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# The Pandora's Box of 21st Century Commercial Speech Doctrine: Sorrell, R.A.V., and Purposed-Contained Scrutiny

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21st Century Commercial  
Speech Doctrine:  
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Constrained Scrutiny

Marc Jonathan Blitz\*

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*The Supreme Court’s decision in Sorrell v. IMS Health is, at first blush, somewhat puzzling: It struck down a Vermont statute that regulated drug marketing. The statute, it said, ran afoul of the First Amendment when it burdened commercial speech on the basis of its content (drug marketing). But one of the Supreme Court’s seminal commercial speech cases – Central Hudson Gas v. Public Service Commission of New York – had already made clear that, while “in most other contexts, the First Amendment prohibits regulation based on the content of the message,” certain features of commercial speech*

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*make it constitutionally acceptable to “permit regulation of its content.” What then made Vermont’s law regarding drug marketing’s content impermissible? In the view of the dissent, and some scholars, the Sorrell majority had no good answer to this question. It was inexplicably deviating from a large body of First Amendment case law that gave legislators significant deference in their choice of which industries to regulate and which commercial activity to focus upon. This article argues that rather than deviating from precedent, the Court was struggling to explain how commercial speech doctrine can be squared with key principles of First Amendment jurisprudence set forth in the 1992 case of *R.A.V. v. St. Paul*, which made clear that even where content-based regulation is permissible, it is only permissible for limited reasons.*

### I. Introduction

The World Wide Web gives consumers access to an unprecedented store of information. In the digital era, a person deciding on a purchase can compare different products from the comfort of her own home, and rapidly locate reviews from experts and previous purchasers. But this informational utopia comes with a price: It not only gives the consumer a window on the world—it gives advertisers a window into her thoughts and interests. As she quickly surfs the Web from one item to another, programs designed to track her interests can often surf with her – building a record of her online behavior that can be used to aid “online behavioral marketing” efforts.

There have been calls from privacy advocates to regulate online tracking – and Congress<sup>1</sup> and the Federal Trade Commission<sup>2</sup> have considered the need for such regulation. But such tracking is not simply a matter of policy, it may be a matter of First Amendment law. To what extent does the Constitution’s freedom of speech protection not only allow for debate about politics, but also allow for collection and exchange of data about commercial behavior? To answer this question, scholars and lawyers have to understand the Supreme Court’s most recent and significant case on that issue – the 2011 case of *Sorrell v. IMS Health, Inc.*<sup>3</sup> This was a case that gave unprecedented constitutional protection to data-driven marketing efforts, but raised an interesting constitutional law puzzle in doing so. This essay aims to explain and resolve this puzzle, so that – as advertisers gain greater access to stores of commercial data – it is clearer when and how government may regulate their access to, and use of this data, consistent with the First Amendment.

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1. See Grant Goss, *Privacy Groups Support New Do-not-track Bill*, PC WORLD, May 9, 2011, available at <http://www.pcworld.com/article/227462/article.html>; Dara Kerr, *Do No Track Privacy Bill Reintroduced in Senate*, CNET, Feb. 28, 2013, available at <http://www.cnet.com/news/do-not-track-privacy-bill-reintroduced-in-senate/>

2. See Federal Trade Commission, *FTC Staff Proposed Online Behavioral Advertising Principles*, available at <http://www.ftc.gov/news-events/press-releases/2007/12/ftc-staff-proposes-online-behavioral-advertising-privacy>.

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

First, a brief description of how and why *Sorrell* protected marketers' access to, and use of, data. Along with two other New England states, Vermont worried that pharmaceutical companies were persuading doctors to prescribe expensive brand name drugs where generic alternatives would be just as good (and also keep health costs down).<sup>4</sup> One of the key culprits, in the view of Vermont's state legislators, was the aggressive marketing that occurred in a process called "detailing." Drug companies would send company representatives to the offices of individual doctors to give them a carefully prepared marketing talk.<sup>5</sup> Advertisers, like all who are in the business of persuasion, try to learn about their audiences' needs and interests before they talk to them. This is precisely what drug companies did: To prepare themselves for their representatives' meetings with doctors, they purchased profiles of each physicians' prescribing history from a data broker – profiles which that data broker had constructed from prescription records supplied by pharmacies.<sup>6</sup> To blunt the perceived ill effects of this strategy, Vermont enacted laws that barred the use of such data in drug marketing.<sup>7</sup> The drug companies, however, claimed such restriction of their marketing violated the First Amendment, and – in *Sorrell v. IMS Health, Inc.* – the Supreme Court agreed.<sup>8</sup>

In the Court's view, Vermont had committed a cardinal First Amendment sin.<sup>9</sup> The pharmaceutical companies, after all, were not the only ones who might offer views about the advantages and disadvantages of prescribing a particular drug rather than an alternative. Medical researchers might offer an opinion on this issue. So might public policy specialists, think tanks, or newspaper reporters. Why, asked the Court, of all of these potential contributors to debates about best practices in drug prescription, were the drug companies – and only the drug companies – kept in the dark about physicians' prescription histories?<sup>10</sup> Why were the drug companies barred from seeing records available to

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4. See Natasha Singer, *A Fight Over How Drugs Are Pitched*, NY TIMES (Apr. 24, 2011), <http://www.nytimes.com/2011/04/25/business/25privacy.html?pagewanted=all>.

5. See Carl Elliott, *The Drug Pushers*, THE ATLANTIC, (Apr. 1, 2006), <http://www.theatlantic.com/magazine/archive/2006/04/the-drug-pushers/304714/> ("To 'detail' a doctor is to give that doctor information about a company's new drugs, with the aim of persuading the doctor to prescribe them."); see also *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2656 (2011) ("Pharmaceutical manufacturers promote their drugs to doctors through a process called 'detailing' . . . 'Detailers' employed by pharmaceutical manufacturers then use the reports to refine their marketing tactics and increase sales to doctors.").

6. See Singer *supra* note 2.

7. *Id.*; *Sorrell*, 131 S. Ct. at 2656.

8. *Id.* at 2659.

9. See *id.* at 2653, 2663, 2673 ("On its face, Vermont's law enacts content- and speaker-based restrictions" and that selective burdening of disfavored speech it "cannot do" under the First Amendment.").

10. *Id.* at 2653. The Court noted that Vermont had "at oral argument . . . for the first time advanced" an argument that Vermont's ban applied not just to pharmaceutical marketers but all entities not expressly permitted by the law to receive prescriber-information. *Id.* at 2662. However, the Court noted that, even under this interpretation of the law, "the information may be used by a wide range of [] speakers" other than the drug companies and that, given that drug companies are "the only paying customers" excluded from receiving the data, "Vermont's law [] has the effect of preventing detailers – and only detailers – from communicating with physicians in an effective and informative manner." *Id.* at 2663.

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everyone else? In short, said Justice Kennedy, Vermont may have had authority to enact data privacy laws that protected the confidentiality of prescription information. But under the First Amendment, it was not permitted to craft such data privacy policies in a way that discriminated against “disfavored speakers.”<sup>11</sup> Even in the commercial sphere, declared the Court, “the State may not burden the speech of others in order to tilt public debate in a preferred direction.”<sup>12</sup> It may not “engage in content-based discrimination to advance its own side of a debate.”<sup>13</sup>

This was the Court’s position and it was, in some respects, a puzzling one. Why should it be constitutionally impermissible for a state legislature, worried about the effects of drug marketing, to focus its consumer protection efforts on such marketing? Indeed, far from being a First Amendment sin, such a focus on a particular industry has often been treated by courts as unproblematic. As the dissent stressed, industry-specific commercial speech restrictions are legion in the modern administrative state. Sometimes the specificity follows from the limits on a government agency’s jurisdiction. “Electricity regulators, for example, oversee company statements, pronouncements and proposals, but only about electricity . . . the FDA regulates the form and content of labeling, advertising, and sales proposals of drugs, but not of furniture.”<sup>14</sup>

Nor is it uncommon for agencies regulating advertising about a product to do so even if they lack the authority to restrict *other* speech about that product – such as criticism of the product by bloggers, journalists, or critical consumers. Cosmetics companies, as the dissent noted, may be – and sometimes are – required by Federal Trade Commission (FTC) to refrain from making claims about their products that are not yet substantiated by “backup testing.”<sup>15</sup> And the FTC imposes this backup-testing requirement on cosmetics companies, even though it may not (under First Amendment law) require similar scientific evidence from “opponents of cosmetics use.”<sup>16</sup> If the FTC and state consumer agencies do not violate the First Amendment when they focus their speech regulations on particular industries and actors, what was different – and worse – about Vermont’s decision to focus on drug marketers?

For some, this puzzle in *Sorrell* shows the case was wrongly decided. Tamara Piety, for example, is incredulous about the Court’s insistence that Vermont’s regulation could restrict marketing of brand name drugs only if it similarly restricted *all other speech* about these drugs– including that of non-commercial actors such as academics and public interest groups.<sup>17</sup> Such a non-discrimination principle, she argues, “makes a hash of

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11. *Sorrell*, 131 S. Ct. at 2653.

12. *Id.* at 2671.

13. *Id.* at 2672.

14. *Id.* at 2677 (Breyer, J., dissenting).

15. *Id.* at 2678 (Breyer, J., dissenting).

16. *Sorrell*, 131 S. Ct. at 2678 (Breyer, J., dissenting).

17. Tamara Piety, “A Necessary Cost of Freedom?:” *The Incoherence of Sorrell v. IMS Health*, 64 ALA. L. REV. 1, 14-15 (2012).

