intimation that singling out commercial speech for different treatment on the basis of its commercial content might run afoul of the First Amendment – even though the doctrine is predicated on such a distinction.

Nevertheless, the Court cautioned that its holding was “narrow.”¹⁴⁵ Justice Stevens writing for the majority noted, “we do not reach the question whether, given certain facts and under certain circumstances, a community might be able to justify differential treatment of commercial and noncommercial

¹⁴³ *Id.* at 65-68.

¹⁴⁴ 507 U.S. 410 (1993).

¹⁴⁵ *Id.* at 428.

newsracks.”¹⁴⁶ Rather the Court held that “[i]n the absence of some basis for distinguishing between ‘newspapers’ and ‘commercial handbills’ that is relevant to an interest asserted by the city, we are unwilling to recognize Cincinnati’s bare assertion that the ‘low value’ of commercial speech is a sufficient justification for its selective and categorical ban on newsracks dispensing ‘commercial handbills.’”¹⁴⁷ The *Discovery Network* opinion asserted that the commercial/non-commercial distinction bore “no relationship *whatsoever* to the particular interests the city has asserted.”¹⁴⁸

Although *Discovery Network* appears to have introduced this content neutrality concept into the commercial speech context, it was in a more modest form than that adopted in *Sorrell*. Content neutrality is brought in at the end of the analysis after applying the *Central Hudson* test. Indeed, Justice Blackmun wrote a concurring opinion because he wished to urge the Court to dispense with *Central Hudson* on the grounds that it offered “insufficient protection to truthful, noncoercive commercial speech concerning lawful activities.”¹⁴⁹

In contrast, in *Sorrell* content neutrality is the first and most critical inquiry, with *Central Hudson* bringing up rear. And Vermont had offered far more than “a bare assertion” that data-mining for marketing purposes was “low value.” Its reasons for enacting the law had a demonstrable connection between the law and the state’s interest in reducing health care costs by encouraging the prescribing of generic drugs. We know that because of the sellers’ eagerness for the data arose directly from its connection to the successful promotion of brand name drugs. So how did we get from the *Discovery Network*’s conception of content neutrality to *Sorrell*’s?

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 424 (emphasis in original).

¹⁴⁹ *Id.* at 431 (Blackmun J., concurring).

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The answer is hinted at in the references to commercial speech as “low value” speech which litter the opinions of the majority and concurring opinions. The implication is that designating something as “low value” is offensive in some way, particularly when the listeners may find it valuable. There is a studied disapproval of what sounds like discriminatory or paternalistic judgments with respect to what constitutes high versus low value speech. This disapproval is the content-focused aspect of can be referred to as “the equality principle” in the First Amendment jurisprudence.

That equality principle had its roots in a completely different context – the civil rights movement. But its importation into the commercial and corporate speech contexts was to have far-reaching consequences. It would represent the “switch” in the focus of the commercial speech doctrine. From the moment it was introduced it began to pave the way for an increasingly robust right for commercial speakers, one that would subordinate those interests which had justified the doctrine in the first place -- the listeners – and would mean that, when challenged, government would have to overcome increasingly high hurdles to justify regulation of marketing.

V. “Switch”: The shift to the speaker

Five years after Redish published his seminal article the Court announced the commercial speech doctrine and as the 20th century advanced, what might be called the “commercial equality” position picked up legitimacy and steam.¹⁵⁰ By the early 1990s

¹⁵⁰ Interestingly what was most noticeable early on was that those who would have typically been identified as “liberal” or “progressive” were no longer as willing to treat the First Amendment or rights language as sacred cows. See J.M. Balkin, *Some Realism About Pluralism: Leal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375 (1990). Professor Balkin presciently observed that “conservative forces soon will overtake and appropriate the libertarian approach to first amendment law that progressives have used so effectively in the past.” *Id.* at 387.

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there was a noticeable uptick in the publication of articles in law reviews which argued for greater, or even full, First Amendment protection for commercial speech or corporate speech.¹⁵¹ And this

¹⁵¹ The argument has been forcefully made that all expression by a commercial entity is, by definition, “commercial speech.” See Tom Bannison, *Nike Revisited: Can Commercial Corporations Engage in Non-Commercial Speech?*, 39 CONN. L. REV. 379 (2006). The list of articles arguing for expanded protection for commercial speech includes Redish’s 1971 article, *supra* note 64 as well as the following articles (although this is by no means an exhaustive list): Burt Neuborne, *A Rationale for Protecting and Regulating Commercial Speech*, 46 BROOK. L. REV. 437 (1979-1980); Michael Gartner, *Commercial Speech and the First Amendment*, 56 U. CINN. L. REV. 1173 (1988); Alex Kozinski and Stuart Banner, *Who’s Afraid of Commercial Speech?*, 76 VA. L. REV. 627 (1990); Larry E. Ribstein, *Corporate Political Speech*, 49 WASH. & LEE L. REV. 109 (1992); Rodney A. Smolla, *Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech*, 71 TEXAS L. REV. 777 (1993); Daniel E. Troy, *Advertising: Not “Low Value” Speech*, 16 YALE J. ON REG. 85 (1999); Note, *Free Speech Protections for Corporations: Competing in the Markets of Commerce and Ideas*, 117 HARV. L. REV. 2272 (2004); Charles H. Moellenberg and Leon F. DeJulius, Jr., *Second Class Speakers: A Proposal to Free Protected Corporate Speech From Tort Liability*, 70 U. PITT. L. REV. 555 (2009).

