

Whither *Central Hudson*? Commercial Speech in the Wake of *Sorrell v. IMS Health*

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The Supreme Court has only recognized that commercial speech deserves First Amendment protection since the 1970s. Commercial speech is intertwined with economic matters, an area in which legislatures are given broad discretion to regulate, and courts reviewing government regulation of commercial speech have applied intermediate scrutiny instead of the strict scrutiny normally applied to regulation of speech. In Sorrell v. IMS Health, however, the Court held that subjecting commercial speech to content- and speaker-based burdens triggers heightened scrutiny. Even while professing to apply the same standard that commercial speech had enjoyed for the past few decades, the Court thereby introduced a new layer of protection and further pinched the already-narrow space between the First Amendment protection accorded commercial and noncommercial speech. While most lower courts have thus far been reluctant to read Sorrell as changing the commercial speech framework, this Note argues that a recent Second Circuit opinion interpreting Sorrell as introducing a new initial step in the commercial speech analysis is the most faithful interpretation of the case.

The scope of corporate First Amendment rights at the Supreme Court has been the subject of wide discussion in the wake of *Citizens United v. Federal Election Commission*.¹ Before the decision was even a week old, President Obama harshly criticized it at his 2010 State of the Union Address, which was attended by

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1. 558 U.S. 310 (2010).

six Justices of the Court.² Former Justice Sandra Day O'Connor also communicated her displeasure with the decision in the days after it was decided, telling an audience that for her opinion on the matter, it should read *McConnell v. FEC*,³ much of which was overruled in *Citizens United*.⁴ *Citizens United* is one of the rare Supreme Court cases that prompts heated widespread opinions reflected in extensive public opinion polling,⁵ and in the few short years since it was handed down has already been discussed in hundreds of articles in publications like the *New York Times*.⁶

For all the attention it has received, however, *Citizens United* is not the only recent majority opinion by Justice Kennedy with serious consequences for corporate speech. In 2011, the Supreme Court in *Sorrell v. IMS Health* struck down a state statute in part because the law imposed content- and speaker-based burdens on commercial speech.⁷ The Supreme Court has not offered a firm definition of what qualifies as commercial speech,⁸ but whatever its precise contours, commercial speech can be generally defined as expression relating to an economic transaction.⁹ The Supreme Court did not recognize commercial speech as warranting First Amendment protection until the 1970s, when it held that while commercial speech was entitled to free speech protection, because it was so intertwined with economic legislation, it occupied a “subordinate position” meriting merely intermediate scrutiny, not the strict scrutiny with which courts review most government

2. Adam Liptak, *Supreme Court Gets a Rare Rebuke, in Front of a Nation*, N.Y. TIMES, Jan. 29, 2010, at A12. Justice Alito, who was in the *Citizens United* majority, shook his head and mouthed “not true” in response to President Obama’s characterization of the repercussions of the case. *Id.*

3. 540 U.S. 93 (2003).

4. Adam Liptak, *Former Justice O’Connor Sees Ill in Election Finance Ruling*, N.Y. TIMES, Jan. 27, 2010, at A16.

5. Dan Eggen, *Poll: Large Majority Opposes Supreme Court’s Decision on Campaign Financing*, WASHINGTON POST (Feb. 17, 2010, 4:38 PM), http://www.washingtonpost.com/wp-dyn/content/article/2010/02/17/AR20100217011151_pf.html.

6. A search of the *New York Times* archives reveals that the phrase “Citizens United” appeared in over 1700 articles between January 21, 2010, and March 17, 2013. N. Y. TIMES, <http://query.nytimes.com/search/sitesearch/#/%22citizens+united%22/from20100121to20130317/articles/1/allauthors/oldest/> (last visited Mar. 17, 2013).

7. 131 S. Ct. 2653 (2011).

8. See *infra* Part II.B.

9. See, e.g., Martin H. Redish, *Commercial Speech, First Amendment Intuitionism and the Twilight Zone of Viewpoint Discrimination*, 41 LOY. L.A. L. REV. 67, 75 (2007).

regulations of speech.¹⁰ By declaring that content-based restrictions trigger heightened review in an area of law that is distinguished by the content of speech, the Court appears to have elevated the First Amendment protection accorded to commercial speech.¹¹ Professor Robert Post, writing in 2000, described the state of the doctrine as “presently controversial and confused.”¹² Given the unclear implications of *Sorrell*, this characterization resonates at least as strongly today as it did in 2000.

This Note argues that a series of Supreme Court decisions culminating in *Sorrell v. IMS Health Inc.* in 2011 has all but collapsed the distinction between the level of First Amendment protection accorded to commercial speech and noncommercial speech. It first discusses a brief history of the development of the commercial speech doctrine at the Supreme Court. It next examines the *Sorrell* decision in detail, exploring the logic of the case. It then examines lower court interpretations of *Sorrell* and the extent to which they interpreted it as working a change in the doctrine. While lower courts have largely not interpreted *Sorrell* as changing the law, it then argues that the Second Circuit was correct to read *Sorrell* as requiring a commercial speech analysis to begin by asking whether the restriction at issue “was content- and speaker based.”¹³

I. BACKGROUND

This section traces the development of the commercial speech doctrine, examining a series of cases that culminated in *Virginia State Board of Pharmacy*, which explicitly held that commercial speech is protected by the First Amendment. The early cases stressed that commercial speech was not entitled to the full protection of the First Amendment because of the economic issues implicated.

10. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 589 (1980) (Rehnquist, J., dissenting).

11. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2666 (2011) (“Vermont’s law imposes a content- and speaker-based burden on respondents’ own speech. That consideration . . . requires heightened judicial scrutiny.”).

12. Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 1 (2000).

13. *United States v. Caronia*, 703 F.3d 149, 163 (2d Cir. 2012).

The history of commercial speech doctrine at the Supreme Court stretches back only a few decades, as the Court did not formally recognize that such speech merited First Amendment protection until the 1970s.¹⁴ In a 1942 case, for example, the Supreme Court, in a brief opinion issued only two weeks after argument, upheld a New York City ordinance prohibiting distribution on the streets of handbills containing commercial advertising.¹⁵ While the Constitution clearly prevented the government from “unduly burden[ing] or proscrib[ing]” the “exercise of freedom of communicating information and disseminating opinion” in the streets, the Court held that it was “equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising.”¹⁶ The following year, the Court struck down a municipal ordinance outlawing the summoning of residents of a dwelling to the door for the purpose of distributing advertisements but was careful to note that the ordinance “was not directed solely at commercial advertising.”¹⁷ It invalidated the law as applied to a Jehovah’s Witness who was fined for door-to-door distribution of leaflets advertising a religious meeting.¹⁸ In *Breard v. City of Alexandria, Louisiana*, the Court held that a similar ordinance aimed only at preventing door-to-door solicitations by those who sought to sell goods did not violate the First Amendment, distinguishing *Martin* by noting that the ordinance at issue there captured more than just commercial advertising.¹⁹

14. See, e.g., *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 590 (1980) (Stevens, J., concurring) (“When the State adopted this scheme and when its Public Service Commission issued its initial ban on promotional advertising in 1973, commercial speech had not been held to fall within the scope of the First Amendment at all.”).

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

16. *Id.* at 54.

17. *Martin v. City of Struthers, Ohio*, 319 U.S. 141, 142 n.1 (1943).

18. *Id.* at 149.

19. *Breard v. City of Alexandria, La.*, 341 U.S. 622, 642–43 (1951). Though there were two dissents, neither objected to the lack of First Amendment protection accorded to commercial speech. Chief Justice Vinson’s dissent focused on the dormant commerce clause, 341 U.S. at 645–49 (Vinson, C.J., dissenting), while Justice Black’s dissent objected on the ground that the ordinance violated freedom of the press. 341 U.S. at 649–50 (Black, J., dissenting). (The appellant was arrested while selling magazine subscriptions door to door.) Justice Black viewed the “constitutional sanctuary for the press” as necessarily including the right to publish, to circulate, and to “solicit paying subscribers.” *Id.* at 650. He noted that this protection of the commercial component extended no further than the press, saying that he “[o]f course” saw no constitutional infirmity in applying the ordi-

The Court formally recognized that commercial speech is not outside the bounds of the First Amendment in *Bigelow v. Virginia*.²⁰ The editor of a Virginia newspaper was convicted of violating a state statute that prohibited the selling or circulating of any publication that encouraged or prompted the procuring of an abortion.²¹ The newspaper carried an advertisement for a New York City organization that promised to place women in “accredited hospitals and clinics” for legal abortions.²² In affirming the conviction, the Virginia Supreme Court relied on *Valentine v. Chrestensen*, assuming that the First Amendment did not protect “paid commercial advertisements.”²³ The Court held this to be in error, limiting *Chrestensen* to its facts and denying that it supports “any sweeping proposition that advertising is unprotected per se.”²⁴ Commercial speech does fall within the realm of speech protected by the First Amendment, but the Court added that the advertisement at issue not only proposed a commercial transaction but additionally contained factual material of potential interest to those with a general interest in the development of the area of law and pertained to an issue with constitutional implications.²⁵ While holding that commercial speech is not outside the bounds of the First Amendment, the Court declined to delineate the exact bounds.²⁶

The Court went further the following Term, when it squarely addressed whether there exists a “First Amendment exception for ‘commercial speech’” in *Virginia State Board of Pharmacy v. Vir-*

nance to a door-to-door seller of pots. *Id.* at n.* (citing *Martin*, 319 U.S. at 144; *Chrestensen*, 316 U.S. 52).