[ ] commercial speech doctrine,” which is necessarily about (and allows some room for) regulations that focus on specific commercial speakers and their advertising. Justice Breyer’s dissent likewise found the majority’s argument to be deeply at odds with long-standing commercial speech doctrine: this doctrine has long permitted regulators to impose restrictions that are “content-based” or “speaker-based.”<sup>18</sup> The Court’s move to place strict limits on regulators’ capacity to target certain advertising or advertisers, would, he wrote, set it on “an unprecedented” path that would pose great dangers to the ordinary workings of the modern administrative state.<sup>19</sup>

But there is another way to understand this puzzle in *Sorrell*. The dissent accused the majority of “opening up a Pandora’s box of First Amendment challenges to many ordinary regulatory practices.”<sup>20</sup> In this essay however, I argue that the *Sorrell* majority is best seen as struggling with a Pandora’s box that the Court had already opened long before *Sorrell*—a set of challenges created as it built a commercial speech framework that was in certain key respects deeply at odds with the larger First Amendment jurisprudence of which it was a part.<sup>21</sup>

In this larger First Amendment universe, the paradigmatic threat to free speech is official action that aims to silence, or weaken the voice of, particular speakers, or blunt the force of particular messages.<sup>22</sup> In fact, even where speech is normally *unprotected*—as is defamation, incitement, threat of violence, or obscenity—the government may only restrict such speech because of the harm it causes, not the message it carries. “The government may proscribe libel,” for example, “but it may not [then] proscribe *only* libel critical of the government.”<sup>23</sup> It may regulate obscenity, but may not prohibit “only those legally obscene works that contain criticism of city government.”<sup>24</sup> In short, the Court made clear in *R.A.V. v. St. Paul*, even such “low value” speech categories may “not be made the vehicles of content-discrimination *unrelated*” to the harm that justifies denying such speech under the normal, robust protection of the First Amendment.<sup>25</sup> Where libel is restricted by government, it should be because of the reputational harm caused by its false content, not because the government dislikes its political slant, or the speaker’s cultural identity.

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18. *Sorrell*, 131 S. Ct. at 2678 (Breyer, J., dissenting).

19. *Id.* (Breyer, J., dissenting).

20. *Id.* at 2685 (Breyer, J., dissenting).

21. Other writers have noted this tension between commercial speech doctrine and First Amendment law. See, e.g., Nat Stern and Mark Joseph Stern, *Advancing An Adaptive Standard of Strict Scrutiny for Content-Based Commercial Speech Regulation*, 47 U. RICH. L. REV. 1171, 1172 (2013) (arguing for a shift in commercial speech doctrine which brings it into line with “broader principles of expression”).

22. See *Simon and Schuster, Inc. v. Members of New York State Crime Victims Board*, 502 U.S. 105, 116 (1991) (noting that the rule against burdening speech on the basis of its content is “engrained in our First Amendment jurisprudence”); *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992) (“The First Amendment generally prevents government from proscribing speech,” or even expressive conduct, on the basis of its viewpoint.).

23. *R.A.V.*, 505 U.S. at 385.

24. *Id.*

25. *Id.* (emphasis added).

But commercial speech doctrine is in tension with this core First Amendment principle. In commercial speech, as the dissent in *Sorrell* points out, the content- and view-point-discrimination that is out of place elsewhere in First Amendment law, is common and widely-permitted.<sup>26</sup> The strangeness of the *Sorrell* decision, I argue here, arises from the majority's attempt to begin merging commercial speech doctrine back into the larger First Amendment universe. *R.A.V. v. St. Paul*, after all, did not exempt commercial speech from its command. Just as the government was forbidden from using obscenity law or libel law as a pretext for attacking views it disliked – said the Court in *R.A.V.* – so it could not use advertising regulation in this way. Ads could only be regulated because of the risk of fraud or other commercial harm they threatened, not because of the views they expressed.<sup>27</sup> The Court's key interest in *Sorrell* was to assure that this principle had force in commercial speech doctrine, even if it had not had much sway there before.

This essay seeks to better explain *Sorrell* in these terms. Part I begins by briefly elaborating on the dispute between the *Sorrell* majority and the dissent – with the help of two analogies. Part II then looks more closely at how this war of analogies might be resolved by examining commercial speech doctrine, its place in (and tension with) First Amendment jurisprudence, and the way that the Court's 1992 decision in *R.A.V. v. St. Paul* helped to highlight this tension – and the need for resolving it. Part III then examines how the Court attempted to apply *R.A.V.* in *Sorrell*. Finally, Part IV very briefly looks at another issue considered in *Sorrell* – the question of whether and when data is speech – and asks how this issue fits into *Sorrell's* larger attempt to merge commercial speech doctrine back into the larger framework of First Amendment law.

## II. Two Analogies

Like the characters in Akira Kurosawa's movie, *Rashomon*, who give contradictory accounts of a crime they have witnessed,<sup>28</sup> the majority and dissent in *Sorrell* were, as I have noted above, starkly at odds over where to locate Vermont's data privacy regulations in the realm of First Amendment jurisprudence. For Justice Kennedy, Vermont's selective targeting of certain speakers and messages threatened interests at the core of the First Amendment, and deserved skepticism and tough scrutiny from courts.<sup>29</sup> For Justice Breyer, Vermont's law was a regulation of commercial conduct that only incident-

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

27. *R.A.V.*, 505 U.S. at 388.

28. See Akira Kurosawa, *Rashomon* (Kadokawa Pictures 1950); Anthony Fassano, *The Rashomon Effect, Jury Instructions and Peremptory Challenges: Rethinking Hernandez v. New York*, 41 RUTGERS L. J. 783, 811 (2010) ("The Rashomon Effect has come to refer to any instance where people perceive the same phenomenon and come away with different ideas and memories about what happened.").

29. *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2665, 2669 (2011) (finding that Vermont's law imposes "more than an incidental burden on protected expression" and that Vermont's law had the impermissible goal of "burdening disfavored speech by disfavored speakers.").

tally affected speech in ways long-accepted in the administrative state.<sup>30</sup> As such, he said, it should receive only minimal scrutiny. How could two Justices purporting to apply the same body of First Amendment law understand its implications so differently?

Ultimately, the difference between them appears to have arisen largely from a growing gap in the way that different Justices on the court understand the logic of commercial speech regulation. On one account, the account that seems to underlie the dissent's reasoning, commercial speech simply isn't as valuable in promoting First Amendment purposes as is other kind of speech, such as speech about politics or artistic expression.<sup>31</sup>

The other account is quite different. If government has more leeway to regulate commercial speech, this is *not* because such speech is any less valuable than speech about art or politics. Rather, it is because commercial speech – while extremely valuable – raises greater risks of fraud or consumer confusion.<sup>32</sup> It occurs in economic interactions where advertisements are treated not only as arguments or statements by a speaker, but also as guarantees in which one can place reliance. While government can restrict commercial speech more substantially than other speech, it must do so in a way that focuses on its distinctive harms to consumers.<sup>33</sup>

I will elaborate on the different approaches shortly. But it is first helpful to illustrate the power of each view with some analogies to the marketing in *Sorrell*. First, consider an analogy that helps to highlight why the majority found the Vermont law to be deeply at odds with free speech law. Imagine that certain conservative lawmakers in a state become irked at arguments – made by companies that sell solar energy, wind power, or other forms of “renewable energy”<sup>34</sup> – that the threat of global warming requires that we abandon use oil, gas, and coal as quickly as possible, and rely instead on renewable energy sources. The lawmakers feel that these alarmist arguments amount to self-interested fear mongering. But they are reluctant, given free speech precedent, to restrict these renewable energy companies' speech directly. So they instead resolve to remove an important weapon from these companies' arsenal of resources. They bar the sale of environmental data, or data about energy consumption patterns, to renewable energy companies who use it to promote their own form of energy production or call for abandonment of competing energy sources. This, they say, will prevent renewable en-

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30. *Id.* at 2685 (Breyer, J., dissenting) (stating that “[t]he speech-related consequences here are indirect, incidental, and entirely commercial.”).

31. *Id.*

32. *Id.* at 2672 (observing that *R.A.V. v. St. Paul* had stated that content-based targeting is permissible when it aims at marketing where there is greater risk of fraud but that Vermont “nowhere showed the speech was misleading”).

33. *Sorrell*, 131 S. Ct. at 2672 (“government’s legitimate interest in protecting consumers from “commercial harms” explains “why commercial speech can be subject to greater governmental regulation than noncommercial speech.”).

34. See *National Atlas*, at [http://nationalatlas.gov/articles/people/a\\_energy.html](http://nationalatlas.gov/articles/people/a_energy.html) (“Renewable energy sources are energy sources that are continually replenished. These include energy from water, wind, the sun, geothermal sources, and biomass sources such as energy crops. In contrast, fuels such as coal, oil, and natural gas are non-renewable.”)



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ergy companies from describing available data in ways that lead their audiences to react emotionally and irrationally.

It is hard to see how courts could view such a selective information restriction as constitutional.<sup>35</sup> In this example, lawmakers are doing one of the things the First Amendment exists to stop government from doing: The hypothetical state legislators in this example are stepping into, and forcibly interfering in, a debate among citizens over global warming and energy use. They are not simply contributing their own views or arguments (which officials often do on the floor of the legislature or by putting out policy statements). Rather, they are using the government's coercive power to weaken one side of the debate by depriving it of information available to everyone else, including other participants in this debate.