Interestingly, a complete list articles supporting this viewpoint were written by attorneys in private practice, some of whom focus their practices on precisely these issues. While there is nothing particularly sinister about that it raises another issue – the distortion in the “marketplace of ideas” which may arise from an imbalance of resources and incentives where some have both the means and a keen interest in shaping of the law. One way to do that (or attempt to do it) is to “seed” the academic literature. See, e.g., Thomas O. McGarity, *A Movement, A Lawsuit, and the Integrity of Sponsored Law and Economics Research*, 21 STAN. L. & POL’Y REV. 51 (2010); Lee Epstein and Charles E. Clarke, Jr., *Academic Integrity and Legal Scholarship in the Wake of Exxon Shipping*, Footnote 17, 21 STAN. L. & POL’Y REV. 33 (2010), Shireen A. Barday, Note: *Punitive Damages, Remunerated Research, and the Legal Profession*, 61 STAN. L. REV. 711 (2008). Because in the past there was no well-developed norm about financial disclosures, law reviews may be particularly vulnerable to being used this way. For a discussion of how the “the marketplace of ideas” metaphor obscures important differences between the search for truth and Pareto optimality in the market for goods and services see Alvin I. Goldman and James C. Cox, *Speech, Truth, and the Free Market for Ideas*, 2 LEGAL THEORY 1 (1996).

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was matched by an increase in hostility in the Supreme Court toward governmental attempts to regulate commercial speech. And in both areas, the rhetoric had shifted *away* from consumer/listener-oriented arguments and *toward* content-discrimination arguments for protecting commercial speech. Tellingly, little rhetorical firepower was expended to make arguments grounded on a strong speaker's rights theory for the speaker's right, *as a speaker*, to "express" itself. Even this newer focus on content, owed much of its persuasiveness to arguments about the social benefits of hearing all views expressed.

A. The equality principle in freedom of expression

As everyone knows, the 50's and 60s, the period which preceded *Virginia Pharmacy*, saw the momentous changes wrought by the Civil Rights Movement. It was a dramatic time. America was also embroiled in a war in Vietnam and a vigorous movement had arisen to protest it. The women's rights movement was beginning (once again) to make its political influence felt, this time not merely on the issue of suffrage for women but on issues of reproductive freedom, equal pay and freedom from sexual coercion and harassment. And again, in the course of both of these movements lives were lost (Kent State) and protestors often experienced violence from the opposition or official violence in the form of arrest. The social and legal consequences of these movements for equal justice were vivid and salient in the mid-70's.

Then, as now, many people associated the First Amendment with these movements and protests. Civil rights and the First Amendment went together. The Civil Rights Movement gave rise to several important First Amendment cases in which civil liberties claims intertwined with economic claims (such as jobs listings in the classified ads) or through commercial means of distribution (newspaper advertising). In many instances arguments for equal protection under the law seemed to merge seamlessly into arguments for protecting freedom of speech. Scholars argued that the First Amendment encompassed equal protection or "equal

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liberty” to speak. This work, and the cases which adopted this framework, would provide the rhetorical framework at the heart of the reasoning in *Sorrell*. One of the most eloquent advocates of this equal liberty argument was Professor Kenneth Karst.¹⁵²

Professor Kenneth Karst and others argued that the First Amendment necessarily contained an equal protection justification; that the principle of protection for freedom of expression must have at its core the notion that freedom of speech was only achieved if that freedom was shared by all.¹⁵³ “The principle of equality, when understood to mean equal liberty, is not just a peripheral support for the freedom of expression, but rather part of the ‘central meaning of the First Amendment’”¹⁵⁴ Karst wrote.

Like Professor Redish before him, Professor Karst constructed an impassioned argument for this equal liberty proposition, predicated on philosophical and political commitments to the importance of informed choice by citizens, the search for truth and “to permit each person to develop and exercise his or her capacities, thus promoting the sense of individual self worth.”¹⁵⁵ And he showed particular skepticism for what he called (after Professor Kalven) the “two-level” theory of speech, a theory in which some speech is deemed wholly outside the protection of the First Amendment.¹⁵⁶ This theory, he thought, was justifiably on its way out. Yet he observed that “[o]ne last area where an offspring of the two-level theory survived longer than it deserved

¹⁵² Kenneth L Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI L. REV. 20 (1975) (citing Harry Kalven, Jr. *Upon Rereading Mr. Justice Black on the First Amendment*, 14 U.C.L.A. L. REV. 428 (1967)).

¹⁵³ *Id.*

¹⁵⁴ Karst, *supra* note 152 at 21 (citing *New York Times v. Sullivan*, *infra* and Harry Kalven, Jr., *The New York Times Case: A Note on ‘The Central Meaning of the First Amendment*, 1964 SUP. CT. REV. 191 (1964)).