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

21. *Id.* at 811.

22. *Id.* at 812.

23. *Id.* at 818–19.

24. *Id.* at 819–20.

25. *Id.* at 822. This portion of the opinion goes to great lengths to show that more than a mere commercial transaction is at issue and at times feels a bit strained:

Viewed in its entirety, the advertisement conveyed information of potential interest and value to a diverse audience—not only to readers possibly in need of the services offered, but also to those with a general curiosity about, or genuine interest in, the subject matter or the law of another State and its development, and to readers seeking reform in Virginia. The mere existence of the Women’s Pavilion in New York City, with the possibility of its being typical of other organizations there, and the availability of the services offered, were not unnewsworthy. Also, the activity advertised pertained to constitutional interests.

Id.

26. *Id.* at 825.

ginia Citizens Consumer Council, Inc.²⁷ The Court acknowledged that earlier decisions had unquestionably “given some indication that commercial speech is unprotected,” citing *Chrestensen* and *Breard*.²⁸ It further noted a series of examples in which it had stressed that “communications to which First Amendment protection was given were not ‘purely commercial.’”²⁹ Even *Bigelow*, which overturned the Virginia Supreme Court’s decision finding commercial speech outside the protection of the First Amendment, “arguably” might have left the door open.³⁰ *Bigelow* noted that the advertisement at issue contained factual information likely in the public interest and was related to abortion, a constitutionally protected right.³¹ Finally, the Court directly confronted the question whether there was a commercial speech exception to the First Amendment, leaving it wholly unprotected, and answered in the negative.

At issue was a Virginia statute deeming pharmaceutical price advertising to be unprofessional conduct for pharmacists licensed in the state.³² Speech that does “no more than propose a commercial transaction” nevertheless deserves some protection.³³ That the advertiser presumably had a purely economic motivation is not disqualifying from a First Amendment perspective; a labor leader in the midst of a dispute with management has a similar economic focus as a driving force but unquestionably enjoys constitutional protection of his speech.³⁴ The 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.”³⁵ Prescription drug prices vary substantially, and for a person of modest means, the ability to price shop might determine whether that person can get the necessary medications

27. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 760–61 (1976).

28. *Id.* at 758.

29. *Id.* The Court cited *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964); *Thomas v. Collins*, 323 U.S. 516, 533 (1945); *Jamison v. Texas*, 318 U.S. 413, 417 (1943); and *Murdock v. Pennsylvania*, 319 U.S. 105, 111 (1943).

30. Va. State Bd. of Pharmacy, 425 U.S. at 760.

31. *Id.*

32. *Id.* at 749–50.

33. *Id.* at 762 (quoting *Pittsburgh Press Co. v. Human Relations Comm’n*, 413 U.S. 376, 385 (1973)).

34. *Id.* at 762.

35. *Id.* at 763.

or be able to acquire basic necessities.³⁶ Such commercial advertising might touch on matters of broader public interest, such as the abortion advertisement in *Bigelow*, but requiring this as a matter of constitutional principle would be of little value, since most commercial speech could easily have such an element added.³⁷ Finally, although advertising may often appear tasteless and have little in common with high-minded political debate that is at the core of speech protected by the First Amendment, “the free flow of commercial information is indispensable” to a free enterprise system.³⁸ Where “numerous private economic decisions” determine the allocation of resources, those decisions need to be informed, and advertising is an exchange of information about what is available, from whom, and at what price.³⁹ Such advertising also informs decisions about the regulation of the free enterprise system, so that even if the First Amendment exists primarily “to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal.”⁴⁰

A. THE MODERN DOCTRINE: *CENTRAL HUDSON*’S INTERMEDIATE SCRUTINY TEST

Even while holding that commercial speech was not wholly outside the scope of the First Amendment, *Virginia Board of Pharmacy* did note that there existed “commonsense differences” between commercial and noncommercial speech and suggested that the former needed a “different degree of protection” than the latter.⁴¹ This section examines the Court’s most enduring elabo-

36. *Id.* at 763–64.

37. *Id.* at 764. For example, a pharmacist’s prescription drug prices alone might not qualify as a matter in the broader public interest, but were he to “cast himself as a commenter on store-to-store disparities,” along with his prices and those of his competitor, the matter would so qualify. *Id.* at 764–65.

38. *Id.* at 765.

39. *Id.*

40. *Id.* (footnotes omitted). For an argument that *Virginia State Board of Pharmacy* was wrongly decided and that this line of reasoning is a “non sequitur,” see Thomas H. Jackson & John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 17–18 (1979) (arguing that “in terms of relevance to political decisionmaking, advertising is neither more nor less significant than a host of other market activities that legislatures concededly may regulate”).

41. *Va. State Bd. of Pharmacy*, 425 U.S. at 771 n.24.

ration of the doctrine in *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*.⁴² There, the Court held that government regulations of commercial speech must meet an intermediate scrutiny test in order to survive, but subsequent commercial speech cases have applied a more rigorous form of the intermediate scrutiny evaluation than what *Central Hudson* outlined.⁴³

The key doctrinal feature in *Central Hudson* is a balancing test approach to First Amendment protection of commercial speech.⁴⁴ The New York Public Service Commission issued a regulation completely banning promotional advertising by the public electrical utility, which challenged the law on First Amendment grounds.⁴⁵ The Court's opinion began by defining commercial speech as "expression related solely to the economic interests of the speaker and its audience."⁴⁶ Commercial speech is valuable not only to the speaker trying to advance an economic interest but it also aids customers and advances the broader societal goal of full dissemination of information, a goal furthered even where the economic information contained in the commercial expression is less than complete.⁴⁷

Despite this value, however, commercial speech is not entitled to the same level of constitutional protection as noncommercial speech. A series of Supreme Court decisions have elaborated on "the commonsense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech."⁴⁸ Given that regulation of the economy is a core function of the government and that commercial speech exists to further economic transactions, the Constitution "therefore accords a lesser protec-

42. 447 U.S. 557 (1980).

43. See, e.g., David C. Vladeck, *Lessons from A Story Untold: Nike v. Kasky Reconsidered*, 54 CASE W. RES. L. REV. 1049, 1059 (2004) ("The *Central Hudson* test no longer gives deference to government judgments or upholds restraints on commercial speech as long as they are reasonable and proportionate to the interests served, as it did as recently as a decade ago.")

44. 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 518 (Thomas, J., concurring) (arguing that the "balancing test adopted in *Central Hudson*" should not apply when the government's asserted interest is to keep consumers in the dark about legal products).

45. *Id.* at 558–59.

46. *Id.* at 561.

47. *Id.* at 562.

48. *Id.* (quoting *Ohralik v. Ohio State Bar Ass'n.*, 436 U.S. 447, 455–56 (1978)).

tion to commercial speech than to other constitutionally guaranteed expression.”⁴⁹ The amount of protection accorded to given commercial speech depends on the “nature both of the expression and of the governmental interests served by its regulation.”⁵⁰

Under *Central Hudson*, two types of commercial speech lie unprotected by the First Amendment.⁵¹ First, the government is free to ban commercial speech relating to an activity that is illegal.⁵² Second, the Constitution does not bar the suppression of inaccurate commercial messages, given that the value of commercial speech is rooted in the “informational function of advertising.”⁵³ If the commercial speech at issue falls into neither of the categories, then the government’s power to limit the speech is more limited. Restrictions placed on the commercial speech must further a substantial state interest, and the regulation must be “in proportion to that interest.”⁵⁴ To be proportional to the interest, the regulation “must directly advance the state interest involved” and must be struck down as excessive if “the governmental interest could be served as well by a more limited restriction on commercial speech.”⁵⁵

Assessing the constitutionality of a commercial speech case, then, requires application of a four-part test.⁵⁶ First, commercial speech must not be misleading or involve illegal activity.⁵⁷ Second, the governmental interest that the regulation seeks to achieve must be substantial.⁵⁸ Third, the regulation must directly advance the interest the government has asserted.⁵⁹ Finally, the regulation cannot stand if it is more extensive than would be necessary to serve the government’s interest.⁶⁰

49. *Id.* at 563. For an argument that lesser constitutional protection for commercial speech is reasonable from an economic perspective, see Richard A. Posner, *Free Speech in an Economic Perspective*, 20 SUFFOLK L. REV. 1, 39–40 (1986).

50. *Cent. Hudson*, 447 U.S. at 563.

51. *Id.* (“Consequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity.”).

52. *Id.*

53. *Id.*

54. *Id.* at 564.