For Justice Kennedy and the *Sorrell* majority, this is precisely what Vermont's legislature was doing when it barred pharmaceutical marketers and *only* pharmaceutical marketers from obtaining and using prescription drug data. While government may use commercial speech regulation to protect consumers against protection or undue pressure by marketers, Vermont went beyond this purpose. Under the pretext of protecting consumers, Vermont was using its legislative power to target a set of speakers and try to weaken their contribution to the conversations among doctors, drug producers, and others about which drugs to prescribe for particular medical problems. As the Court said in finding this unconstitutional, the government may not "engage in content-based discrimination to advance its own side of a debate."<sup>36</sup>

One might respond by noting that Vermont's limit on pharmaceutical companies did not prevent *all* speech in favor of brand-name drugs. Advocating use of brand name drugs was still permissible outside of marketing, so messages expressing such a view-

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35. This would at least be true in the absence of concrete evidence of false or misleading claims on the part of a given renewable energy company, for example, about the benefits of a particular solar energy device. To be sure, under at least one well-known decision – the California High Court's decision in *Kasky v. Nike*, 45 P.3d 243 (2002) – it is plausible that state law might allow a suit against the renewable energy companies for their criticism of fossil fuels if the speech was misleading. In *Kasky*, the Court found that Nike was engaged in commercial speech and subject to state's regulation of misleading advertising when it made statements denying that mistreated its overseas workers – disseminating these statements "in press releases, in letters to newspapers, in a letter to university presidents and athletic directors." *Id.* at 248. The Court held that this speech constituted "commercial speech" and as such received no First Amendment protection when it was also "false or misleading" speech. *Id.* at 261-262. This decision, however, doesn't show that state legislature generally have the power to burden the speech of commercial actors whose speech they has negative effects on the outcome of a given public debate. In the first place, the *Kasky* decision did not conclude that courts would take at face value the legislator's claims that particular speech was misleading. *Id.* at 262. Moreover, *Kasky's* conclusions are at odds with other jurists' arguments in favor of providing commercial actors with First Amendment protection for the statements that contribute to public debates or discussions. In *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, for example, Justice Stevens argued in his concurrence that First Amendment protection should not be denied to "an electric company's advocacy of the use of electric heat for environmental reasons, as opposed to wood-burning stoves." *Central Hudson Gas v. Public Service Com'n of N.Y.*, 447 U.S. 557, 581 (1980), at 581.(Stevens, J., concurring).

36. *Sorrell*, 131 S. Ct. at 2672.

point could still be very much a part of the debate on the topic. A medical researcher who believed that a new brand name drug had advantages over a generic alternative would be permitted under Vermont's law to obtain and analyze prescription data and rely on it in making his argument.<sup>37</sup> The limits imposed on a particular commercial speaker, such as a drug company, would not amount to an across-the-board prohibition on expressing the viewpoint held by that speaker.

But First Amendment jurisprudence does not permit the state to censor one speaker based on the justification that there is another speaker who can voice the same message. When a state wishes to blunt the effect of a particular argument on an audience, and does so by burdening one of the speakers with the strongest interest in making it, it cannot wave away First Amendment worries by noting there may be other adherents of the position who remain free of the laws' restrictions.

Take my hypothetical, for example. The lawmakers who bar renewable energy companies from obtaining data crucial to their argument could claim that they have done nothing to weaken the debate over energy. There are others, such as academic researchers or journalists, who still have unfettered access to environmental and energy use data and could use it to question the public's reliance on fossil fuels, although they are less likely than renewable energy companies to twist the data to suit their financial interests. But the lawmakers' data restriction would still clearly be an effort to target, and disadvantage, a particular message (arguing against the use fossil fuels and for alternative energy sources), even if the restriction burdens the message in a way that falls short of completely silencing it.

For Justice Breyer and the dissent, however, a different analogy makes more sense. As Breyer noted in dissent, "a public utilities company that directs local gas distributors to gather usage information for individual customers might permit the distributors to share the data with researchers (trying to lower energy costs) but forbid the sales of data to appliance manufactures seeking to sell gas stoves."<sup>38</sup> This would not likely be an attempt by government to forcibly tilt a debate about energy use in any way. Rather, it is more plausibly explained as an attempt to gather information that is helpful (perhaps even essential) to support a particular public need, but to do so in a way that does not have harmful side effects for consumers' privacy.

Commercial speech regulations, one might add, typically and inevitably focus on particular types of businesses. Consider, for example, the government's requirement that airlines advertise "the total fare" more prominently than any components (such as taxes or fees). This rule was established by the Department of Transportation to assure that prospective customers were not misled about the final price they would pay for an airline

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37. *Id.*

38. *Sorrell*, 131 S. Ct. at 2676 (Breyer, J., dissenting).

ticket.<sup>39</sup> And the D.C. Circuit upheld this regulation in *Spirit Airlines v. Department of Transportation*.<sup>40</sup> It did not insist that the law would be unconstitutional if it left other transportation companies – such as train or bus companies – greater freedom to describe their own pricing. Nor did it consider the possibility that the law would constitute viewpoint discrimination if it allowed non-commercial speakers, such as bloggers critical of the airline industry, free to describe ticket prices in other ways – for example, by highlighting the alleged unfairness of certain airline charges without making any mention of government taxes.

One reason for the D.C. Circuit’s lack of concern about the airline advertising measure stemmed from the nature of the Department of Transportation’s regulation: It was not censoring or preventing the airlines from telling ticket shoppers what the taxes on a ticket would be. In fact, it was not barring them from saying anything. It was, on the contrary, *compelling* them to say something – namely, to prominently provide information about the total amount a ticket buyer would pay. Where government imposes such a disclosure requirement to avoid consumer deception or confusion, the Supreme Court has held – in *Zauderer vs. Office of Disciplinary Counsel of Ohio*<sup>41</sup>—that it is subject not to the intermediate scrutiny normally applied to commercial speech restriction, but rather to a more deferential type of review. The government’s measure need only be “rationally related to the State’s interest in preventing deception of consumers.”<sup>42</sup> But even under a more demanding intermediate scrutiny test, government would not be required to assure that its airline speech regulations were consistent with its treatment of other transportation entities’ speech, or other speech about airline tickets. On the contrary, the D.C. Circuit’s opinion in *Spirit Airlines* concluded that the Department of Transportation’s airline ticket advertising requirement would survive under intermediate scrutiny as well as *Zauderer*’s more deferential test.<sup>43</sup>

This focus on airline companies makes sense. The Department of Transportation would likely find it impossible to regulate airline advertising if it could do so only in an unwieldy regulatory process that simultaneously considered and generated rules for advertising by all other transportation businesses.<sup>44</sup> Nor could it plausibly guarantee that such advertising restrictions would leave the airlines just as free to highlight the government’s taxes in their ads as critics are to highlight the airlines own charges in blogs. The government, as the Supreme Court said in the 1955 case *Williamson v. Lee Optical of*

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39. *Spirit Airlines, Inc. v. U.S. Dept. of Transportation*, 687 F.3d 403, 409 (D.C. Cir. 2012) (“ Under [the] so-called “Airfare Advertising Rule,” airlines remain free to provide an itemized breakdown (displaying to the customer the amount of the base fare, taxes, and other charges), but they may not display such price components “prominently” or “in the same or larger size as the total price.”).

40. *Id.*

41. *Zauderer v. Office of Disciplinary Counsel of Ohio*, 471 U.S. 626 (1985).

42. *Id.* at 651.

43. *Spirit Airlines, Inc.*, 687 F.3d at 415.

44. *Id.*

*Okla., Inc.*, must often address commercial problems “one step at a time,”<sup>45</sup> and thus cannot be forced, in addressing airlines’ prices to address similar problems in every other price advertisement at the same time. Nor does the fact that officials are strictly limited in the restrictions that they can impose on bloggers and other non-commercial speakers’ discussion of economic matters mean that they must be equally limited when they regulate marketing and advertising about the same topics.

### III. Intermediate and Heightened Scrutiny In Commercial Speech Doctrine

#### A. Central Hudson’s Intermediate Scrutiny for Commercial Speech

Given these two analogies for Vermont’s legislation, which one is correct? Was Vermont’s focus on drug companies and their marketing just another instance of the way consumer protection law typically focuses on a particular business and particular threats to consumers? Or was it an attempt to interfere in a certain discussion about drug prices by assuring that one speaker – and only that speaker – was deprived of the data needed to create an effective message?

One way to resolve a debate like this– in all cases where a law burdens commercial speech – is to simply apply the standard that the Court has applied to commercial speech regulation since 1980. In *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*,<sup>46</sup> the Court set forth a four-part test to evaluate the constitutionality of restrictions on commercial speech. Under the first prong of the test, the Court made it clear that the state had significant leeway to protect consumers from misleading speech or speech advocating illegal activity. When, however, the government instead aims to restrict commercial speech that is truthful and advertising only legal activity then it may do so only (2) if there is a substantial government interest at stake, (3) the speech regulation directly advances that interest and (4) the regulation does not restrict speech any more than it has to in order to advance that interest.<sup>47</sup> The Court subsequently held, in *Board of Trustees of State University of New York v. Fox*, that the narrow tailoring requirement in the fourth prong does not always require the “least restrictive” conceivable measure, but rather one that does not bar substantially more speech than necessary to achieve the state’s objective.<sup>48</sup> The government need only show that there is a “reasonable fit” between its regulatory objectives and the means it uses to achieve them.<sup>49</sup>

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45. *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955).

46. *Central Hudson Gas v. Public Service Com’n of N.Y.*, 447 U.S. 557 (1980).

47. *Id.* at 564, 566.

48. *Bd. of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 477-8 (1989).

49. *Id.* at 480.

The *Central Hudson* test – or at least the second, third, and fourth prongs of this test—is an example of intermediate scrutiny.<sup>50</sup> It is “intermediate” because the level of deference falls somewhere in between the toughest and most lenient approaches the courts can take. It is more deferential than the strict scrutiny that courts give to most speech restrictions that restrict expression of particular views or on particular topics. When the court applies strict scrutiny to a statute, it generally views it as presumptively unconstitutional.<sup>51</sup> In fact, in most instances, strict scrutiny is virtually impossible for the government to survive.<sup>52</sup> A statute reviewed under strict scrutiny will only be found constitutional if it (1) serves a compelling government interest and (2) is necessary to achieve that interest and does so in the least restrictive way (i.e., through a means that is “narrowly-tailored” to the end it serves).<sup>53</sup> While individuals will disagree about what interests are compelling, the Court has made it clear that such an interest has to have extraordinary importance.<sup>54</sup> It is not the case that any “substantial interest” of the kind demanded by the *Central Hudson* intermediate scrutiny test will also be urgent or powerful enough to be “compelling.” The fit between the government’s means and ends must also be more precise to satisfy strict scrutiny: Not only must the government have a compelling interest, it must select the means that does as little damage as possible to the speech it is restricting.<sup>55</sup> By contrast, *Central Hudson’s* intermediate scrutiny test is more forgiving. As noted above, the Court demands not that the statute do as little damage to speech as possible, but rather that it avoid causing substantially more damage to speech than is necessary to achieve the goal. The means-ends fit has to be a good fit to satisfy *Central Hudson*, but it does not have to be perfect.<sup>56</sup>

While intermediate scrutiny sets a much lower hurdle for government than strict scrutiny does, it is higher than the minimal scrutiny or rational basis review that Courts use to assess the constitutionality of most laws outside the First Amendment context.<sup>57</sup> In most cases, after all, when elected representatives enact laws on commerce, the environment, health care, or the myriad other issues government must attend to, they do not

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50. See *Milavetz, Gallop & Milavetz, P.A. v. U.S.*, 559 U.S. 229, 249 (2010) (noting that the *Central Hudson* test is a form of intermediate scrutiny).