¹⁵⁵ Karst, *supra* note 152 at 23.

¹⁵⁶ *Id.* at 30-35. Another way of expressing this is as “low value” versus “high value” speech. See *supra* note 48

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is the area of advertising and ‘commercial speech.’”¹⁵⁷ “Just as the prohibition of government-imposed discrimination on the basis of race is central to equal protection analysis,” he claimed, “protection against governmental discrimination on the basis of speech content is central among first amendment values.”¹⁵⁸

It seems doubtful that when he wrote this Karst had the large multi-national corporation in mind because the commercial speech doctrine was not yet born. When Professor Karst wrote this article however the commercial speech doctrine itself was still a year away even though there had been, as noted above, a few rumblings about protection for commercial speech and he himself suggested that this “two-tiered approach” was of dubious constitutional validity with respect to commercial speech. So although he was eager to embrace full First Amendment protection for commercial speech, it seems unlikely that he intended to argue for the dismantling of a host of regulatory institutions that had been considered legitimate for decades. It seems even more doubtful that when he wrote these words he had any inkling that, many years later, this idea that the First Amendment encompassed commercial speech and that any regulation of commercial speech

¹⁵⁷ *Id.* at 33. He goes on in this vein, calling this area a “darkened corner of the first amendment until very recently.” *Id.* He then discusses several of the cases discussed in the next section, praising some as upholding this equality principle, and criticizing others as inconsistent with it. Yet what is clear from the nature of the cases is that not one of them raised the questions that are raised today under the banner of this equality principle – namely, whether marketing itself (not the particular product or message but *all* marketing) is a “viewpoint” such that governmental regulation can be said to offend content neutrality where it attempts to regulate it.

¹⁵⁸ *Id.* It very important to note that distinguished scholars have disputed this claim that content-neutrality has any place in First Amendment analysis of commercial speech. See Robert C. Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 42 n. 222 (2000-2001) (“[T]he distinction has virtually no application within the domain of commercial speech, where most regulation is content based.”)

failed the content neutrality requirement of “equal liberty,” and would become a justification for saying that the government may not exclude multi-national, global corporations like GE, ExxonMobil, Shell, Nike or Microsoft from participating in political advertising or that the First Amendment must shelter an array of marketing practices, regardless of their negative social consequences.

If it is hard to picture the large, multinational corporation as an oppressed minority in need of the protection of the counter-majoritarian power of the Court to counteract state-sanctioned discrimination it is likely that is probably because no one imagined it would come to that. Yet once the commercial speech doctrine was created this “equal liberty” strand of argument quickly served as a basis for arguments that a separate standard of review for commercial speech amounted to content discrimination.¹⁵⁹

Over time, these two streams of thought; (1) that commercial speech is valuable for consumers and should be protected on that basis and (2) that the first amendment encompasses an equal protection aspect that prohibits courts from distinguishing amongst speakers or types of speech, would (predictably) converge with a third legal principle – that of corporate personhood and corporations as holders of First Amendment rights to create the right of corporate political speech. It was perhaps especially inevitable that these streams would converge given the enormous resources devoted to making

¹⁵⁹ *Id.* at 29-35.

arguments in court and in law reviews that commercial speech deserved full First Amendment protection.¹⁶⁰

*B. Nondiscrimination and corporate political speech:
“Content” as a stand-in for speaker rights*

A mere two years after *Virginia Pharmacy* was decided the Court decided another, seemingly unrelated, case which shifted the Court’s focus to the interests of the speaker and set the course that culminated in *Sorrell – First National Bank of Boston v. Bellotti*.¹⁶¹ In that case the Court faced a challenge to a Massachusetts statute which prohibited corporations from spending money from their general treasuries to defeat or pass referenda unless the referendum was one that affected the corporation’s business.¹⁶² The State’s Attorney General, Francis Bellotti interpreted this provision to forbid corporations from participating in advertising on a referendum relating to personal property taxes.¹⁶³ The First National Bank of Boston disagreed and brought a declaratory judgment action seeking to have the statute declared unconstitutional.¹⁶⁴ The lower court had rejected the Bank’s claim and upheld the statute. The Supreme Court reversed.

Justice Powell, who only a few years before had been urging his friend Eugene Sydnor, Jr. at the U.S. Chamber of Commerce, to engage in a full-scale, broad ranging effort to

¹⁶⁰ See *supra* note 151. At present there is no way to say for sure which (if any) of these articles were subsidized by particular industries, underwritten by law firms, or commissioned in the manner described in the Exxon punitive damages example in note 94. But it seems unlikely that the number is zero. The record of amicus briefs in the various commercial speech cases which have come before the Court since 1976 speak for themselves. This is, however, the subject for a future article.

¹⁶¹ *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

¹⁶² *Bellotti*, 435 U.S. at 767-68.

¹⁶³ *Id.* at 769.