55. *Id.*

56. *Id.* at 566.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

Applying the test to the Public Service Commission's ban on advertising by the electric utility, the Court found that the regulation could not stand.⁶¹ The advertising involved neither illegal activity nor misleading communications, so it fell within the scope of commercial speech protected by the First Amendment.⁶² The Court accepted as substantial two interests that the Commission asserted would be served by the advertising ban: first, that it had an interest in energy conservation that would be advanced by preventing advertising by energy utilities, and second, that suppressing promotional advertising for off-peak energy consumption would limit the likelihood of pricing inequities, thus advancing the government's interest in fair and efficient pricing.⁶³ Though a substantial interest, the connection between fair and efficient pricing and an advertising ban was held to be too tenuous and speculative to stand.⁶⁴ The interest in energy conservation, however, was "directly advanced" by the Commission's order and did satisfy the third step of the test.⁶⁵ It failed the fourth prong of the test, as the Court held the ban to be more extensive than necessary to advance the government interest.⁶⁶ The absolute ban prevented the utility from advertising more-energy-efficient products and services, an outcome clearly at odds with the state's goals of conservation and one that has no chance of misleading the public.⁶⁷ An outright ban on advertising by the utility was a blunt tool where attempting "to restrict the format and content" of the advertising would be a more exacting way to further the state's interest without suppressing more speech than necessary.⁶⁸ "In the absence of a showing that more limited

61. *Id.* at 571.

62. *Id.* at 566–67.

63. *Id.* at 568–69. As to the second point, the Commission argued that since the utilities' rates were not based on marginal cost, "promotion of off-peak consumption also would increase consumption during peak periods. If peak demand were to rise, the absence of marginal cost rates would mean that the rates charged for the additional power would not reflect the true costs of expanding production. Instead, the extra costs would be borne by all consumers through higher overall rates." *Id.*

64. *Id.* at 569.

65. *Id.*

66. *Id.* at 570–71.

67. *Id.* at 570.

68. *Id.* at 570–71.

speech regulation would be ineffective,” the advertising ban failed this fourth prong and was held to be unconstitutional.⁶⁹

Then-Justice Rehnquist was the lone dissenter.⁷⁰ He first objected to the notion that “the speech of a state-created monopoly, which is the subject of a comprehensive regulatory scheme,” is entitled to any First Amendment protection at all.⁷¹ More broadly, even accepting that commercial speech is constitutionally protected,⁷² it stands subordinate to speech advocating ideas, and the closer to parity they stood, the greater the risk of watering down the First Amendment.⁷³ He quoted *Ohralik v. Ohio State Bar Association*:

To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment’s guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.⁷⁴

Subjecting state regulation of commercial speech to the exacting analysis that the majority laid out “fails to give due deference to this subordinate position of commercial speech,”⁷⁵ and instead elevates it “to a level that is virtually indistinguishable from that

69. *Id.* at 571.

70. *Id.* at 583 (Rehnquist, J., dissenting).

71. *Id.* at 584. Because of the “special public interests” a utility serves, for purposes of the First Amendment it is closer to a “state-controlled enterprise” than an ordinary corporation and that a state regulatory body “may reasonably decide to impose on the utility a special duty to conform its conduct to the agency’s conception of the public interest.” *Id.* at 587–88.

72. Justice Rehnquist had dissented in earlier cases affording commercial speech constitutional protection. *Bigelow v. Virginia*, 421 U.S. 809, 829 (1975) (Rehnquist, J., dissenting); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 781 (1976) (Rehnquist, J., dissenting).

73. *Cent. Hudson*, 447 U.S. at 588–89.

74. *Id.* at 589 (quoting *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 455–456 (1978)).

75. *Id.*

of noncommercial speech.⁷⁶ Regulation of commercial speech, in his view, is “more akin to an economic regulation to which virtually complete deference should be accorded” to the decisions of the political branches.⁷⁷ Calling ordinary economic regulation a restraint on free speech, Rehnquist wrote, went “far to resurrect the discredited doctrine” of the *Lochner* era.⁷⁸

Despite Justice Rehnquist’s vigorous disagreement and warnings about the newly-elevated status of commercial speech,⁷⁹ he was alone in dissent, and the four-pronged analysis the majority laid out remained the broad outline for the modern doctrine.⁸⁰ Though the test hasn’t changed, the Court has applied a more rigorous form of it more recently. While the Court in *Board of Trustees of State University of New York v. Fox* said that the *Central Hudson* analysis did not require a least restrictive means analysis but only a “reasonable fit,”⁸¹ the Court in *Rubin v. Coors Brewing Co.* invalidated a statute that banned the alcohol content of beer from being displayed on the label in an analysis of “fit” that appears indistinguishable from a least restrictive means test.⁸² In *Lorillard Tobacco Co. v. Reilly*, the Court found that even though the Massachusetts Attorney General had relied on

76. *Id.* at 591.

77. *Id.*

78. *Id.* (citing *Lochner v. New York*, 198 U.S. 45 (1905)).

79. Academics generally did not agree with his conclusion that the protection given to commercial and noncommercial speech was virtually indistinguishable. See, e.g., Alex Kozinski & Stuart Banner, *Who’s Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 653 (1990) (examining the aftermath of *Central Hudson*, concluding that “for reasons that have never been adequately explained, both judges and commentators have seen fit to give commercial speech a lower level of protection than other types of speech,” and arguing against this lower level of protection).

80. In *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469 (1989), the Court clarified that the fourth prong of the *Central Hudson* test does not require a “least-restrictive-means” approach, despite the statement in *Central Hudson* that “if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive,” *Cent. Hudson*, 447 U.S. at 564, and dicta along the same lines in subsequent cases. See, e.g., *Fox*, 492 U.S. at 476. The fourth prong requires only that the government regulation be narrowly tailored such that there is a proportional, “reasonable” fit between means and ends. *Id.* at 480. The decision also noted that the test for whether something qualified as a commercial transaction was whether a commercial transaction was proposed. *Id.* at 473–74.

81. *Fox*, 492 U.S. at 480 (the fit need be “not necessarily perfect, but reasonable”).

82. *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 490–91 (1995) (listing “several alternatives, such as directly limiting the alcohol content of beers, prohibiting marketing efforts emphasizing high alcohol strength (which is apparently the policy in some other western nations), or limiting the labeling ban only to malt liquors, which is the segment of the market that allegedly is threatened with a strength war.”).

substantial factual findings that prohibiting smokeless tobacco and cigar advertising within 1,000 feet of schools and playgrounds would help to reduce youth tobacco use, the ban did not represent a “reasonable fit between the means and ends of the regulatory scheme” and failed the fourth prong of the *Central Hudson* test.⁸³ The Court quoted *Fox* in saying that the government need not show that the regulation is the least restrictive means in order to satisfy the *Central Hudson* test,⁸⁴ but the *Central Hudson* test has taken on teeth that it lacked when it was first announced.⁸⁵

B. WHAT QUALIFIES AS COMMERCIAL SPEECH?

Though the Supreme Court has issued a number of opinions regarding the level of protection accorded to commercial speech, it has rarely defined what qualifies for such protection.⁸⁶ The guidance the Court has given seems to indicate that speech advocating purchase meets the definition.

In *Virginia State Board of Pharmacy*, the Court defined commercial speech as speech that “does Who more than propose a commercial transaction.”⁸⁷ In *Central Hudson* the Court defined it as “expression related solely to the economic interests of the speaker and its audience.”⁸⁸ In *Bolger v. Youngs Drug Products*

83. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 561 (2001).

84. *Id.* at 556.

85. See Coleen Klasmeier & Martin H. Redish, *Off-Label Prescription Advertising, the FDA and the First Amendment: A Study in the Values of Commercial Speech Protection*, 37 AM. J.L. & MED. 315, 339, 348 (2011) (Writing that while at one time “one might have been able to characterize the Court’s protection of commercial speech as far below the level afforded more traditionally protected varieties, over approximately the last fifteen years the Court has extended commercial speech a level of protection that in many ways rivals full protection” and that “in recent years [the Court] has significantly increased the burden that this requirement imposes on government, on more than one occasion invalidating the suppression of commercial speech because of its failure to satisfy its demands.” (footnote omitted)); see also Vladeck, *supra* note 43, at 1059.

86. Professor Nat Stern argues that this “judicial reluctance to embrace a set of all-encompassing criteria for commercial speech represents a healthy pragmatism, not jurisprudential failure.” Nat Stern, *In Defense of the Imprecise Definition of Commercial Speech*, 58 MD. L. REV. 55, 57 (1999).

87. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.* 425 U.S. 748, 762 (1976) (quoting *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 385 (1973)).

88. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 561 (1980).

Corp., the Court addressed the scope of commercial speech directly.⁸⁹ Youngs, a condom manufacturer, challenged a prohibition on the unsolicited mailing of advertisements for contraceptives.⁹⁰ Youngs' mailings included "informational pamphlets," some of which included "detailed descriptions" of the condoms Youngs manufactured and others that discussed venereal disease and the benefits of prophylactics more generally without mentioning specific Youngs products.⁹¹ Since the pamphlets did more than merely present "proposals to engage in commercial transactions," the case required a deeper analysis to determine whether the pamphlets could be properly characterized as commercial speech.⁹² The mere fact of being advertisements was not enough to conclude that they were commercial speech,⁹³ the "reference to a specific product" alone similarly did not trigger the conclusion that it was commercial speech, and the presence of "an economic motivation for mailing the pamphlets would clearly be insufficient by itself to turn the materials into commercial speech."⁹⁴ Though the three characteristics were inadequate individually to compel a conclusion that the material was commercial speech, the Court said that the "combination of *all* these characteristics, however, provides strong support for the District Court's conclusion that the informational pamphlets are properly characterized as commercial speech."⁹⁵ Despite the different definitions that the Court has offered, "[i]t is probably reasonable to conclude that, at this point, the Court has unambiguously adopted the view that commercial speech is confined to expression advocating purchase."⁹⁶

89. 463 U.S. 60 (1983).