51. See *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 400 (2000) (noting that “a strong presumption against constitutionality” is often viewed by courts as accompanying strict scrutiny); *District of Columbia v. Heller*, 554 U.S. 570, 689 (2008) (Breyer, J. dissenting) (describing “strict scrutiny” as a form of review that “presume[s] . . . unconstitutionality.”).

52. See *Vieth v. Jubelirrer*, 541 U.S. 267, 294 (2004) (“As is well known, strict scrutiny readily, and almost always, results in invalidation.”).

53. See *Citizens United v. Federal Election Comm’n*, 558 U.S. 310, 340 (2010) (Strict scrutiny “requires the Government to prove that the restriction ‘furthers a compelling interest and is narrowly tailored to achieve that interest.’”) (quoting *Federal Election Comm’n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 464 (2007)).

54. *Id.*

55. See *John Doe No. 1 v. Reed*, 130 S.Ct. 2811, 2839 (2010) (strict scrutiny requires that a restriction be “narrowly tailored— i.e., the least restrictive means—to serve a compelling state interest.”).

56. *State Univ. of New York v. Fox*, 492 U.S. 469, 478 (1989).

57. John F. Manning, *Competing Presumptions About Statutory Coherence*, 74 *FORDHAM L. REV.* 2009, 2041 (“The Court applies the highly deferential rational basis test when it reviews ordinary legislation.”).

expect unelected judges to constantly second-guess and nullify their work.<sup>58</sup> Most of these laws raise no constitutional difficulty. Thus, as the Court said in *Carolene Products*, “regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless. . .it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.”<sup>59</sup> Most laws affecting “regulatory legislation,” in other words, are presumptively constitutional – and the Court will strike them down only in the very rare case that they lack any reasonable relationship to a legitimate government purpose.<sup>60</sup> In short, under rational basis, the government’s end only needs to be legitimate, not be compelling or substantial. And the regulatory means it uses to achieve that end need not be the perfect means of achieving that end, nor even a good fit. It must only have a reasonable relationship that end.

In contrast to these two extremes – strict scrutiny on the high end and rational basis on the low end – the intermediate scrutiny of *Central Hudson* is a bit of a gray zone. The outcome of applying intermediate scrutiny is far less clear than it is when the court applies strict or minimal scrutiny. There is no presumption of constitutionality or unconstitutionality – and judges may well disagree sharply about the result this four-part test should produce. Indeed, while Justices Kennedy and Breyer respectively favored tests akin to strict scrutiny and rational basis in *Sorrell*, they each nonetheless applied the *Central Hudson* test as well and came to different results: Kennedy found Vermont’s statute clearly failed *Central Hudson*;<sup>61</sup> Breyer found that it easily survived.<sup>62</sup>

There are competing explanations for why Court has chosen to apply intermediate scrutiny to commercial speech regulation rather than a stricter or more lenient standard of review. At times, the Court has indicated that it does so because commercial speech – while often providing consumers with important information – is not as important as political debate, artistic expression, or other kinds of expression outside of the commercial context. In *Ohralik v. Ohio State Bar Association*, for example, the Court said that the First Amendment affords commercial speech “a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values.”<sup>63</sup> Two years later, in *Central Hudson* itself, the Court said that commercial speech “although meriting some protection is of less constitutional moment, than other forms of speech.”<sup>64</sup> Commercial speech, said the Court in *Central Hudson*, is valuable for the limited reason

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58. *Sorrell*, 131 S. Ct. at 2674-75 (Breyer, J., dissenting).

59. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938).

60. Rational basis review requires a court to determine if the legislation (1) rationally relates to (2) a legitimate state interest. Furthermore, rational basis review is appropriate unless the legislation “warrants some form of heightened review because it jeopardizes the exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic.” *Nordlinger v. Hahn* 505 U.S. 1, 11, 21 (1992).

61. *Sorrell*, 131 S. Ct. at 2667-72.

62. *Id.* at 2679-85 (Breyer, J., dissenting).

63. *Ohralik v. Ohio*, 436 U.S. 447, 456 (1978).

64. *Central Hudson Gas v. Public Service Comm’n of New York*, 447 U.S. 557, 562 n.5 (1980).

that it has an “informational function.”<sup>65</sup> When advertising does not serve this function, when it does not accurately inform the public about lawful activity, it has little value and can be regulated.<sup>66</sup> Even where it does serve this informational function, however – even where it *is* accurate and informative – its lower place in the First Amendment hierarchy means that the state still receives some leeway to regulate,<sup>67</sup> on the basis of its content.<sup>68</sup>

In other cases, however, the Court has offered a different explanation for why commercial speech receives less protection than other forms of speech. It is not because it is any less valuable for consumers. On the contrary, said Justice Blackmun in *Virginia Pharmacy Board*, a “particular consumer’s interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day’s most urgent political debate.”<sup>69</sup> Rather, the reason the state gets leeway to regulate commercial speech is because its value – unfortunately – comes with greater risk of financial harm. Because individuals rely on advertising in their economic decision-making, a false or misleading guarantee in this realm of speech can lead to economic harm in other realms of life. As Justice Kennedy put this point in *Edenfield v. Fane*, commercial speech is “linked inextricably’ with the commercial arrangement that it proposes, so the State’s interest in regulating the underlying [non-speech] transaction may give it a concomitant interest in the speech itself.”<sup>70</sup> If government has a responsibility to protect consumers from fraud, unconscionable contracts, and other dangers of modern commercial interaction, it has little alternative but to regulate the speech that raises such dangers.

To be sure, commercial speech is not unique in creating the possibility of harm. Even the most staunchly protected forms of speech can impose great damage. Insults or taunts from one’s friends and acquaintances can cause deep pain, and possibly anguish. Hate speech can do so as well, and can also propagate demeaning stereotypes of racial, ethnic or religious groups. But whereas the Court has held that such worrisome effects on feelings or belief are the price that must be paid for First Amendment freedom, it has not taken the same stance toward economic harm – which it has found the government has authority to regulate and thwart.

In short, then, the Court has offered two different theories of commercial speech’s lesser status in First Amendment law: (1) it has lower value than other speech and (2) it raises greater risk of financial or other harm (of a kind the Courts do not deem a necessary sacrifice that comes with First Amendment freedom). Both of these theories justify intermediate, rather than strict or minimal, scrutiny.

But beyond that commonality, they may have very different consequences. If commercial speech is subject to greater regulation because it has less value than other

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65. *Id.* at 563.

66. *Id.*

67. *Id.* at 564-65.

68. *Id.*

69. *Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U.S. 748, 763 (1976).

70. *Edenfield v. Fane*, 507 U.S. 761, 767 (1993) (citations omitted).

speech, then – even when it is truthful – the need for it may be outweighed by a host of “substantial government interests” that trump it, even though they do not trump free debate and exchange in other contexts. If on the other hand, commercial speech is left more vulnerable to government restriction because of the harms it raises, then government’s job in regulating it is to address those harms – it is *not* to use this regulatory power to address a host of other government interests.

There is another key difference between these two approaches. The first “lower value” approach is difficult to square with the Court’s later insistence, in *R.A.V. v. St. Paul*, that the government must eschew content discrimination even when regulating a category of speech that is normally unprotected, or less protected, than speech usually is. By contrast, the “greater harm” theory fits well with *R.A.V. v. St. Paul* and it is thus not surprising, as I explain below, that the *Sorrell* majority’s effort to square commercial speech with *R.A.V. v. St. Paul* led it toward this “greater harm” theory of commercial speech’s status.

To be sure, these two approaches are hardly the only ones that can explain how courts can and do evaluate commercial speech restrictions. One can imagine additional approaches, some of which combine elements of the “lower value” and “greater harm” approach. For example, one can imagine an argument that treats commercial speech protection as having a more limited *purpose and scope* than the First Amendment protection offered to political or artistic speech – but offers *protection* that is just as strong. More specifically, a court could conceivably hold that commercial speech protection should only protect speech that *accurately informs* consumers about a product, but argue that – as long as an instance of commercial speech does this, any restriction of it, should be subject to strict scrutiny. As noted below,<sup>71</sup> Justice Blackmun has taken a position close to this. Alternatively, courts might treat a very narrow category of speech by commercial actors – such as speech that asks a particular consumer to purchase of a specific product – as having lower value than political or artistic expression. But they might then treat other speech by commercial actors, such as speech about their company’s mission, aspirations, or overall commitment to consumers, as being as deserving of protection as any other speech, except when it deceives consumers about important economic decisions. In other words, they might use the “lower value” approach for certain instances of speech by commercial actors and the “greater harm” approach for others. (The level of protection afforded speech a company may depend in part on whether courts count it as a “commercial speech.”). For purposes of this essay’s analysis, however, I will focus on the two approaches I have outlined above, and how they related to the holdings and discussion of *R.A.V. v. St. Paul* and *Sorrell v. IMS Health*.

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71. See text accompanying notes 111-114 *infra*.