¹⁶⁴ *Id.* at 769-80.

rehabilitate the image of business,¹⁶⁵ wrote the opinion. Although the issue as framed by the parties and the lower court had been whether the corporate identity of the speaker was determinative of its First Amendment rights, this framing put the spotlight on the corporation itself, which was not conducive to applying the usual rhetoric about the need for self-expression as an attribute of human intellect since, obviously, a corporation is not a human being. Justice Powell nimbly sidestepped this difficulty however by reframing the question.

The court below framed the principal question in this case as whether and to what extent corporations have First Amendment rights. We believe that the court posed the wrong question. The Constitution often protects interests broader than those of the party seeking their vindication. The First Amendment, in particular, serves significant societal interests. *The proper question therefore is not whether corporations “have” First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether § 8 abridges expression that the First Amendment was meant to protect.* We hold that it does.¹⁶⁶

By redirecting the focus to the *content* of the speech Powell essentially ignored the issue as it had been presented. To propose that the question was whether political advertising *as a category* was protected by the First Amendment was to answer it: of course it was. But it meant that there would be no deeper examination of whether any of the expressive purposes of the First Amendment would be served by extending its protection to private, commercial institutions or whether these entities *needed* the protection of the

¹⁶⁵Powell Memorandum available at http://reclaimdemocracy.org/corporate_accountability/powell_memo_lewis.html

¹⁶⁶ *Bellotti*, at 775-76 (emphasis added).

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courts in order to make their views known. Instead, the Court framed the issue as one of public's right to *hear* all "viewpoints."

If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. *It is the type of speech indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual. The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.*¹⁶⁷

In this one paragraph (later to be repeated countless times, not only in subsequent political speech cases, but in future submissions to the Court and in some decisions issuing *from* the Court with respect to *commercial* speech) the Court laid the foundation for a shift to focusing on a speaker-centered analysis in the commercial speech doctrine.

The two-year old commercial speech doctrine did not support a reading that corporations' protected speech was limited to its "business interests," Powell wrote. To the contrary, that precedent, like the protection for political speech was grounded in the public interest. "A commercial advertisement is constitutionally protected *not so much because it pertains to the seller's business as because it furthers the societal interest in the 'free flow of commercial information.'*"¹⁶⁸ This statement expressly eschewed locating protection for commercial speech or the new protection for corporate political speech in the rights or need of *the speaker*. Yet, at the same time the first quote conjures up notions of equality, identity, antidiscrimination and balance, to frame the case as an issue of civil rights, of viewpoint discrimination. *Bellotti*

¹⁶⁷ *Bellotti*, 435 U.S. at 776-77 (emphasis added).

¹⁶⁸ *Id.* at 783 (footnotes omitted) (emphasis added).

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read as if corporations could be said to have a “viewpoint” that would be systematically suppressed unless the Court came to their rescue.

If a legislature may direct business corporations to “stick to business,” it also may limit other corporations-religious, charitable, or civic-to their respective “business” when addressing the public. *Such power in government to channel the expression of views is unacceptable under the First Amendment.* Especially where, as here, the legislature's suppression of speech suggests an attempt to give *one side* of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended.¹⁶⁹

The opinion skillfully drew together various strands of First Amendment jurisprudence, the long standing principle that corporations were “persons” for purposes of the Constitution¹⁷⁰

¹⁶⁹ *Id.* at 785-86 (footnotes omitted). Again, because the Court was avoiding answering the question of just what was the constitutional status of corporations for purposes of the First Amendment, it could elide the issue of whether there was a difference between for-profit and not-for-profit corporations for purposes of the protection of speech. Had the analysis focused on the purposes of these disparate types of corporations there may have been a basis for making a distinction between these types of organizations. And indeed more than a decade later the Court did draw a distinction between the status of for-profit and not-for-profit organization, holding that the government could more readily regulate the political speech of the former rather than the latter. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990). *Austin* was of course the case that the *Citizens United* decision overturned.

¹⁷⁰ *Bellotti*, 435 U.S. at 780 n. 15 (“It has been settled for almost a century that corporations are persons within the meaning of the Fourteenth Amendment. *Santa Clara County v. Southern Pacific R. Co.*, 118 U.S. 394, 6 S. Ct. 1132, 30 L.Ed. 118 (1886)”). What this footnote neglected to mention was that this decision had not resolved the issue of whether corporations’ rights under that Amendment were *exactly* the same as human beings’ rights. That issue hadn’t been decided in the *Santa Clara* case and, in fact, subsequent decisions made clear that they were not completely parallel. *Northwestern Nat. Life Ins. Co. v.*

and the newly minted commercial speech doctrine to conclude that a rule that excluded speech based on the identity of the speaker was inherently illegitimate and discriminatory. In so doing it made this decision seem like the natural and inevitable outgrowth of the Court's jurisprudence rather than a fairly bold departure from it. This move shifted the balance of power over to speakers with an assumption that simply because a commercial entity claimed it had something to say, it was necessarily in the public interest that have unfettered right to do so.