90. *Id.* at 61–62.

91. *Id.* at 62 n.4.

92. *Id.* at 66.

93. *Id.* (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 265–66 (1964)).

94. *Id.* at 66–67.

95. *Id.* at 67.

96. Redish, *supra* note 9, at 75.

II. *SORRELL V. IMS HEALTH*

A. THE MAJORITY OPINION

Though the *Central Hudson* test had gained teeth in the preceding years, the Supreme Court broke new ground in 2011 when it held that commercial speech that regulates on the basis of content or speaker is presumptively invalid and is subject to review under heightened scrutiny. Even in the realm of commercial speech, the majority opinion said, government regulation that amounts to viewpoint discrimination triggers either a special commercial speech inquiry or simply heightened review.⁹⁷ Since the outcome would be the same in either instance, the Court declined to clarify which it was applying.⁹⁸ The Court focused not on the traditionally subordinate status of commercial speech but instead on the constitutional impermissibility of the government seeking to silence speech it disfavors.

The *Central Hudson* framework remained the basic test for commercial speech when the Supreme Court handed down *Sorrell v. IMS Health Inc.* in 2011. At issue in the case was the constitutionality of a 2007 Vermont statute, the Prescription Confidentiality Law,⁹⁹ that restricted the exchange and use of physicians' prescription practices in the state.¹⁰⁰ Pharmaceutical manufacturers market their products to doctors, a process that regularly involves sales representatives paying visits to doctors' offices to distribute samples, provide medical studies regarding the drugs, and answering any questions the doctors may have.¹⁰¹ The sales representatives can be more effective when they have information about individual doctor's prescription practices (known as "prescriber-identifying information"), so that they can target doctors who are most likely to be receptive and tailor their presentations accordingly.¹⁰² Pharmaceutical companies tend to focus their salespeople's efforts on high-profit patent-protected drugs.¹⁰³

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

98. *Id.* at 2667.

99. VT. STAT. ANN. tit. 18, § 4631 (2013).

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

101. *Id.* at 2659.

102. *Id.* at 2659–60.

103. *Id.* at 2660.

Pharmacies get prescriber-identifying information during the course of filling prescriptions and often sell the information to “data miners,” who then analyze it and compile reports to sell to the pharmaceutical companies for use in their marketing tactics.¹⁰⁴ Vermont’s Prescription Confidentiality Law prohibited pharmacies, insurance companies, and others from selling prescriber-identifying information for marketing purposes without a doctor’s consent and prohibited pharmaceutical companies and marketers from using it for marketing purposes without a doctor’s consent.¹⁰⁵ The statute included a list of exceptions to this disclosure prohibition, including one for use in “health care research.”¹⁰⁶ The law further appropriated money for an “evidence based prescription drug education program” that sought to provide information to doctors “about commonly used brand-name drugs for which the patent has expired” or will expire shortly.¹⁰⁷ Legislative findings that accompanied the law included findings that doctors frequently lack the time to conduct their own research, leading to undue influence for pharmaceutical companies’ marketing materials, leading to doctors making information based on a one-sided body of information, resulting in increased use of new, brand-name drugs with attendant high costs.¹⁰⁸ A suit brought by three Vermont data miners and another by an association of pharmaceutical manufacturers, each arguing that the law violated their First Amendment rights, were consolidated. A bench trial concluded with a victory for Vermont but the companies prevailed before a split panel of the Second Circuit.¹⁰⁹

The majority opinion from the Supreme Court began its analysis by noting, as it would often throughout the majority

104. *Id.*

105. *Id.* Section 4631(d) of the statute reads:

A health insurer, a self-insured employer, an electronic transmission intermediary, a pharmacy, or other similar entity shall not sell, license, or exchange for value regulated records containing prescriber-identifiable information, nor permit the use of regulated records containing prescriber-identifiable information for marketing or promoting a prescription drug, unless the prescriber consents Pharmaceutical manufacturers and pharmaceutical marketers shall not use prescriber-identifiable information for marketing or promoting a prescription drug unless the prescriber consents.

VT. STAT. ANN. tit. 18, § 4631 (2013).

106. *Id.*

107. *Id.* at 2660–61.

108. *Id.* at 2661.

109. *Id.* at 2661–62.

opinion, that the law imposes “content- and speaker-based restrictions on the sale, disclosure, and use of prescriber-identifying information.”¹¹⁰ Among the Vermont legislature’s findings accompanying the law were that pharmaceutical companies’ goals “are often in conflict with the goals of the state.”¹¹¹ This, the Court said, makes it apparent that the law “imposes burdens that are based on the content of speech and that are aimed at a particular viewpoint,”¹¹² going “even beyond mere content discrimination, to viewpoint discrimination.”¹¹³ This content-based burden triggers heightened judicial scrutiny.¹¹⁴ Such heightened scrutiny is required by the First Amendment whenever government regulates speech “because of disagreement with the message it conveys.”¹¹⁵ The Court disposed of arguments that the law regulates not speech but access to information¹¹⁶ and that the information suppressed by the law is a commodity warranting no First Amendment protection.¹¹⁷ The Court noted again that in an ordinary case “it is all but dispositive to conclude that a law is content-based and, in practice, viewpoint-discriminatory.”¹¹⁸ The outcome here is “the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied.”¹¹⁹

The majority opinion then outlined the *Central Hudson* test: the government must show that the statute directly advances a substantial government interest, that the message is drawn to achieve that interest, that there is a proportional fit between

110. *Id.* at 2663.

111. *Id.* (citing 2007 VT. ACTS & RESOLVES 80, § 1(3)). The Court noted that courts may consider a statute’s stated purpose in assessing its constitutionality. *Id.* (citing *United States v. O’Brien*, 391 U.S. 367, 384 (1968)).

112. *Id.* at 2663–64.

113. *Id.* at 2663 (quoting *R.A.V. v. St. Paul*, 505 U.S. 377, 391 (1992)).

114. *Id.* at 2664 (citing *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 426 (1993); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 658 (1994)).

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

116. *Id.* at 2665–66.

117. *Id.* at 2666–67. The Court noted that there was a “strong argument” that the prescriber-identifying information is speech for First Amendment purposes (since facts are the “beginning point” for much valuable speech) but said that the content- and speaker-based restrictions of the information mean that the case “can be resolved even assuming” that the information is nothing more than a commodity. *Id.* at 2667.

118. *Id.* at 2667.

119. *Id.*

means and ends,¹²⁰ and, additionally, that “the law does not seek to suppress a disfavored message.”¹²¹ The Court characterized the asserted governmental interests as being, broadly, the protection of medical privacy and, second, improved public health and reduced healthcare costs.¹²² The state offered three interests related to the first point, the protection of medical privacy. First, it argued that the restriction advanced the confidentiality of physicians’ prescribing information. The Court quickly rejected this, noting that the regulation allows pharmacies to “share prescriber-identifying information with anyone for any reason” other than marketing.¹²³ If Vermont had allowed for disclosure or sale of the information in only a few “narrow and well-justified circumstances,” a very different case would have been before the Court.¹²⁴ Instead, the statute “allows the information to be studied and used by all but a narrow class of disfavored speakers,” falling well short of advancing the asserting interest.¹²⁵ Vermont’s second asserted interest was to protect doctors from “harassing sales behaviors.”¹²⁶ Freedom requires enduring speech one may not like, and in any case physicians are free to decline to meet with sales representatives who enter their office.¹²⁷ The third asserted interest was that use of the information might undermine the doctor-patient relationship.¹²⁸ If the information undermines the patient-physician relationship, it is because “doctors find it persuasive,”¹²⁹ and under normal circumstances, “fear that speech might persuade provides no lawful basis for quieting it.”¹³⁰

The Court took Vermont’s second justification – that the law advanced important policy goals by lowering the cost of medical

120. *Id.* at 2667–68 (citing *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 566 (1980); *Bd. of Trustees of State University of N.Y. v. Fox*, 492 U.S. 469, 480–81 (1989)).

121. *Id.* at 2668 (citing *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662–63 (1994)).

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 2669 (quoting 2007 VT. ACTS & RESOLVES 80, § 1(28)).

127. *Id.* at 2669–70.

128. *Id.* at 2670.

129. *Id.*

130. *Id.* (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam)).

services and promoting public safety – more seriously.¹³¹ The majority held that while these may be proper goals, advancing them by diminishing sales representatives’ ability to market to physicians is not a permissible way to advance those goals.¹³² The “fear that people would make bad decisions if given truthful information”¹³³ is not enough to warrant content-based burdens on speech, a fact especially true where the target audience of the burdened speech is a “sophisticated and experienced” one.¹³⁴ In any case, stifling expression is not an option the First Amendment gives the government when faced with speech it finds to be “too persuasive.”¹³⁵ The state is free to use its own speech to attempt to bring public opinion on its side, but failing to persuade does not allow the state to “burden the speech of others in order to tilt public debate in a preferred direction”;¹³⁶ even in the commercial marketplace, “the general rule is that the speaker and the audience, not the government, assess the value of the information presented.”¹³⁷

The First Amendment does not prevent the government from some content-based restrictions, since it does have an interest in “protecting consumers from commercial harms,” allowing for greater regulation of commercial speech than noncommercial speech.¹³⁸ Nevertheless, the Vermont law does not have a neutral justification. It does not claim that the speech being suppressed is false or misleading or that the law would prevent false or misleading speech.¹³⁹ The core of what drove Vermont to pass the law, and its interest in burdening the speech, “turns on nothing more than a difference of opinion.”¹⁴⁰ Burdening the speech of

131. *Id.* at 2670.