## B. R.A.V.'s Heightened Scrutiny for Commercial Speech

*R.A.V.* was relied upon quite heavily by the *Sorrell* majority,<sup>72</sup> in part because it is the Court's leading case on when courts should apply strict scrutiny even to state regulation of "low value" speech, such as commercial speech. *R.A.V.* was not a commercial speech case. It concerned hate speech. A group of teenagers in St. Paul had burned a cross in front of an African-American family's house. After St. Paul charged one of teenagers (identified only as "R.A.V.") under a law penalizing hate speech, the Supreme Court ultimately struck down St. Paul's law as a violation of the First Amendment.<sup>73</sup>

As noted earlier, *R.A.V.* essentially holds that, while the state is normally free to regulate obscenity, incitement, libel or other categories of unprotected speech subject only to rational basis review, this does not mean the state may target an instance of such speech because it disfavors the viewpoint or topic of it. In *R.A.V.* itself, the Court assumed the cross burning at issue in the case constituted "fighting words," – that is, words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace".<sup>74</sup> The Court held in 1942 that fighting words are unprotected by the First Amendment.<sup>75</sup> But while the free speech clause allowed St. Paul to regulate fighting words– it did *not* permit St. Paul to use this power (of restricting fighting words) to penalize only fighting words expressing views it disliked, such as those supporting racial discrimination.<sup>76</sup>

In other words, the flexibility that government is given to regulate fighting words or other unprotected categories of speech is not a blank check. Rather, it is provided in order for the state to be able to address a particular kind of harm or concern. In the case of obscenity, for example, the government is empowered to regulate hard-core pornography in written or pictorial form. This is because, in the view of the court, obscenity raises certain harms: personal development and family life, it concluded, can be "debased and distorted by crass commercial exploitation of sex".<sup>77</sup> To control such harm, or address the effect of obscene speech on the community, the state can regulate pornography to an extent that it cannot regulate other kinds of speech. However, where officials use such First Amendment leeway *not* to address the specific harms or characteristics of pornography, but for an entirely different purpose – such as punishing those who use pornography to express a political message the state finds objectionable – then these officials have abused the flexibility given to them by First Amendment doctrine. The same is true for other areas of traditionally unprotected speech. Officials may not penalize true

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72. See *Sorrell*, 131 S. Ct. at 2663, 2665, 2667, 2672.

73. *R.A.V. v. St. Paul*, 505 U.S. 377, 385 (1992).

74. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942); see also *R.A.V.* 505 U.S. 388 (1991).

75. *Chaplinsky*, 315 U.S. at 572.

76. *R.A.V.*, 505 U.S. at 381.

77. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 63 (1973).

threats of violence only when they are aimed Democrats, while leaving people free to threaten Republicans in the same way.

The rational basis test that applies to low value speech is thus best understood as what we might call “purpose-constrained rational basis.” Government has great freedom to restrict obscenity, incitement or other forms of speech. But it is *not* permitted to use this First Amendment flexibility for any conceivable legitimate government purpose – but rather for a *specific type of purpose*, namely one that justifies the exception from normal First Amendment limits. As noted above, the Court made clear that even a viewpoint- or content-based restriction of obscenity, fighting, words, or other low value speech would pass muster under the First Amendment so long as the rationale for targeting of a particular view or topic “consists of the very reason the entire class of speech is proscribable.”<sup>78</sup>

*R.A.V.* is not the only First Amendment case that proposes such a purpose-constrained rational basis test. One also finds it in the Court’s case law on school-sponsored speech. In *Hazelwood v. Kuhlmeier*, the Court held that schools had significant leeway to limit speech in school-sponsored activities such as student newspapers.<sup>79</sup> But this leeway was not unlimited, and it was not as broad as that which officials receive when under ordinary rational basis law, under which an act is constitutional whenever it is reasonably related to any legitimate government purpose. School authorities are not free to base a restriction of school speech on any legitimate government purpose. Rather, such a restriction – held the Court in *Kuhlmeier* – must be “reasonably related to a legitimate *pedagogical* purpose.”<sup>80</sup>

Moreover, it is not only rational basis review that sometimes incorporates such a purpose constraint, but also intermediate scrutiny review. Such a purpose constraint is built into the form of intermediate scrutiny that the Supreme Court applies in expressive conduct cases, the intermediate scrutiny test set forth in *United States v. O’Brien*. In *O’Brien*, the Supreme Court held that government may limit expressive conduct – such as the burning of a draft card – without having to satisfy strict scrutiny.<sup>81</sup> Rather, because the government often has a greater need to prohibit or restrict physical activity, such as burning of objects, it receives greater leeway to regulate such activity.<sup>82</sup> It need only show that it is pursuing a “significant government interest” and not burdening substantially more speech than it needs to in order to achieve this interest. In other words, it must only satisfy intermediate – not strict – scrutiny.

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78. *R.A.V.*, 505 U.S. at 387-88 (1991).

79. *Hazelwood v. Kuhlmeier*, 484 U.S. 260, 270-71 (1988).

80. *Id.* at 283 (1988) (emphasis added).

81. *United States v. O’Brien*, 391 U.S. 367, 377 (1968) (stating the four-part test for reviewing government regulation of symbolic conduct); *see also* *U.S. v. Chi Mak*, 683 F.3d 1126, 1135 (9th Cir. 2012) (describing the test from *O’Brien* as a form of intermediate scrutiny).

82. *O’Brien*, 391 U.S. at 377 (1968).

But, like *R.A.V.*, *O'Brien* does not give the government an *unconditional* right to this more deferential form of First Amendment review in symbolic speech cases. Rather, it receives such intermediate scrutiny review only if its purpose is “unrelated to the suppression of free expression.”<sup>83</sup> If the government betrays this demand - if it restricts draft card burning not to protect safety or property, but rather to silence the protester - then it eliminates the central reason it is given greater leeway. Like the obscenity or libel regulation that targets political viewpoints, such a message-targeting expressive conduct restriction is subject to strict scrutiny. In short, the intermediate scrutiny given to expressive conduct restriction is also purpose-constrained. It ceases to apply if government restricts speech for impermissible content-targeting purposes. Justice Scalia’s decision in *R.A.V.* recognized this connection between the purpose constraint he was outlining in *R.A.V.*, and that which was built into *O'Brien*’s intermediate scrutiny test. The Court, he noted, has “long held . . . that nonverbal expressive activity can be banned because of what the action entails but not because of the ideas it expresses.” The same principle, he made clear, applies to content-based restriction of fighting words and other forms of “unprotected” speech.<sup>84</sup> To be sure, harms that the government is empowered to regulate when it restricts fighting words, libel, obscenity are harms that flow from certain features of the speech’s *content* - rather than non-speech conduct with which speech is entwined (as is the case in expressive conduct). But in both cases, government may not use the limited license for restricting speech to restrict expression more broadly or for the wrong reasons.

## IV. *Sorrell*, The Boundary between High and Intermediate Scrutiny, and the Purpose of Commercial Speech Restriction

How does this concept of purpose-constrained minimal or intermediate scrutiny apply to commercial speech like that in *Sorrell*? It requires that courts have some way of assessing when a government regulation of commercial speech has *misused* the flexibility it is given under the commercial speech doctrine. When regulating commercial speech, government is subject only to intermediate rather than strict scrutiny, perhaps because commercial speech is less central to the First Amendment universe than speech that is “political, esthetic, [or] moral,”<sup>85</sup> or perhaps because it is inextricably intertwined with non-speech economic activity.

Whatever the logic of giving commercial speech lower protection, under *R.A.V.*, it is logic that officials cannot entirely disregard. As the Court noted in *R.A.V.*, the fact that government may restrict price advertising where the “risk of fraud” is great, does not mean it is equally free to restrict price advertising simply because it dislikes the political

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83. *Id.*

84. *R.A.V.*, 505 U.S. at 385.

85. *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2674 (2011) (Breyer, J., dissenting).

or cultural views expressed in the advertising.<sup>86</sup> By passing the latter type of viewpoint-targeting restriction, the government would betray the trust First Amendment law places in it when it gives it greater room to restrict commercial speech. This leeway is provided not for the government to use in any way it likes, but so that it can safeguard consumer interests in a fair and well-functioning marketplace of goods and services. Government betrays this mission if it instead uses this regulatory authority over commercial speech to steer the direction of certain moral, cultural, or political debates, or limit citizens' opportunity to hear certain views.

The challenge is identifying when such a betrayal has occurred. There are at least two ways to do so. One is simply to compare the government's justification for a law with some criterion (or set of criteria) for what counts as a permissible justification of commercial speech regulation. Such a method, of course, requires some clarity regarding the purposes of commercial speech regulation. One cannot tell whether the government is using commercial speech authority in a way that is contrary to its purpose unless one knows what this purpose is.

A second way is for courts to apply *R.A.V.* and identify certain features of a statute – such as a focus on disadvantaging particular political speakers or undercutting the expression of particular political views – which are extremely unlikely to be consistent with an appropriate use of the government's authority to restrict low value speech. Since a central purpose of *R.A.V.*'s limit on low value speech is to make sure that the government does not “drive certain ideas. . . from the marketplace,”<sup>87</sup> we can identify a violation of *R.A.V.* where this exclusion of ideas is clearly happening. Such an application of *Sorrell* requires an “incompletely theorized” sense of what commercial speech doctrine is for.<sup>88</sup> Even if courts do not know, or cannot agree on, the central purpose for which government is given greater flexibility, under the First Amendment, to regulate commercial speech, they might be able to agree what that purpose *is not*. They might agree, for example, that whatever the logic that underlies commercial speech regulation, it is *not* to allow government to silence its political enemies, or undercut the speech of disfavored interest groups simply because they are disfavored. For example, in discussing when courts might apply strict scrutiny to certain commercial disclosure requirements, Nat Stern and Mark Joseph Stern note that courts might do so “when compelled disclosures carry facial indicia of aims” other than protecting consumer interests and thus signal that “official suppression of ideas is afoot.”<sup>89</sup>

It may seem, from Justice Kennedy's language in *Sorrell*, that the second, more modest of these approaches is sufficient for his holding. Vermont's flouting of *R.A.V.*, the Court seems to indicate, is clear from its single-minded focus on drug company speech: It

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86. *R.A.V. v. St. Paul*, 505 U.S.377, 388-89 (1992).

87. *Id.* at 387.