Once again, Justice Rehnquist was not persuaded. "The question presented today," he wrote, "whether business corporations have a constitutionally protected liberty to engage in political activities, *has never been squarely addressed by any previous decision of this Court.*"¹⁷¹ Moreover, "[u]ntil recently, it was not thought that any person, natural or artificial, had any protected right to engage in commercial speech."¹⁷² And although "the Court has never explicitly recognized a corporation's right of commercial speech, such a right might be considered necessarily incidental to the business of a commercial enterprise."¹⁷³ Not so the right to engage in political activities. "It cannot be so readily concluded that the right of political expression is equally necessary to carry out the functions of a corporation *organized for commercial purposes.*"¹⁷⁴ The various states, Rehnquist observed, promulgate the laws under which corporations, of all types, are organized and those laws both define the organizational purposes

Riggs, 203 U.S. 243 (1906) (protection for "liberty" under Fourteenth Amendment is limited to "natural, not artificial persons."). Thus, the degree of First Amendment protection artificial persons like corporations would receive was precisely the question presented and precisely the one the majority refused to answer. This footnote also made no mention of the somewhat controversial manner in which the *Santa Clara* Court "settled" this question – "with neither argument nor discussion." *Bellotti*, 435 U.S. at 832 (Rehnquist, J. dissenting).

¹⁷¹ *Bellotti*, 435 U.S. at 821-22 (footnotes omitted) (emphasis added).

¹⁷² *Id.* at 825 (emphasis added).

¹⁷³ *Id.*

¹⁷⁴ *Id.* (emphasis added).

and provide a number of privileges which are intended to facilitate those purposes, among which are perpetual life and limited liability.

However, he noted that: “*It might be reasonably concluded that those properties, so beneficial in the economic sphere, pose special dangers in the political sphere. Furthermore, it might be argued that liberties of political expression are not at all necessary to effectuate the purposes for which the States permit commercial corporations to exist.*”¹⁷⁵ “Indeed, the States might reasonably fear that the corporation would use its economic power to obtain further benefits beyond those already bestowed.”¹⁷⁶ Chief Justice Rehnquist’s reservations seem, from today’s vantage point, extremely well founded.

VI. The incoherence and dangers of *Sorrell*

As Chief Justice Rehnquist predicted, it has been hard for the Court to maintain those “common sense” distinctions between commercial speech and other protected speech. And to the extent that *Bellotti* was interpreted by some to mean that different treatment for corporations or commercial entities violated the First Amendment, the notion that the commercial speech doctrine’s intermediate scrutiny standard was in some way “discriminatory” became a persuasive argument that industry would regularly use to argue that any attempted regulation of commercial speech, or indeed liability for false statements, represented unconstitutional discrimination.

It has apparently been a compelling argument to many of the Justices. The last part of the twentieth century and the beginning of this have seen “a paradigm shift... in which the focus has moved from consumer protection to speaker protection.”¹⁷⁷

¹⁷⁵ *Id.* at 825-26.

¹⁷⁶ *Id.*

¹⁷⁷ Smolla, *Free the Fortune 500!: The Debate Over Corporate Speech and the First Amendment*, 54 CASE WEST. RES. U. L. REV. 1277, 1295-96 (2004).

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The rhetoric in the *Virginia Pharmacy* was “wrapped up in notions of informed consumer choice and social utility. The case was not speaker-based but recipient based.”¹⁷⁸ Beginning somewhere in the 1990s,¹⁷⁹ “the emphasis seemed to change, with greater attention paid to the rights of the commercial speaker.”¹⁸⁰

Justice Rehnquist’s reservations about these new avenues of constitutional protection that the Court had opened up reflect a conservative approach in what is the older sense of the word, that is, a cautious approach to change, an unwillingness to abandon the received wisdom of the past in favor of an untested formulation. His stance on both the commercial speech doctrine as articulated in his dissents to *Virginia Pharmacy* and *Central Hudson*, and then in his dissent to the corporate speech protection extended in *Bellotti*, also reflected his commitment to a vision of federalism and separation of powers that counseled deference to legislative decisions, especially when they reflected “such a broad consensus...over a period of many decades” as was the case with the restrictions on corporate political speech in *Bellotti*.

One thing is clear: the commercial speech has undergone significant revision in the course of the ensuing four decades since it was announced. And its justifications today seem very far away from those that originally were offered to support the inclusion of some protection for commercial speech under the First Amendment. And the content neutrality trope that Justice Kennedy adopts pretends to a comprehensiveness that is not found in the actual law. As Professor Jack Balkin has pointed out, “the ideal of eliminating content based regulation was never realized in practice.”¹⁸¹ “Despite the constitutionalization of defamation and privacy law begun with *New York Times v. Sullivan*, many

¹⁷⁸ *Id.* at 1296.

¹⁷⁹ Probably the case that signaled the shift was *City of Cincinnati v. Discovery Network*, 507 U.S. 410 (1993) discussed earlier.

¹⁸⁰ Smolla, *supra* note 177 at 1296.

¹⁸¹ J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L. J. 1, 22 (1990).