132. *Id.*

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

134. *Id.* at 2671 (quoting *Edenfield v. Fane*, 507 U.S. 761, 775 (1993)).

135. *Id.* at 2671. (“In an attempt to reverse a disfavored trend in public opinion, a State could not ban campaigning with slogans, picketing with signs, or marching during the daytime. Likewise the State may not seek to remove a popular but disfavored product from the marketplace by prohibiting truthful, nonmisleading advertisements that contain impressive endorsements or catchy jingles. That the State finds expression too persuasive does not permit it to quiet the speech or to burden its messengers.”).

136. *Id.*

137. *Id.* at 2671–72 (quoting *Edenfield*, 507 U.S. at 767).

138. *Id.* at 2672 (internal citations omitted).

139. *Id.*

140. *Id.*

those with whom it disagrees while leaving unburdened those “whose messages are in accord with its own views” is unconstitutional.¹⁴¹

B. THE DISSENT

Justice Breyer, joined by Justices Ginsburg and Kagan, dissented. The dissenters saw a case involving ordinary regulation of noncommercial speech where the “far stricter, specially ‘heightened’ First Amendment standards” the majority applied are “out of place.”¹⁴² The pharmaceutical industry has long been heavily regulated, and the Vermont statute targeted “information that exists only by virtue of government regulation.”¹⁴³ The majority opinion represents the first time that the Court has found that the First Amendment “prohibits the government from restricting the use of information gathered pursuant to a regulatory mandate. . . . Nor has this Court *ever* previously applied any form of ‘heightened’ scrutiny in any even roughly similar case.”¹⁴⁴

The dissent similarly saw the majority opinion as coming to a novel legal conclusion when it held that content-based and speaker-based restrictions on commercial speech warrant any sort of heightened scrutiny.¹⁴⁵ Distinctions based on content are virtually ubiquitous in regulatory programs.¹⁴⁶ The Federal Reserve Board “regulates the content of statements, advertising, loan proposals, and interest rate disclosures, but only when made by financial institutions.”¹⁴⁷ Regulatory rules also often are

141. *Id.* Note that this is not necessarily entirely accurate; the Court stated earlier in the opinion that pharmacies were free to sell or disclose the information to virtually anyone other than pharmaceutical companies and marketing firms working for the pharmaceutical companies. *Id.* at 2668 (the statute “allows the information to be studied and used by all but a narrow class of disfavored speakers.”). Pooling everyone other than pharmaceutical companies into a single category of “speakers whose messages are in accord with [the government’s] views” would seem to overstate the case. *Id.* at 2672.

142. *Id.* at 2673.

143. *Id.* at 2676 (noting that pharmacists are subject to both state and federal regulations).

144. *Id.* at 2677 (citing *L.A. Police Dept. v. United Reporting Publ’g Corp.*, 528 U.S. 32 (1999); *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 426 (1993)).

145. *Id.*

146. *Id.* (citing *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761–62 (1976) (“If there is a kind of commercial speech that lacks all First Amendment protection . . . it must be distinguished by its content.”)).

147. *Id.*

“speaker-based,” affecting only a certain class of regulated speakers.¹⁴⁸ The Food and Drug Administration (FDA), for example, heavily regulates what pharmaceutical firms may tell patients and doctors about their products, including issuing restrictions about promoting “off label” use of drugs.¹⁴⁹ Rules that affect only certain small classes of speakers, such as electricity generators or natural gas pipelines are exceedingly common, and the regulations “almost always reflect a point of view, for example, of the Congress and the administration that enacted them and ultimately the voters.”¹⁵⁰ Inviting judges to closely scrutinize such a broad range of “widely accepted regulatory activity” threatens the same sorts of problems that the Court had during the *Lochner* era, as Justice Rehnquist noted his *Central Hudson* dissent.¹⁵¹

Rather than threatening much accepted regulatory activity, the dissent would simply apply the intermediate commercial speech test of *Central Hudson*.¹⁵² Vermont’s interest in protecting public health, maintaining physician privacy, containing costs for both private and public payers, and “ensuring that prescribers receive unbiased information” can all be deemed substantial.¹⁵³ The statute was accompanied by an extensive legislative record to support the idea that the law satisfied the third prong of *Central Hudson* by directly advancing those substantial interests: included, for example, was testimony that pharmaceutical sales representatives with more limited access to physician-specific information presented more neutral descriptions of their products and testimony citing studies indicating that sales representatives armed with physician-specific information lead to more prescriptions of brand-name drugs, “often with no additional patient benefit but at much higher cost to patients and to state-based insurance programs.”¹⁵⁴ The record also indicated that exceptions

148. *Id.*

149. *Id.* at 2678. This is an interesting example for the dissent to cite. Many commentators questioned whether restriction of off-label promotional material could stand in the wake of *Sorrell*. See, e.g., John N. Joseph et al., *Is Sorrell the Death Knell for FDA’s Off-Label Marketing Restrictions?*, 5 J. HEALTH & LIFE SCI. 1 (2012). *Sorrell* was the basis for an opinion in the Second Circuit vacating a conviction for off-label marketing of pharmaceuticals in *U.S. v. Caronia*, 703 F.3d 149, 163 (2d Cir. 2012), discussed in Part III.A.

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

151. *Id.* at 2679.

152. *Id.*

153. *Id.* at 2682.

154. *Id.* (internal citations omitted).

to the norm of privacy for physicians' prescribing information are relatively few.¹⁵⁵ Given that the fit between means and ends need not be perfect, the legislative judgments satisfy the third prong. Finally, the dissent saw no "adequately supported, similarly effective 'more limited restriction.'"¹⁵⁶ The majority's suggestion that doctors may simply turn away sales representatives to achieve the legislative goals is incorrect; refusing to meet with them does nothing to lower costs, and in any case, the representatives do offer "much useful information," whether it is imbalanced or not.¹⁵⁷ The majority's suggestion that Vermont would be more likely to prevail if it had instead issued a broad prohibition on the disclosure of prescribing information with limited exceptions is similarly incorrect. Such a case would be a "*greater*, not *lesser*, burden" and would not be a "*more limited* restriction," as *Central Hudson* requires.¹⁵⁸ The dissent concludes by saying that the majority opinion at best "opens a Pandora's Box of First Amendment challenges to many ordinary regulatory practices that may only incidentally affect a commercial message" and at worst returns to the *Lochner* era of "substituting judicial for democratic decisionmaking where ordinary economic regulation is at issue."¹⁵⁹

III. LOWER COURT INTERPRETATIONS OF *SORRELL*

Sorrell has already been the source of much litigation in the lower courts. While litigants have been eager to argue that the decision worked a deep change in commercial speech doctrine, courts thus far generally have been unwilling to credit the case as signaling a fundamental change, even while acknowledging that the decision seems to point in that direction. Part III.A examines a recent Second Circuit opinion that interpreted *Sorrell* to require that a reviewing court applying the *Central Hudson* framework must first ask whether the regulation discriminates on the basis of content or speaker, which Part IV will argue is a proper read-

155. *Id.* at 2683.

156. *Id.* (quoting *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 564 (1980)).

157. *Id.*

158. *Id.* at 2684.

159. *Id.* at 2685.

ing of *Sorrell*. Part III.B considers cases falling within the majority of judicial authority so far, which reject arguments that *Sorrell* altered the *Central Hudson* test and instead hold that *Sorrell* is in line with prior commercial speech precedent.

A. COURTS INTERPRETING *SORRELL* AS A CHANGE IN LAW

The Second and Ninth Circuits have construed *Sorrell* as striking a change in commercial speech doctrine.¹⁶⁰ The Second Circuit used the case to vacate a conviction for off-label marketing of pharmaceutical drugs, while the Ninth Circuit merely noted in a footnote that *Sorrell* requires a very demanding form of intermediate scrutiny without stating whether this was a novel legal proposition.¹⁶¹

Numerous commentators have noted that under *Sorrell*'s logic, the criminal ban on pharmaceutical companies' off-label marketing appears to rest on a very shaky constitutional foundation,¹⁶² a position the Second Circuit adopted when it vacated the conviction of a pharmaceutical sales representative for promoting an FDA-approved drug for an off-label use in *United States v. Caronia*.¹⁶³ The *Caronia* court read *Sorrell* as commanding a reviewing court to ask first "whether the government regulation restricting speech was content- and speaker-based."¹⁶⁴ If so, then the inquiry would continue the assumption that it was "presumptively invalid."¹⁶⁵ The second step is then to consider whether "the government had shown that the restriction on speech was consistent with the First Amendment under the applicable level of heightened scrutiny."¹⁶⁶ The court concluded that the ban on off-label marketing was subject to heightened scrutiny both because it distinguishes speech that is favored and disfavored based on the content (whether the use of the drug is approved by the

160. *United States v. Caronia*, 703 F.3d 149 (2d Cir. 2012); *Minority Television Project, Inc. v. FCC*, 676 F.3d 869 (9th Cir. 2012), *reh'g en banc granted*, 09-17311, 2012 WL 5896542 (9th Cir. Nov. 21, 2012).