88. See CASS SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 35-61 (1996).

89. See Stern and Stern, *supra* note 21, at 1188.

## NEXUS

barred use of prescription data only in pharmaceutical marketing and in no other speech.<sup>90</sup> This story is one of a state legislature trying to undercut the speech of a disfavored interest group. Vermont's own legislative findings had stated that it was regulating drug marketers' speech because "the goals of marketing programs are often in conflict with the goals of the State."<sup>91</sup> And Justice Kennedy found in this language evidence that Vermont's regulation was weakening drug companies' message to strengthen adherence to its own preferred view. Whatever may justify commercial speech restriction, one might argue, it is not the desire to tilt a debate or argument against one's rivals or in favor of one's friends.

Such a summary, however, leaves out a key point: Vermont was not targeting drug companies simply because it disliked them or their products, nor because they were (or supported) the legislators' political enemies. They were, on their own perfectly plausible account, targeting drug marketers because it was drug marketers that they believed were responsible for certain commercial and medical harms that had been brought to the legislature's attention.<sup>92</sup> They were, in other words, simply doing what the U.S. Department of Transportation did when it imposed special price advertising requirements on airline companies: The Department of Transportation was not doing so out of spite or as political revenge. While its regulation focused on the airlines – and not on businesses of all kinds – it did so not in order to subject the airlines industry to unusually onerous burdens but simply because it was trying to meet a problem that had been called to its attention by an aspect of a particular industry's advertising practices. Where a state believes that "the goal of marketing programs" involves generating a harmful state of affairs (like wasteful energy or higher health spending), then it shouldn't be shocking that legislators view such goal as "in conflict with the goals of the state." Thus, Vermont's finding that drug companies' marketing conflicted with the public interest does not, but itself, show that it was trying to stack a debate in its favor.

*Sorrell's* holding makes more sense, however, if one uses the first of the two approaches that I just identified for understanding whether a speech restriction's purpose meets the purpose limit built into a certain First Amendment category. Instead of simply characterizing Vermont's law as an inexplicable, politically motivated viewpoint discrimination - far outside the bounds of permissible commercial speech regulation, we might show that Vermont falls outside these boundaries by saying more about what these boundaries are.

When one does so, it likely makes a significant difference whether the Court favors one or the other of the two rationales I discussed earlier for commercial speech's middle-level First Amendment status: the "lower value" and "greater harm" theory. If what makes commercial speech less protected than other speech is its lower First Amendment

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

91. *Id.*

92. *Id.* at 2661.

value, then government may restrict it on the basis of viewpoint or content whenever officials are, in doing so, focused on the aspect of commercial speech that makes it less valuable. Perhaps, for example, government could burden certain instances of commercial speech more heavily if they are more closely connected to buying and selling than other instances of commercial speech. Or perhaps it could restrict certain commercial speech that has little connection to political debate or artistic expression, while leaving more creative or politically-relevant advertising untouched. The problem is that it is not entirely clear the Court can plausibly define certain commercial speech as having less value than other commercial speech: as the Court stressed in *Virginia Board of Pharmacy*, information as mundane as drug prices can have greater and more immediate importance for a sick individual than a newspaper's coverage of the State of the Union, or a masterful rendition of Beethoven's Ninth Symphony.<sup>93</sup> If something as purely commercial as price information can have such value, what kind of commercial speech can courts confidently proclaim to be lacking in value?

The "greater harm" theory provides a more plausible starting point for the *Sorrell* majority's analysis— and, in fact, it is this theory that *R.A.V.* itself implicitly relies upon in trying to illustrate how its central holding would apply to commercial speech. It significantly notes that "one of the characteristics of commercial speech that justifies depriving it of full First Amendment protection" is to lessen the "risk of fraud." So a commercial speech law that targets a particular industry or business in order to lessen the risk of fraud would be consistent with this purpose. This focus on the risk of fraud, of course, assumes that commercial speech is "proscribable" because of the harms it threatens.

Indeed, as Charles Fischette emphasizes, *R.A.V.*'s focus on the harms of commercial speech might not only provide the basis for a minor revision to commercial speech doctrine, but for a deep restructuring of it – a new "architecture" of commercial speech law.<sup>94</sup> More specifically, he says, unlike the *Central Hudson* test in its current form, a good commercial speech law "should allow regulation based on the unique harms present in commercial speech" – harms like "deception" and "mislabeling leading to misuse."<sup>95</sup>

This explains why the Department of Transportation, in commanding that airline prices prominently display the total fee for a ticket, was acting in accord with the logic of commercial speech law, even though it burdened one type of business more than others.<sup>96</sup> It also helps explain why Vermont's speech restriction is different from this airline price advertising requirement: As the majority noted, after reciting *R.A.V.*'s language that commercial speech restriction may target an industry where "the risk of

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93. See *Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U.S. 748, 763-64 (1976).

94. Charles Fischette, *A New Architecture of Commercial Speech*, 31 HARVARD J.L. & PUB. POL'Y 663, 709-14 (2008).

95. *Id.* at 709.

96. See *Spirit Airlines, Inc. v. U.S. Dept. of Transportation*, 687 U.S. F.3d 403, 414-15 (D.C. Cir. 2012).

fraud is . . . greater,” Vermont had made no showing that “detailing [was] false or misleading.”<sup>97</sup>

To be sure, the Court in *R.A.V.* did not treat prevention of fraud as the only purpose of commercial speech restriction. The danger of fraud, it said, was only “one of the characteristics of commercial speech” that justified “depriving it of full First Amendment protection.”<sup>98</sup> This leaves open the possibility there might be others.

Indeed, under the *Central Hudson* test, the government can have all kinds of “substantial government interest[s]” that might conceivably justify commercial speech restriction.<sup>99</sup> *Central Hudson* itself, for example, found that the state’s interest in energy conservation was “[p]lainly . . . substantial,” as was its “concern that [utility] rates be fair and efficient.”<sup>100</sup> However, if the purpose of commercial speech restriction is so amorphous - if government can regulate even truthful commercial speech for any purpose that happens to be substantial enough at the time - then it is hard to treat purpose as a constraint, as *R.A.V.* does. Courts would be able to tell when government is misusing obscenity law by targeting obscene speech on the basis of something other than its sexual content. They could tell when it was misusing the power to regulate true threats - by targeting such speech on the basis of its political, cultural, or moral assumptions rather than its power to create fear of death or bodily harm.<sup>101</sup> But they could not tell when government was misusing commercial speech regulation if government could identify a substantial purpose for aiming at any regulatory target it chose. Its aim would never fall outside commercial speech regulation’s permissible boundary lines because those boundary lines can move as government’s commercial interests change.

This leaves the Supreme Court two choices. First, it can concede that, while *R.A.V.* purported in dicta to apply its purpose-constraint requirements to commercial speech, this is not a workable move in the end. While the Court can perhaps define with some confidence and clarity the reasons that the state is permitted to regulate obscenity, libel, incitement or true threats, it cannot offer such an explanation for commercial speech regulation. *Central Hudson* held that any “substantial government interest” provides a good enough justification for regulating commercial speech.<sup>102</sup> So wherever government can plausibly point to such an interest to justify its regulatory choices, courts cannot find that it is so far outside the boundaries of commercial speech regulation that intermediate scrutiny no longer applies. This appears to be the choice that the dissent in *Sorrell* makes. Despite the majority’s heavy reliance on *R.A.V.*, the dissent does not even cite this case once.<sup>103</sup> And that may be because Justice Breyer and the other dissenters real-

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97. *Sorrell*, 131 S. Ct. at 2672.

98. *R.A.V.*, 505 U.S. at 388 (emphasis added).

99. See *Central Hudson Gas v. Public Service Com’n of New York*, 447 U.S. 557, 566-69 (1980).

100. *Id.* at 568-69.

101. See *Virginia v. Black*, 538 U.S. 343, 363 (2003).

102. See *Central Hudson Gas*, 447 U.S. at 564.

103. See *Sorrell*, 131 S. Ct. at 2673-2684 (Breyer, J., dissenting).

ized that *R.A.V.*'s limits on content-based choices can have no role to play where the commercial speech law can have myriad legitimate purposes and where courts are often less qualified than legislatures to judge their legitimacy.

The second choice is to reinforce *R.A.V.*'s purpose constraints by more strictly defining commercial speech regulation's permissible purposes. The *Sorrell* majority took a significant step in this direction by placing great weight on the only commercial speech purpose specifically identified by *R.A.V.*: addressing the risk of fraud or deception.<sup>104</sup> As noted before, *R.A.V.* did not assume this was the only possible purpose for commercial speech regulation.<sup>105</sup> And neither did *Sorrell*. It held open the possibility that even if Vermont could not show that its drug marketing restriction was necessary to prevent fraud, it could provide some other "neutral justification" based on other "commercial harms."<sup>106</sup> But one key lesson of this holding is that not every substantial governmental interest provides such a neutral justification. Vermont's concern about the wisdom of doctors' prescribing practices and their effect on health spending was not good enough in this respect – even though it is not clear why such policy concerns are any less than New York state's worries about energy conservation were in *Central Hudson*. In fact, the Court began its analysis in *Sorrell* by simply assuming "that these interests are significant."<sup>107</sup> Clearly, a significant policy interest is no longer enough to justify content-based choices in commercial speech regulation. It also has to be the kind of interest – such as an interest in fraud prevention – that justifies commercial speech's special status in First Amendment law.

This move by *Sorrell* is not necessarily inconsistent with what I have called the "lower value" theory of commercial purposes. As I noted earlier, it is conceivable that one could elaborate this "lower value" theory with enough specificity for courts to figure out what they need to figure out to apply *R.A.V.*: namely, what it is that makes commercial speech "distinctively proscribable" in a way that most other speech is not.<sup>108</sup>

But the Court's discussion of commercial speech in both *R.A.V.* and *Sorrell* both indicate that the more promising way of understanding commercial speech's status, going forward, is by focusing on its distinctive harms – and this may ultimately require the Court to abandon *Central Hudson*'s holding that any substantial government interests provides a good enough reason for regulating commercial speech. While the *Sorrell* deci-

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104. *Sorrell*, 131 S. Ct. at 2672 (2011).