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common law rules of libel and slander, which were directly concerned with content, remained intact...And this is to say nothing of the well-known examples of fraud, perjury, and professional malpractice, *which have never been considered 'speech' for purposes of the first amendment.*"¹⁸²

Even as he uses a content neutrality test that is particularly solicitous of speakers' freedom, Justice Kennedy nevertheless continues to justify protection for commercial speech as one that protects listeners' interests. Content-based restrictions cannot be upheld, he writes, on the grounds that people might make bad decisions with that information. "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."¹⁸³

But the listener benefit Kennedy proposes is one that is anchored more in theory than in the facts of the case. Doctors lobbied for this law. To be sure some doctors find detailing visits from reps who know their prescriptions practices to be helpful;¹⁸⁴ but the Vermont law permitted physicians who felt this way to opt-into information sharing. It did not in any way prevent those doctors from having the benefit of this "information" while permitting those who did object to the practice to prohibit the sale of their private information. To those physicians who might protest that they did not *want* to receive this information, and in fact

¹⁸² *Id.* (footnote and citations omitted) (emphasis added) *See also* Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765 (2004); Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 270-71 (1981).

¹⁸³ *Sorrell v. IMS Health*, ___ U.S. ___ 131 U.S. 2653, 2671 (2011) (quoting *44 Liquormart*, 517 U.S. at 503.).

¹⁸⁴ *See supra* note 13 describing a survey which found that a majority of doctors find visits from drug reps "very" or "somewhat" helpful. It is not clear however whether survey respondents meant to include access to the doctor's prescribing information as part of what they found made the reps visits helpful.

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wanted to marshal the power of the state to protect them from having their private information be used against them in ways that they believed might compromise their professional judgment, Justice Kennedy responded: “Many are those who must endure speech they do not like, *but that is a necessary cost of freedom.*”¹⁸⁵

This is rather grand language to use about protecting the ability of pharmaceutical representatives to engage in the “hard sell.” Nothing in the original *Virginia Pharmacy* opinion suggested that the Court intended to expand the First Amendment so dramatically. In fact the Court has repeatedly ignored invitations in cases like *Nike v. Kasky*¹⁸⁶ to abolish commercial speech’s “subordinate” position – and with good reason. It is difficult to say how many laws would be implicated by such a radical recalibrating of the balance between the First Amendment and the Commerce Clause.

What is most at risk is the government’s ability to regulate fraud¹⁸⁷ because the strict scrutiny standard of review is often said to “strict in theory, but fatal in fact.”¹⁸⁸ The *Nike* case illustrates this difficulty. It involved a lawsuit against Nike brought by a consumer activist, Kasky, who claimed that many of the public statements Nike made about its labor practices were false and alleging that these false statements constituted a violation of California’s false advertising and unfair trade practices laws, fraud and deceit. Nike filed a demurrer (motion to dismiss) arguing that all of the statements were made in forums which were traditionally considered protected by the First Amendment, such as letters to the editor or issue ads. The lower courts agreed but the California

¹⁸⁵ *Id.* at 2669 (emphasis added).

¹⁸⁶ 539 U.S. 654 (2003).

¹⁸⁷ For a fuller treatment of this issue see Tamara R. Piety, *Grounding Nike: Exposing Nike’s Quest for A Constitutional Right to Lie*, 78 TEMPLE L. REV. 151 (2005).

¹⁸⁸ Gerald Gunther, *The Supreme Court, 1971 Term – Foreword: in Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

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Supreme Court disagreed, finding that at least some of Nike's speech might be considered commercial speech and thus only protected if it were truthful.¹⁸⁹ Nike appealed this ruling to the Supreme Court arguing that the standard which should apply was the strict scrutiny standard of *New York Times v. Sullivan*. The Court heard argument but ultimately dismissed the case on the grounds that cert had been improvidently granted. Yet the concurring and dissenting opinions to the dismissal suggested that there was some sympathy on the Court to Nike's argument. But would we really want *New York Times v. Sullivan*'s "breathing room" for false statements to be the standard against which we measure claims of commercial fraud?

Strict scrutiny may not justify a motion to dismiss but it will often support a motion for summary judgment. And although recent research suggests that the "fatal in fact" aphorism is somewhat exaggerated,¹⁹⁰ it is still the case that strict scrutiny review would be distinctly *more* fatal to the regulation of commercial speech than the rational basis review that normally is applied to the regulation of commerce. "Although Gunther's famous adage arose in the context of equal protection, strict scrutiny is actually *most fatal* in the area of free speech, where the survival rate is 22 percent, *lower than in any other right*."¹⁹¹

This feature of strict scrutiny ought to be a matter of grave concern. Much of the work of the Federal Trade Commission, the

¹⁸⁹ *Kasky v. Nike, Inc.*, 45 P.3d 243 (Cal. 2002).

¹⁹⁰ See Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793 (2006).

¹⁹¹ *Id.* at 844 (emphasis added). It is also important to note that while Winkler broke down the category of the First Amendment into several separate categories, commercial speech was not one of them. Moreover, given the subsequent decisions of the Court, in *Citizens United* and *Sorrell* in particular, it is unclear how predictive this analysis would be for future cases. Although it is theoretically possible that the Court's expansive grant of protection to commercial speech will inspire courts to interpret it in a manner that preserves more of the status quo, I am not terribly sanguine about that prospect.