161. *Caronia*, 703 F.3d at 168–69; *Minority Television Project*, 676 F.3d at 881 n.8.

162. Gayland O. Hethcoat II, *Regulating Pharmaceutical Marketing after Sorrell v. IMS Health Inc.*, 15 QUINNIPIAC HEALTH L.J. 187 (2012); Joseph et al., *supra* note 49; Klasmeier & Redish, *supra* note 85.

163. 703 F.3d 149 (2d Cir. 2012).

164. *Id.* at 163.

165. *Id.*

166. *Id.* at 163–64.

government) and because it targets just one class of speakers — pharmaceutical manufacturers.¹⁶⁷

The three-judge panel then applied the *Central Hudson* framework, as the Court did in *Sorrell*. It found that the first two prongs were satisfied, holding that off-label use of a drug is not false or misleading and that the government has a substantial interest in drug safety and public health.¹⁶⁸ The restriction, however, failed both the third and fourth prongs of the *Central Hudson* test. The prohibition fails to directly advance the government's asserted interest: off-label use itself is lawful, and "it does not follow that prohibiting the truthful promotion of off-label drug usage by a particular class of speakers would directly further the government's goals of preserving the efficacy and integrity of the FDA's drug approval process and reducing patient exposure to unsafe and ineffective drugs."¹⁶⁹ The ban "essentially legalizes the outcome — off-label use — but prohibits the free flow of information that would inform that outcome," thus failing to "directly advance [the government's] interest in reducing patient exposure to off-label drugs or in preserving the efficacy of the FDA drug approval process."¹⁷⁰ The court further found that the fourth prong, narrow tailoring, was not satisfied, holding that "[n]umerous, less speech-restrictive alternatives are available," including tiered warning systems or a direct prohibition on certain off-label uses.¹⁷¹ The court, following *Sorrell*, applied the *Central Hudson* analysis even after noting that content-based burdens are subject to strict scrutiny.¹⁷² It concluded that the "government cannot prosecute pharmaceutical manufacturers and their representatives under the FDCA for speech promoting the lawful, off-label use of an FDA-approved drug."¹⁷³ The government, fearing that the decision would be affirmed by the Supreme Court, declined to appeal.¹⁷⁴

167. *Id.* at 165.

168. *Id.* at 165–66.

169. *Id.* at 166.

170. *Id.* at 167.

171. *Id.* at 167–68.

172. *Id.* at 163.

173. *Id.* at 169.

174. Linda Greenhouse, *Opinionator: Justice(s) at Work*, N.Y. TIMES (Feb. 6, 2013, 9:00 PM), <http://opinionator.blogs.nytimes.com/2013/02/06/justices-at-work/?hp>.

At issue in the Ninth Circuit's *Minority Television Project, Inc. v. FCC*, was an Federal Communications Commission (FCC) ban prohibiting public television and radio stations from airing certain types of advertisements.¹⁷⁵ Though the case was resolved under the test for intermediate broadcast scrutiny, the opinion used a footnote to note that the test used in *Sorrell* would subject the regulation at issue to a similarly rigorous analysis as the one employed in the case.¹⁷⁶ The court summarized *Sorrell* and concluded that while the decision "did not formally overrule any cases holding that commercial speech is subject to less protection than core public issue or political speech," the case made it "clear that commercial speech is subject to a demanding form of intermediate scrutiny analysis."¹⁷⁷ Though not explicitly stated in the opinion, the subtext of the footnote is that *Sorrell* changed the law without formally overruling prior precedent holding commercial speech regulations to a lower level of scrutiny.

B. COURTS INTERPRETING *SORRELL* AS MAINTAINING THE STATUS QUO

In contrast to the Second Circuit's decision in *Caronia* and the Ninth Circuit's implications in its footnote in *Minority Television Project*, most courts construing *Sorrell* have been reluctant to hold that it represented new doctrine and instead have held that *Sorrell* is consistent with prior precedent.

In *Fleminger, Inc. v. U.S. Department of Health and Human Services* in the U.S. District Court for the District of Connecticut, the plaintiff, a manufacturer and retailer of green tea, alleged that the FDA violated the First Amendment when it issued a requirement that the plaintiff append a "modified disclaimer" to its health claim that drinking green tea "may reduce the risk of breast or prostate cancer."¹⁷⁸ The plaintiff argued that *Sorrell* had changed the *Central Hudson* framework, reworking the fourth prong to require more than just a "reasonable fit" between

175. 676 F.3d 869, 872 n.8 (9th Cir. 2012), *reh'g en banc granted*, 09-17311, 2012 WL 5896542 (9th Cir. Nov. 21, 2012).

176. *Id.* at 881 n.8.

177. *Id.*

178. 854 F. Supp. 2d 192, 194–95 (D. Conn. 2012).

the means and ends to be achieved.¹⁷⁹ The argument focused on the fact that the majority in *Sorrell* did not use the word “reasonable” when discussing the connection between the government’s ends and means used to realize those ends, and that the majority also “at one point noted that the statute at issue ‘at least’ must directly advance the substantial government interest.”¹⁸⁰

The court rejected this argument. The *Sorrell* opinion explicitly cited the cases the plaintiff claimed were overturned, and in any case, “it is unlikely that the Supreme Court would directly overturn a prior holding and drastically alter the level of scrutiny afforded under a foundational constitutional analysis without a thorough and comprehensive discussion heralding such an elemental change to the long standing and well-established constitutional framework.”¹⁸¹ The court concluded that *Sorrell* did not alter the traditional commercial speech framework under the First Amendment.¹⁸²

The Fourth Circuit construed *Sorrell* in *Wag More Dogs, LLC v. Cozart*, which involved a small business owner who was not allowed to operate her business until she covered up a mural on the side of her building, as the local government deemed it to be an impermissible business sign instead of a permissible informational one.¹⁸³ She alleged, among other claims, that the local sign ordinance was an unconstitutional abridgement of the First Amendment, citing *Sorrell*. In affirming the dismissal of her suit, the Fourth Circuit rejected her claim that *Sorrell* established a new framework for assessing content neutrality in commercial speech cases.¹⁸⁴ *Sorrell* found that the statute facially discriminated based on content and that the legislative history demonstrated that the law was intended to burden the speech of disfavored speakers, and striking down such a statute “did not signal the slightest retrenchment from its earlier content-neutrality jurisprudence” and was “entirely consistent” with prior Supreme Court cases.¹⁸⁵

179. *Id.* at 196.

180. *Id.* (quoting *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2667–68 (2011)).

181. *Id.* at 196–97.

182. *Id.* at 197.

183. 680 F.3d 359, 363–64 (4th Cir. 2012).

184. *Id.* at 366 n.4.

185. *Id.*

The Fourth Circuit again interpreted *Sorrell* in *Greater Baltimore Center for Pregnancy Concerns, Inc. v. Mayor & City Council of Baltimore*, which involved a challenge to a Baltimore ordinance requiring that “limited-service pregnancy centers” post signs in their waiting rooms making clear that they do not provide or make referrals for abortions or birth control.¹⁸⁶ The Fourth Circuit affirmed the district court’s conclusion that the speech being regulated was fully protected, noncommercial speech and thus subject to strict scrutiny.¹⁸⁷ In a footnote, the opinion stated that the ordinance triggered strict scrutiny for the additional reason that it was not viewpoint neutral, since it had the effect of burdening those whose religious or moral codes underlay their efforts to oppose abortion and birth control.¹⁸⁸ The footnote cited *Sorrell* as support for this proposition, since the Vermont law at issue there had the “practical effect” of burdening one group of speakers.¹⁸⁹

The D.C. Circuit also rejected the idea that *Sorrell* represented novel legal doctrine. In *R.J. Reynolds Tobacco Co. v. FDA*, a group of tobacco companies challenged on First Amendment grounds a rule promulgated by the FDA requiring that all cigarette packs in the United States carry graphic warning labels.¹⁹⁰ The majority opinion found that the graphic warning labels failed the *Central Hudson* test and remanded to the agency.¹⁹¹ The majority did not view *Sorrell* as marking a change in the law, citing it as a case that “reminded us” that the government may not burden the speech of people whose messages are too persuasive.¹⁹² A case that serves to “remind” its readers of a principle surely provides nothing new. The dissent acknowledged that parts of

186. 683 F.3d 539, 549 (4th Cir. 2012); *vacated and rev’d en banc on other grounds*, 721 F.3d 264 (4th Cir. 2013).

187. *Id.* at 555.

188. *Id.* at 555 n.4.