105. *R.A.V.*, 505 U.S. at 388-89.

106. *Sorrell*, 131 S. Ct. at 2672. Tamara Piety interprets Justice Kennedy's opinion in *Sorrell* as "engrafting a content neutrality test onto the commercial speech doctrine." See Piety, note 17 *supra*, at 4. However, this is not the most plausible way to understand Justice Kennedy's insistence the commercial speech doctrine have a "neutral justification" for any "discrimination" it shows toward a particular form of marketing. The Court's insistence on a "neutral justification" is not a requirement of content-neutrality. It permits the government to aim its regulation at harms that flow from the content of commercial speech, but – as required by *R.A.V.* – the commercial harms it aims at must be the *type of harms* that justify speech restriction.

107. *Id.* at 2659

108. *R.A.V.*, 505 U.S. at 383-84.



sion did not emphasize this move away from the *Central Hudson* intermediate scrutiny paradigm, and even took time to apply the *Central Hudson* test to Vermont's law, its use of heightened scrutiny and the way it applied *R.A.V.* strongly indicate that such a shift is underway. As Ashutosh Bhagwat and Matthew Struhar write, while Justice Kennedy did not take the "final step of abandoning intermediate scrutiny. . . the writing certainly seems to be on the wall."<sup>109</sup>

For Justice Breyer, this move away from past commercial speech doctrine is deeply problematic: by relying on *R.A.V.* to place heavier restrictions on the content-based choices of advertising and marketing regulators, the Court – he wrote in dissent – has “embarked upon an unprecedented task.” But while the Court's recent step may in a sense be unprecedented, the argument is not. The notion that commercial speech has as much value as most other types of speech for its audiences – except when it is fraudulent or misleading – is one that found support in past Supreme Court cases, especially from Justice Blackmun, the author of the first case (*Virginia Pharmacy Board*) to extend protection to commercial speech.<sup>110</sup> As noted earlier, Justice Blackmun emphasized in that case the extraordinary importance commercial speech has for many consumers.<sup>111</sup>

Justice Blackmun reiterated this point in later concurrences, and added that anything less than full First Amendment protection was inappropriate where such speech raised no threat of fraud or manipulation. In *Central Hudson*, for example, he took strong exception to the majority's rule allowing government to regulate commercial speech – in accord with a narrow-tailoring requirement – whenever it has a “substantial governmental interest.”<sup>112</sup> For Justice Blackmun, the appropriate government interests in commercial speech regulation were more limited. While commercial speech merits less First Amendment protection than other speech when it is “misleading or coercive,” he said it should receive the same robust First Amendment protection as other speech when it is “truthful, non-misleading, [and] non-coercive.”<sup>113</sup>

This is essentially the standard against which the Court tested Vermont's statute in *Sorrell* in concluding that its targeting of drug companies fell outside the bounds of content-discrimination left permissible by *R.A.V.* The drug marketing, at issue, it noted was neither false nor misleading.<sup>114</sup> And although the Court left open the possibility that Vermont could identify some other “neutral justification,”<sup>115</sup> such a framework seems to assume there are limits on what kind of justification can fit this description in commercial speech doctrine.

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109. Ashutosh Bhagwat and Matthew Struhar, *Justice Kennedy's Free Speech Jurisprudence*, 44 *McGEORGE L. REV.* 167, 181 (2013).

110. *Va. Pharmacy Bd.*, 425 U.S. at 762.

111. *Id.* at 765.

112. *Central Hudson Gas*, 447 U.S. at 573 (Blackmun, J., concurring).

113. *Id.*

114. *Sorrell*, 131 S.Ct. at 2672

115. *Id.*

Two other points are worth noting about this development in commercial speech doctrine. First, *Sorrell* was not the first case to struggle with attempting to define the nature of the distinctive harms of commercial speech, and to strike down a government restriction of such speech on a basis other than these harms. In *Cincinnati v. Discovery Network*,<sup>116</sup> the Court struck down a Cincinnati ordinance that barred commercial speakers from distributing advertising-filled magazines to pedestrians using newsracks. The ordinance did not banish these newsracks entirely from Cincinnati's sidewalks. Publishers of newspapers and periodicals remained free to place them there to distribute their own publications. Cincinnati's asserted reason for targeting commercial publishers was to prevent "visual blight" and "safety concerns" created by the existence of too many newsracks on city streets – and since they felt unable to prohibit newspaper stands altogether, they instead sought to reduce the number of newsracks by eliminating their use by commercial speakers.<sup>117</sup> While this law targeted commercial speech, it did so, said the Court, for reasons that had nothing to do with "commercial harms."<sup>118</sup> Such distinctive commercial harms, said the Court, provide "the typical reason why commercial speech can be subject to greater regulation than noncommercial speech." Where a regulation has nothing to do with such commercial speech harms, it lacks an adequate justification.<sup>119</sup>

The second point to note is that this move by the Court raises doubts not only about the survival of the *Central Hudson* test in its current form, but about any use of intermediate scrutiny in commercial speech cases. That is because in those cases where government regulates commercial speech that is false or misleading, then *Central Hudson* specifically exempts it from having to demonstrate the "reasonable fit" with a "substantial government interest"—the showing that is at the core of the intermediate scrutiny it requires. Thus, Justice Blackmun's concurrence in *Central Hudson* was more at odds with the Court's decision in that case than it purported to be: his concurrence called for narrowing *Central Hudson* so that its intermediate scrutiny test applied only to speech that is "misleading or coercive."<sup>120</sup> But this would not be a narrowing of the test, but a shifting of it. Where the majority applied intermediate scrutiny only to truthful, non-misleading speech, and applied rational basis to speech that was "false or misleading," Justice Blackmun would apply strict scrutiny to truthful speech, and intermediate scrutiny to the false and misleading speech that receives rational basis under *Central Hudson*.<sup>121</sup> (It is possible, perhaps, that Blackmun and the majority would at least agree in applying intermediate scrutiny to one type of regulatory purpose: Where commercial speech is regulated because it is "coercive" rather than "false or misleading," or advocat-

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116. *Cincinnati v. Discovery Network*, 507 U.S. 410, 430 (1993).

117. *Id.* at 426.

118. *Id.*

119. *Id.*

120. *Central Hudson*, 447 U.S. at 573 (Blackmun, J., concurring).

121. *Id.*

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ing illegal activity; it would perhaps receive intermediate scrutiny under both the majority's and Justice Blackmun's version of the *Central Hudson* test).

As noted earlier, government is already permitted to use a form of rational basis in regulations of false and misleading speech not only where it restricts such speech, but also where it compels a company to add additional factual information to an advertisement to reduce the risk of deception. In *Zauderer v. Office of Disciplinary Counsel of Ohio*,<sup>122</sup> the Court held that such a disclosure requirement is constitutional as long as it is "reasonably related to the State's interest in preventing deception of consumers."<sup>123</sup> (To use the language I have used earlier, this a kind of purpose-constrained rational basis: It allows the state to regulate not on the basis of any legitimate government interest, but only a particular type of government interest – namely "the State's interest in preventing deception of consumers.").

If the "greater risk of fraud" identified by *R.A.V. v. St. Paul* is the only "commercial harm" that justifies leaving commercial speech more vulnerable to state regulation than other types of speech, then it is not clear there is a continued role for intermediate scrutiny – unless the Court decided to apply intermediate scrutiny to false and misleading speech rather than the rational basis it currently applies.

Instead, the Court might simply use the same two-tier scrutiny framework to evaluate commercial speech restriction that it uses to evaluate other types of so-called "low value" speech, such as true threats, or obscenity. That is, it might apply rational basis review when the government is restricting such speech in order to attack the distinctive harms raised by it (the violence or fear of violence created by true threats, the sexual harms raised by obscenity, the risk of fraud or deception raised by commercial speech). When the government is instead seeking to limit the content of such speech for another reason, courts might apply strict scrutiny. In fact, although the dissent in *Sorrell* failed to persuade a majority of the Court's justices to apply rational basis to Vermont's law, some of its points might well persuade the Court in future cases to apply rational basis (rather than intermediate scrutiny) to commercial speech regulation that *is* aimed at the risk of fraud or deception. For the reasons Justice Breyer offers, when agencies protect consumers from such threats, they cannot address every industry at once. They must rather focus on a particular industry or business practices, either because they have limited jurisdiction, or because it is impractical for government to tackle all industry practices at once. They must, in other words, proceed "one step at a time," which is something the Court has expressly and repeatedly allowed room for under rational basis review, but far less tolerant of when applying intermediate or strict scrutiny.

To be sure, there are ways of saving a role for *Central Hudson* style-intermediate scrutiny in the wake of *R.A.V.* The most obvious way is for the Court to actually identify the other types of commercial harms – apart from deception – that justify lowering the

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122. *Zauderer v. Office of Disciplinary Counsel of Ohio*, 471 U.S. 626, 651 (1985).

123. *Id.* at 651.

First Amendment bar in the First Amendment context, and apply intermediate scrutiny (instead of rational basis) to regulation aimed at these harms. As noted above, it is possible that intermediate scrutiny would apply to speech that is “coercive” – perhaps because, as in lawyers’ in-person solicitation of recent accident victims that the Court struck down in *Ohralik v. Ohio*, “the overtures of an uninvited lawyer may distress the solicited individual simply because of [its] obtrusiveness and the invasion of the individual’s privacy.”<sup>124</sup> And it could specifically identify other examples of the “commercial harm” which it suggested in *Discovery Network* and *Sorrell* provides the only legitimate basis to leave commercial speech more vulnerable to regulation than other speech. Or, the Court might – following Justice Blackmun’s recommendation – preserve intermediate scrutiny and apply it to cases where the government regulates speech that is false or misleading. In any case, whatever route the Court chooses, it seems clear that *R.A.V.*, *Discovery Network*, and *Sorrell* leave it at a crossroads where it has to decide what – if any commercial speech – will still be subject to intermediate scrutiny.