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Securities and Exchange Commission and countless other governmental agencies is predicated on the government's ability to pursue and punish not only fraud, but statements which may be misleading or to require various disclosures in order to conduct certain businesses. After *Sorrell* many of these laws will be challenged.

But the agency most clearly in the cross-hairs of industry assault is the Food and Drug Administration. The Food and Drug Administration prohibits pharmaceutical sales reps from marketing drugs which have been approved by the agency for one purpose for use in another unapproved, "off-label" use.¹⁹² Numerous drug companies have paid millions, if not billions, of dollars in fines for off-label use marketing violations.¹⁹³ Predictably they have argued that the First Amendment protects their right to promote these drugs for a purpose for which they have not been prescribed.¹⁹⁴ After *Sorrell* the off-label use marketing prohibition may be endangered.

The potential harms arising from the aggressive promotion of new drugs which have not been thoroughly tested should be

¹⁹² Food, Drug & Cosmetic Act, 21 U.S.C.A. §§ 331 (a). For a discussion of one of the recent cases see Natasha Singer, *Maker of Botox Settles Inquiry*, N.Y. TIMES (Sept. 1, 2010) A1

¹⁹³ Gardiner Harris, *Pfizer Pays \$2.3 Billion to Settle Marketing Case*, N.Y. TIMES (Sep. 3, 2009).

¹⁹⁴ See, e.g., Editorial, *FDA's Off-label Rule Under Attack*, L.A. TIMES (Nov. 7, 2011) ("Some drug makers are arguing in court that the FDA's marketing limits violate their 1st Amendment rights"). Not surprisingly there are several law review articles which urge that the prohibition on off-label use marketing is unconstitutional. See Lora E. Barnhart Driscolla, *Citizens United v. Central Hudson: A Rationale for Simplifying and Clarifying the First Amendment's Protection for Nonpolitical Advertising*, 19 GEO. MASON L REV. 213 (2011); Kristie LaSalle, *A Prescription for Change: Citizens United's Implications for Regulation of Off-Label Promotion of Prescription Pharmaceuticals*, 19 J. L. & POL'Y 867 (2011); John E. Osborn, *Can I Tell You the Truth? A Comparative Perspective on Regulating Off-Label Scientific and Medical Information*, 10 YALE J. HEALTH POL'Y, L. & ETHICS 299 (2010).

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apparent from the Vioxx debacle in which thousands of people died from adverse cardiac impacts of the drug.¹⁹⁵ In fact, the issues with Vioxx only fully emerged after the drug had been approved through what are known as “seeding trials.” Seeding trials are designed to look like clinical studies but they are in fact orchestrated by the marketing department – not the research arm – of the company. They are intended to get key doctors, those identified as “opinion leaders,” to prescribe the drug and recommend it to others.¹⁹⁶ In addition, in some cases academics have allowed their names to be used on articles “ghostwritten” by drug company employees and have not disclosed this fact.¹⁹⁷ Would *Sorrell* implicate the FDA’s ability to regulate that practice? Yet another example is the FDA’s recent rules regulating cigarette packaging. They have already been successfully attacked on the grounds that the regulations violate the tobacco companies’ freedom of expression.¹⁹⁸ And these are just a few examples in one area of regulatory authority – the FDA.¹⁹⁹ What of the FTC? The SEC? The EPA?

¹⁹⁵ See, e.g., ANGELL, *supra* note 39, at 265-78 (describing the Vioxx and COX-2 inhibitors scandal); Jost, *supra* note 14, at 325.

¹⁹⁶ Kevin Hill, MD, MHS, Joseph S. Ross, MD, MHS, David S. Egilman, MD, MPH; and Harlan M. Krumholz, MS, SM, *The ADVANTAGE Seeding Trial: A Review of Internal Documents*, 149 ANNALS OF INTERNAL MEDICINE 251 (Aug. 2008).

¹⁹⁷ Joseph S. Ross, MD, MHS, Kevin P. Hill, MD, MPH, David S. Egilman, MD, MPH, Harlan, Krumholz, MD, SM, *Guest Authorship and Ghostwriting in Publications Relating to Rofecoxib*, 299 JAMA 1800 (Aug. 16, 2008).

¹⁹⁸ *R.J. Reynolds v. U.S. Food and Drug Admin.*, ___ F. Supp. 2d ___, 2011 WL 5307391 (D. D.C. 2011) (reviewing the law under strict scrutiny and finding it unconstitutional). See also *Commonwealth Brands v. U.S.*, 678 F. Supp.2d 512 (W.D.Ky 2010) (declining to apply strict scrutiny but nevertheless finding portions of the law unconstitutional).

¹⁹⁹ For more examples see Christopher T. Robertson, *The Money Blind: How to Stop Industry Bias in Biomedical Science, Without Violating the First Amendment*, 37 AM. J. L. & MED. 358 (2011); David S. Egilman, Susanna Rankin Bohme, *Corporate Corruption of Science*, 11 INT. J. OCCUP. ENVIRONMENTAL HEALTH 331 (2005).