189. *Id.* The majority in *Sorrell* repeatedly asserts that the speaker- and content-based restrictions trigger “heightened” scrutiny, 131 S. Ct. at 2659, 2664, 2666, 2667, but it never states that it is applying strict scrutiny. It noted that “the outcome is the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied.” *Id.* at 2667. At one point the dissent characterizes the majority’s standard of review as an “unforgiving brand of ‘intermediate’ scrutiny.” *Id.* at 2679 (Breyer, J., dissenting). The precise standard of review remains unclear.

190. 696 F.3d 1205, 1208 (D.C. Cir. 2012).

191. *Id.* at 1222.

192. *Id.*

Sorrell appear to mark a change in the law but concluded that the majority actually applied the deferential *Central Hudson* analysis.¹⁹³ Neither the majority nor the dissent read *Sorrell* to change the framework for assessing regulation of noncommercial speech, but the dissent was aware that some language in *Sorrell* certainly seemed to indicate otherwise.

The U.S. District Court for the Eastern District of California also rejected the proposition that *Sorrell* overruled prior case law, even while acknowledging that some language in the opinion could be read as introducing new doctrine.¹⁹⁴ In a motion for reconsideration after the denial of a motion for summary judgment, the defendant in *Yeager v. AT&T Mobility, LLC* argued that the *Citizens United* and *Sorrell* decisions had together “dramatically expanded the free speech rights of corporations” since the district court entered its order.¹⁹⁵ The defendant argued that since the two cases were both written by Justice Kennedy, they “create an inference that corporate speech equates to individual speech” and noted “Justice Breyer’s dissent in which he recognizes this significant departure in the law concerning commercial speech.”¹⁹⁶ This expansion of corporate speech, it continued, in effect overruled a prior decision, the application of which led to the denial of its motion for summary judgment.¹⁹⁷ *Sorrell* had specifically referenced the opinion that the defendant claimed had been overruled, and the court had no difficulty denying the motion for reconsideration.¹⁹⁸ It concluded by stating that even if the foundation of a case that is directly applicable appears to have crumbled but the case has not been formally overruled by the Supreme Court, then a lower court has no authority to find that the case no

193. *Id.* at 1226 n.4 (Rogers, J., dissenting) (“Notwithstanding any intimations it may have made in cases such as *Sorrell v. IMS Health Inc.*, . . . the Supreme Court has continued to apply the more deferential framework of *Central Hudson* to commercial speech restrictions.”).

194. *Yeager v. AT&T Mobility, LLC*, CIV. S-07-2517 KJM, 2011 WL 3847178 (E.D. Cal. Aug. 30, 2011).

195. *Id.* at *4.

196. *Id.* at *6.

197. *Id.*

198. *Id.* See *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2669, 2670, 2672 (2011) (citing, with approval, *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983) (involving a determination whether a pamphlet qualified as commercial speech)).

longer remains good law.¹⁹⁹ Even if the court agreed with the defendant's arguments, it concluded, it would be powerless to rule in its favor.

IV. *SORRELL* COLLAPSED THE DISTINCTION BETWEEN COMMERCIAL AND NONCOMMERCIAL SPEECH

Lower court cases applying *Sorrell* have not been receptive to the argument that it worked a dramatic change in the commercial speech doctrine, and some have even accepted the idea that it was entirely consistent with prior precedent.²⁰⁰ If *Sorrell* is to be taken seriously and its ideas applied consistently in subsequent cases, however, then the distinction between commercial and noncommercial speech cannot stand. The Second Circuit and, though less forceful and less developed in so stating, the Ninth Circuit were correct in interpreting the case as representing a novel legal conclusion. First, *Sorrell* threw into question the constitutional viability of off-label marketing restrictions for pharmaceuticals, laws that were not questioned prior to *Sorrell*. Second, even though the Court stated that it was not overturning *Central Hudson*, the principles it applied substantially changed the framework. Finally, *Sorrell* for the first time imported the idea that content- and speaker-based restrictions trigger heightened scrutiny from noncommercial First Amendment doctrine, thereby increasing the protections for commercial speech.

First, the newly questioned viability of off-label marketing statutes indicate that *Sorrell* has destabilized the doctrine. The prohibition on off-label marketing — which prevents pharmaceutical companies and their sales representatives from passing along truthful, non-misleading information about their products unless first asked for it by a doctor — is precisely the sort of speaker-based discrimination the Court denounced in *Sorrell*.

199. *Yeager*, 2011 WL 3847178 at *6. (“We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. We reaffirm that ‘[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.’”) (internal citation omitted) (quoting *Agostini v. Felton*, 521 U.S. 203 (1997)).

200. See, e.g., *Fleminger, Inc. v. U.S. Dept. of Health & Human Servs.*, 854 F. Supp. 2d 192 (D. Conn. 2012).

Doctors are free to learn of off-label uses through their own research or from fellow doctors or friends, but there are criminal repercussions if the information comes from an employee of a pharmaceutical company. The prohibition on off-label marketing is essentially *Sorrell* in reverse: the Vermont statute allowed physician prescribing information to go to anyone other than a pharmaceutical company or a marketing company working for one, while the ban on off-label marketing allows information to come from anyone other than the representative of a pharmaceutical company. In each instance, the pharmaceutical company is singled out from the flow of information based on its status as a pharmaceutical company.

Second, the Court's denial that it was changing the law cannot avoid the conclusion that it did so when it applied a novel test to the Vermont statute. As noted above,²⁰¹ with the exception of the Second Circuit in *Caronia*, lower courts have been hesitant to read *Sorrell* as working a change in the doctrine. After all, the Court itself denied it was doing so,²⁰² and in the absence of a clear command, lower courts will not apply a new framework to commercial speech cases before them.²⁰³ In *Sorrell*, however, lower courts were given a clear command. The decision repeatedly states that content- and speaker-based burdens on speech, including commercial speech, trigger heightened scrutiny. This is the overarching principle of the case and a holding that no lower court is free to ignore merely because the Court never stated explicitly that it was overruling or altering *Central Hudson*. Whether the Court was explicit in overruling *Central Hudson* is irrelevant where the Court is clear in laying out principles that alter the test, an idea that courts should be especially attuned to, given the many iterations of the *Central Hudson* test since its initial introduction in 1980.²⁰⁴

201. See *supra* Part III.

202. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2667 (2011) ("As in previous cases, however, the outcome is the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied.").

203. See, e.g., *King v. Gen. Info. Servs., Inc.*, CIV. A. 10-6850, 2012 WL 5426742, at *4 (E.D. Pa. Nov. 6, 2012) ("If the Court wished to disrupt the long-established commercial speech doctrine as applying intermediate scrutiny, it would have expressly done so. Absent express affirmation, this Court will refrain from taking such a leap.").

204. See *supra* Part I.A.

Sorrell did not formally do away with the *Central Hudson* framework, but, as the Second Circuit concluded, it did add initial steps. Now, a commercial speech inquiry begins first by asking “whether the government regulation restricting speech was content- and speaker-based,” and if so, proceeding with the assumption that it was “presumptively invalid.”²⁰⁵ Next, the court considers whether “government had shown that the restriction on speech was consistent with the First Amendment under the applicable level of heightened scrutiny.”²⁰⁶ Finding that a heightened level of scrutiny applied, the *Caronia* court then applied the *Central Hudson* test while noting the speaker- and content-based burdens at issue in the case. It had held earlier in the opinion that such burdens trigger strict scrutiny²⁰⁷ yet went on to apply *Central Hudson*, indicating that the *Central Hudson* test, or at least the version of it the Court applied in *Sorrell* differs little from a strict scrutiny analysis.

Judge Rogers, in dissent in *R.J. Reynolds*, characterized parts of *Sorrell* as making “intimations” about changing the law but concluded that it had simply applied the existing *Central Hudson* framework and cited the pages of the opinion where it asserts that it is applying *Central Hudson*.²⁰⁸ *Sorrell* itself does not purport to be applying the same version of *Central Hudson* that the Court employed in *Central Hudson* itself but instead acknowledges repeatedly that because of the content-based burden on speech, the Court is examining the regulation with “heightened” scrutiny.²⁰⁹ The Court may deny that it is changing the law, but where it lays out principles that do so, lower courts are not free to ignore them.

205. *United States v. Caronia*, 703 F.3d 149, 163 (2d Cir. 2012).

206. *Id.* at 163–64.

207. *Id.* at 163.

208. *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d, 1205, 1226 n.4 (D.C. Cir. 2012) (Rogers, J., dissenting) (citing *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2667–68, 2672 (2011)).

209. *Sorrell*, 131 S. Ct. at 2667 (“As in previous cases, however, the outcome is the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied.”). Justice Breyer notes in dissent that regardless of whether the Court was applying a heightened version of intermediate scrutiny or strict scrutiny, it was an exacting level of scrutiny that the Court had not previously applied to similar cases. *Id.* at 2677 (Breyer, J., dissenting) (“Nor has this Court ever previously applied any form of “heightened” scrutiny in any even roughly similar case.”).