## V. *Sorrell*, Privacy and The Rule that Information is speech

Thus far, I have argued that in order to apply *R.A.V. v. St. Paul* in commercial speech cases, the Supreme Court must place increasing emphasis on the “greater harm” rationale for regulating speech, and especially the need to guard against fraud or misleading marketing.

But what if the government’s motive in regulating commercial speech is not to protect consumers from fraud, but rather to protect them from surveillance or tracking? What if its goal is to protect consumer privacy? Should commercial speech doctrine – or some other aspect of First Amendment law – give government greater leeway to restrict commercial speech when privacy is at stake?

Privacy, after all, was one of Vermont’s purposes in enacting its Prescription Confidentiality Act.<sup>125</sup> Privacy was not the only purpose. It was also concerned about the effects that drug companies’ detailing was having on doctors’ decision-making and on health spending.<sup>126</sup> But privacy was one of the concerns raised by Vermont’s legislature: they were concerned that as data miners and drug companies gathered reams of data on which drugs doctors were prescribing, this would reduce doctors’ privacy, and possibly even threaten that of patients. While the patient information was stripped out of the pharmacies’ prescription records, once someone knows the prescribing doctor, and the medicine prescribed, it may be far easier for them to figure out which of the doctors’ patients the prescription was written for.<sup>127</sup>

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124. *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 465 (1978).

125. *Sorrell*, 131 S.Ct. at 2659.

126. *Id.* at 2658.

127. *Id.* at 2668.

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The Supreme Court majority did not have to struggle long with this privacy justification for the speech regulation. It found it entirely unconvincing. As a privacy statute, wrote Justice Kennedy for the majority, the law did remarkably little to protect privacy. It allowed “pharmacies [to] share prescriber-identifying information with anyone for any reason save one.”<sup>128</sup> The information was shielded from only one audience – and it was an audience (those wishing to use the information for drug marketing) that was defined by its intention to engage in a certain kind of speech.

However, in future cases, it may not be so easy for the Court to discount the legislature’s desire to protect privacy. Consider again one of the hypotheticals used by Justice Breyer to defend Vermont’s law: imagine he says, a situation where a public utility agency directs gas companies to keep records about customer’s gas consumption. It does so because it believes such information is valuable for research on energy conservation –and for this reason, it expressly permits gas distributors to share this gas usage data with researchers. But it wishes to do so without severely compromising customers’ privacy, so it forbids gas distributors from selling the same gas usage data to stove manufacturers, who would like to use it to contact and craft sales pitches to customers.<sup>129</sup>

It is hard to see how the fraud-protection rationale for commercial speech could explain or justify denying gas usage data to stove sellers. There is no indication, in the fact pattern, that the stove sellers are misleading or planning to mislead customers. That is not the government’s concern. Rather, it wants to keep data out of the stove seller’s hands in order to protect customers’ privacy – and to protect them against annoying solicitation.

Such a privacy-protection purpose should and does provide a legitimate rationale for government data protection law. Indeed, it is a rationale that works much better in Justice Breyer’s hypothetical than in the *Sorrell* case. In *Sorrell*, the government’s claim that it sought to protect privacy was highly suspicious because it had protected the confidentiality of prescription data only from drug marketers, leaving everyone else free to obtain it – including those crafting arguments in opposition to the drug marketers. In the hypothetical, by contrast, there is no indication that gas usage data is available to anyone other than researchers. Nor is there any indication that the researchers are using the data to craft arguments attacking the stove manufacturers.

But if privacy sometimes provides a good rationale for government to limit speech, it is not clear that this should be a component of commercial speech doctrine rather than part of a broader First Amendment rule that might apply, in some cases, to commercial and non-commercial speech alike. The personal details in one’s medical history or video rental list might be sought not only by companies wishing to identify and gather data on customers, but by a newspaper reporter or blogger, a suspicious spouse, or an Internet

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128. *Id.*

129. *Id.* at 2676.

troll. Information privacy laws have protected citizens from all of these surveillance threats.

Speech that reveals sensitive information might count as an invasion of privacy under state law. Like defamatory speech, such disclosure thus counts as a category of speech that receives lower-than-typical protection under First Amendment. Like defamation, speech that constitutes the tort of public disclosure of private facts can subject the discloser to liability. Moreover, under *R.A.V.*, while the state cannot shape invasion of privacy law so as to discourage (and subject to liability) only privacy invaders who target government officials, or their friends, it *may* enact privacy legislation that focuses on the most significant surveillance and disclosure threats.<sup>130</sup> This might help explain why Justice Breyer's example – of a utility rule that mandates data collection for research purposes, but bars disclosure to stove sellers – seems likely to be constitutional. Stove sellers who use the data to contact customers, might be likely to then sell it to other businesses, and might well represent a greater threat to the privacy of that consumer data than a researcher who receives on the understanding he or she will not sell it.

In short, a certain kind of privacy-invading or privacy-threatening speech might receive lower protection under First Amendment whether it is commercial in nature or not. In fact, the Court's dicta about data sharing in *Sorrell* may require greater exploration of this question. In discussing the bar on disclosing data to drug companies, the Court noted that this bar on data disclosure might itself be a speech restriction – quite apart from its effect on any subsequent marketing efforts.<sup>131</sup> "Facts, after all" wrote Justice Kennedy, "are the beginning point for much of the speech that is most essential to advance human knowledge and conduct human affairs" and there is thus "a strong argument that prescriber-identifying information is speech for First Amendment purposes."<sup>132</sup> The rule in First Amendment cases, he said, is that "information is speech."<sup>133</sup> A more even-handed statute, one that shielded prescription data not just from drug companies, but from all interested parties, might still raise First Amendment concerns. After all, if, as the court said, "information is speech," then a state is censoring such speech when it illegalizes an information transfer.<sup>134</sup>

Such a First Amendment principle would raise the possibility that many privacy statutes could violate the First Amendment. The Court did not see a need to address this question. It said that even if data transfers are not protected First Amendment activity, even if data was like any other "commodity," Vermont's statute still violated barring the sale of this commodity only to particular speakers, with particular views.<sup>135</sup>

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130. *R.A.V.*, 505 U.S. at 384-85.

131. *Sorrell*, 131 S. Ct. at 2659.

132. *Id.* at 2667.

133. *Id.*

134. *Id.*

135. *Id.*

However, in the future, the Court may have a case where the “information is speech” principle makes a difference. It may have to decide, for example, whether an even-handed law barring data transfers violates the constitution by thwarting speech. Various writers have suggested that such data transfer laws do raise First Amendment concerns.

Eugene Volokh, for example, has argued that while some people appear to believe “there’s something inherently unspeech-like in corporations communicating with other corporations, there’s no reason why this would be so.”<sup>136</sup> While such communication occurs between corporations, it simultaneously occurs between the people who act for and within those corporations. Jane Bambauer likewise argues that because data restrictions are usually designed to prevent us from gaining factual knowledge, they trigger First Amendment concerns (and scrutiny) even if they have the goal of protecting privacy.<sup>137</sup> Ashutosh Bhagwat agrees, noting that while many seem to resist the conclusion that data of the kind in *Sorrell* is speech, it is hard to deny this.<sup>138</sup> Such data, he argues, may nonetheless be viewed as unprotected under First Amendment protections for reasons akin to those which make obscenity or fighting words unprotected: People do not typically need the data about others’ private lives to engage in the discussion necessary for self-governance and there is a long tradition of regulations that shield private information from public view.<sup>139</sup>

In any event, while there may be similarities in the way courts deal with commercial and privacy-threatening speech under the First Amendment, and in applying *R.A.V. v. St. Paul*, these are separate questions. I have focused, in this essay, on the first of these two and then briefly called attention to the second. Future cases may begin to delve into the First Amendment status of data restrictions in the way that *Sorrell* struggled with the question of when government may single out particular commercial speakers.

## VI. Conclusion

For the *Sorrell*’s detractors, the Court’s decision was an unjustifiable break from a long tradition of deferring to regulators’ choices about which industry’s advertising to regulate and what kinds of advertising regulations are needed. The Court’s break from this tradition – its willingness to apply heightened First Amendment scrutiny to ordinary regulation – threatened a return to the *Lochner* era. For other observers, *Sorrell* was not as puzzling – it was a routine application of *R.A.V. v. St. Paul*’s holding that the

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136. Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049, 1082-83 (2000).

137. See Jane Bambauer, *Is Data Speech?*, 66 STAN. L. REV. 57, 63-64 (2014).

138. Ashutosh Bhagwat, *Sorrell v. IMS Health: Details, Detailing, and the Death of Privacy*, 36 VT L. REV. 855, 856, 875-76 (2012).

139. *Id.*

government is barred from discriminating on the basis of viewpoint even when it regulates unprotected speech.

But both of these views of *Sorrell* are too simple. One cannot simply dismiss as Lochnerism the Court's attempt to apply a core First Amendment principle – namely, the First Amendment's bar on government measures that silence particular viewpoints or topics – to a speech regulation. The Court had little alternative but to apply this principle, as *R.A.V.* had made clear it must do even for speech that normally receives little or no protection under the First Amendment. On the other hand, applying this principle is not a simple matter: it requires an analysis – one that Court has not yet fully developed – of what commercial harms are legitimate bases for government regulation of advertising or other marketing speech content, and what type of scrutiny different commercial harms might trigger.

Such an analysis leaves unanswered many questions about the future of commercial speech doctrine. But it at least provides a sketch of the rules government will have to follow if it restricts data driven marketing – including the online data-driven marketing enabled by consumers' increasing use of the World Wide Web. In short, government will likely find, under First Amendment law, that it may not interfere with such marketing efforts – or selectively deny companies the consumer data they use for them – simply because such data makes the marketing efforts more persuasive. Rather, government will have to base its marketing restriction on some showing that its efforts are necessary to bar fraud, deception, or some other commercial harm of a kind that manipulates consumers instead of educating them. Government will, in other words, have to show that the characteristics of commercial speech it is targeting – whether the threat of deception or some other risk or harm – match the characteristics that First Amendment jurisprudence leaves vulnerable to regulation.