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In his dissent Justice Breyer asserted that the majority's reasoning in *Sorrell* "reawakens *Lochner*'s pre-New Deal threat of substituting judicial for democratic decision-making where ordinary economic regulation is at issue."²⁰⁰ How *Lochner*-esque *Sorrell* is as a matter of doctrine I leave to others,²⁰¹ but it is obviously substantially more difficult to regulate commerce if you cannot regulate commercial speech. Apparently as a retort to Justice Breyer's observation, Justice Kennedy invoked Justice Holmes' famous *Lochner* dissent and observed that while the Constitution "does not enact Mr. Herbert Spencer's Social Statics'...[i]t *does* enact the First Amendment."²⁰²

The irony here, of course, is that the Constitution also enacts the Commerce Clause. And the justification originally offered for giving *any* First Amendment protection to commercial speech was the protection of a "free enterprise economy," an observation which prompted Justice Rehnquist to protest that the Constitution also did not enact the philosophy of Adam Smith. Justice Kennedy apparently believes that it did under the guise of the First Amendment. It would be difficult to conceive of a clearer declaration of supremacy in the struggle between the First Amendment and the Commerce Clause. Yet it seems unlikely that the First Amendment was intended to undo the Commerce Clause.

²⁰⁰ *Sorrell*, 131 S.Ct. at 2685 (Breyer, J. dissenting).

²⁰¹ The correct constitutional interpretation of *Lochner* is beyond the scope of this piece. Suffice it to say that Breyer's use of *Lochner* suggests that he believes it is presumptively illegitimate, or as Balkin might say – part of the "anti-canon" in constitutional law. See Balkin, "*Wrong the Day It Was Decided*," *supra* note 11. That Justice Kennedy's opinion doesn't really challenge that claim to anti-canonical status but rather offers something like a "so what?" could be argued as evidence of Balkin's theory that *Lochner*'s status as anti-canon is sufficiently in dispute that Kennedy feels free to disregard it. On the other hand, one could read his failure to defend *Lochner* more forcefully (along the revisionist line Balkin discusses) as confirmation of its continued anti-canonical status.

²⁰² *Sorrell v. IMS Health, Inc.*, ___ U.S. ___, 131 S.Ct. 2653, 2665 (quoting *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J. dissenting) (emphasis added)).

Conclusion

For now, we know how this story ends. By the year 2010 the commercial speech doctrine had evolved into a test that was strict scrutiny in all but name, although the Court continued to recognize a distinction between commercial and non-commercial speech. Then came *Citizens United* and its muscular version of corporate personhood which, given the interpenetration of the commercial and corporate political speech doctrines, made it seem like just a matter of time before the Court imported that very robust, speaker-centric vision into the commercial speech doctrine. It only took a year.

Yet *Sorrell* is, in many ways if not a *more* dangerous opinion for democracy, at least equally dangerous. In *Sorrell* the Court took a doctrine that was conceived of as a species of consumer protection which was justified as furthering the *public* interest and turned it into a weapon against an effort to protect consumers and protect the public health, safety and welfare and ensure efficient use of taxpayers' money with respect to the cost of prescription drugs. It took a doctrine which was supposed to give the listeners *more* autonomy and freedom to make their own decisions and used it to deny those listeners, in this case doctors who were the objects of the pharmaceutical company sales pitches, the ability to control who had access to their private decisions made between themselves and their patients.

And because it did all this without explicitly overruling *Central Hudson* or acknowledging that it was announcing a new standard by which to evaluate commercial speech, it rendered the commercial speech doctrine incoherent and sowed further confusion about what the appropriate test is. Armed with this new (and inherently contradictory) "content neutrality" inquiry, the Supreme Court is in a position to pick and choose those parts of

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the regulation of commerce which are brought to it and with which its majority disagrees.

It is too soon to say what the Court will do with these new powers that it has appropriated for itself, to subject economic regulation to substantive rather than deferential review. But it seems safe to say that if these last two Terms offer any hints, its exercise of this review power is not likely to be “conservative” in the traditional sense.

The rhetoric of content neutrality and equal rights for corporate speakers obscures that the entities and interests being protected here are some of the world’s most powerful institutions, institutions with enormous, some would say excessive influence in the legislative process to obtain favorable laws. They do not need to marshal the counter-majoritarian power of the courts to preserve their rights against an oppressive minority in the electorate. Nor are they human beings with inherent political rights. Rather they are creatures of law meant to *serve* the public interest, not to dominate it. To argue that selling toothpaste is of the same significance as political protest and to put commercial speakers on a par those engaging in lunch counter sit-ins is to trivialize the whole notion of civil rights. The Commerce Clause arguably points to the legitimacy of subordinating commercial expression to other sorts of expression. False or misleading commercial speech is a grave danger to the public and distorts proper market function. Not only is it *not* a “necessary cost of freedom” to offer full First Amendment protection to commercial speech, it may be a necessary cost of freedom to keep it in check.