Third, lower courts may be reluctant to find a change in law where the principles applied are familiar and the Court cites precedent to support them, but *Sorrell* introduced heightened scrutiny for content- and speaker-based regulations into commercial speech jurisprudence for the first time and represents a major doctrinal change. It bears noting at the outset that there is a logical inconsistency in declaring that content-based discrimination is impermissible in a commercial speech case. Regardless of the precise contours of what falls under the category of commercial speech,²¹⁰ the category of expression is distinguished by its content.²¹¹ The entire foundation of the commercial speech doctrine rests on the idea that expression advocating an economic transaction merits less constitutional protection than other types of expression (a category that is based on content), yet the *Sorrell* Court began its analysis by declaring categorically that content-based discrimination triggers more searching scrutiny from a reviewing court.²¹²

To be sure, *Sorrell* is not the first opinion to contain language indicating that content-based bans on speech categorically trigger heightened scrutiny; Justice Stevens's plurality opinion in *44 Liquormart, Inc. v. Rhode Island*²¹³ is the first such example.²¹⁴ The opinion saw no reason to review a ban on "truthful, nonmisleading commercial speech" with any "added deference."²¹⁵ It noted that "commercial speech bans not only hinder consumer choice, but also impede debate over central issues of public policy" and concluded that the "First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good. That teaching applies equally to state attempts to deprive consumers of accurate information about their chosen products."²¹⁶ This categori-

210. See *supra* Part I.B.

211. See, e.g., Martin H. Redish, *Commercial Speech, First Amendment Intuitionism and the Twilight Zone of Viewpoint Discrimination*, 41 LOY. L.A. L. REV. 67, 75 (2007) ("It is probably reasonable to conclude that, at this point, the Court has unambiguously adopted the view that commercial speech is confined to expression advocating purchase.").

212. *Sorrell*, 131 S. Ct. at 2664.

213. 517 U.S. 484 (1996).

214. Klasmeier & Redish, *supra* note 85, at 340.

215. *44 Liquormart*, 517 U.S. at 502.

216. *Id.* at 503. Klasmeier and Redish summarize the opinion as "arguing that the First Amendment is designed to prevent government from manipulating citizen behavior, not through free and open debate but rather through the selective suppression of speech

cal approach did not, however, command a majority of the Court until *Sorrell*.²¹⁷

The *Sorrell* majority opinion imported from noncommercial speech doctrine the idea that the government may not enact content-based burdens. After explicating the *Central Hudson* test, the majority concluded that “[a]s in other contexts, these standards ensure not only that the State’s interests are proportional to the resulting burdens placed on speech but also that the law does not seek to suppress a disfavored message.”²¹⁸ It cited *Turner Broadcasting, Inc. v. FCC* as support for this proposition.²¹⁹ *Turner Broadcasting* was not a commercial speech case and did not invoke the *Central Hudson* test. It dealt with the must-carry provisions of the Cable Television Consumer Protection and Competition Act of 1992, and though it had been cited in eleven Supreme Court opinions prior to *Sorrell*, never once had a majority cited it in a commercial speech case.²²⁰

advocating lawful action. Where government is concerned about public health or safety, it is constitutionally authorized to regulate or even prohibit *the actual activity itself*, not merely the speech advocating the activity. Once government has made the activity itself illegal, it has full authority under the First Amendment to suppress speech advocating that now illegal activity. But it cannot achieve its regulatory goal furtively through suppression of information and opinion.” Klasmeyer & Redish, *supra* note 85, at 340.

217. Despite similar language in some majority opinions, “a majority of the Court has never formally adopted this categorical approach in place of the *Central Hudson* test.” *Id.*

218. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2668 (2011).

219. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662–63 (1994). At issue were the provisions of the Cable Television Consumer Protection and Competition Act of 1992 that required cable companies to carry local broadcast stations. This portion of *Turner Broadcasting* stated that the must-carry provisions were “content-neutral restrictions that impose an incidental burden on speech” and thus subject to intermediate scrutiny under *United States v. O’Brien*, 391 U.S. 367 (1968). *O’Brien* upheld against a First Amendment claim a criminal conviction for burning a selective service card. *Id.*

220. The only time *Turner Broadcasting* had been cited in a commercial speech case was in a concurrence by Justice Thomas that was joined by no other Justice. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 574 (2001) (Thomas, J., concurring in the judgment). He argued that “when the government seeks to restrict truthful speech in order to suppress the ideas it conveys, strict scrutiny is appropriate, whether or not the speech in question may be characterized as ‘commercial.’” *Id.* at 572. The other cases prior to *Sorrell* that cited *Turner Broadcasting* were *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002) (adult entertainment zoning regulations and the secondary effects of protected speech); *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (challenge to the Copyright Term Extension Act of 1998 under the Copyright Clause); *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656 (2004) (Breyer, J., dissenting) (Child Online Protection Act); *Gonzales v. Raich*, 545 U.S. 1 (2005) (Commerce Clause challenge to the intrastate regulation of marijuana under the Controlled Substances Act); *Rapanos v. United States*, 547 U.S. 715 (2006) (definition of “navigable waters” under the Clean Water Act); *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008) (punitive damages); *Ysursa v. Pocatello Educ. Ass’n*, 555 U.S.

Many prior commercial speech cases could have been framed in terms of content- or speaker-based burdens but were not. In *Rubin*, for example, the Court did not declare that requiring wine and spirit producers to place alcohol content on their products' labels but prohibiting beer producers from so doing was a content- or speaker-based burden that triggered heightened scrutiny; instead, the Court used this fact to question whether the government's asserted interest was really furthered by the ban.²²¹ The ban was struck down under *Central Hudson's* intermediate scrutiny, but if the commercial speech test now asks whether there is a content- or speaker-based burden, treating some alcohol producers differently from others might bump the regulation into heightened review at the outset. The Court in *Sorrell* is not clear in delineating precisely what types of content- and speaker-based burdens trigger heightened review (since virtually all commercial speech restrictions do share that quality), but the addition of this new step appears to substantially change the doctrine.

Perhaps the heightened scrutiny extends no further than to situations involving especially sophisticated consumers of speech. Justice Kennedy's majority opinion noted that the idea that the government cannot ban speech based on a fear that people will make bad decisions applies "with full force when the audience, in this case prescribing physicians, consists of 'sophisticated and experienced' consumers."²²² This might leave open the possibility that the ideas would apply with less force when the regulated speech is not directed at a sophisticated audience, but given the continued, almost repetitive focus on the ills of content-based regulation,²²³ the opinion clearly intended to convey the message

353 (2009) (First Amendment challenge to ban on public-employee payroll deductions for political activities); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009) (agency change in policy not subject to heightened standard of review under the Administrative Procedure Act); *Citizens United v. FEC*, 558 U.S. 310 (2010) (independent corporate electioneering expenditures). Omitted here is *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997) (*Turner II*).

221. *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 488 (1995) ("If combating strength wars were the goal, we would assume that Congress would regulate disclosure of alcohol content for the strongest beverages as well as for the weakest ones.").

222. *Sorrell v. IMS Health Inc.*, 131 S. Ct. at 2671 (quoting *Edenfield v. Fane*, 507 U.S. 761, 775 (1993)).

223. Nearly every paragraph in the final section of the majority opinion contains some formulation of the idea that the government may not burden expression it finds to be too persuasive to advance its side of a debate. *Id.* at 2670–72.

that government suppression of disfavored ideas is constitutionally impermissible, even if the speech's intended audience does not consist solely of individuals with graduate education. This one line was more than likely included to further fortify the outcome of the case, not to leave a sliver of hope for the government in future commercial speech cases. The opinion rests on much more than that this sophisticated population of doctors is wise enough to make its own decisions.²²⁴

The Second Circuit's decision in *Caronia* has been the most important case to date interpreting *Sorrell* to contain a novel legal proposition, while most lower courts have been reluctant in the absence of an explicit statement overruling prior case law to interpret *Sorrell* as saying anything new. The Second Circuit's interpretation is the only tenable one and, going forward, lower courts should follow its lead. While *Caronia* arose in the narrow context of off-label marketing restrictions, the principles it identifies in *Sorrell* are applicable across the range of commercial speech cases. *Sorrell* was the first case, for instance, to begin by asking whether the commercial speech restriction at issue involved content- or speaker-based restrictions, and the Second Circuit was correct to see this as adding a new initial step to the *Central Hudson* inquiry. Prior cases involving commercial speech often involved restrictions that could be seen as content- or speaker-based restrictions, but the Court had never before in a majority position used that as grounds to find a restriction to be unconstitutional. The Court's repeated denunciation of such restrictions made clear that they fall outside the boundary of acceptable commercial speech regulations. While the Court claimed that it was applying some heightened form of the *Central Hudson* intermediate scrutiny framework, the analysis appears to differ little from strict scrutiny. The holding regarding speaker- and content-discrimination in the commercial speech context uproots the existing commercial speech doctrine, and lower courts are bound to apply the law as the Supreme Court gives it.

224. The opinion only once mentions that doctors are a sophisticated audience, *id.* at 2671, but repeats throughout that banning one view in favor of another warrants heightened judicial scrutiny. *Id.* at 2670–72.

V. CONCLUSION

A series of decisions culminating in *Sorrell* has elevated the rigor of judicial review of commercial speech to something stronger than the intermediate scrutiny applied to it under the *Central Hudson* framework. This is a profound development in First Amendment doctrine that has not been fully recognized in the lower courts.

Over the stretch of a rather abbreviated time commercial speech has gone from lacking any recognition at all, to being formally recognized as protected in the mid-1970s, to being virtually indistinguishable from noncommercial speech in the level of protection it enjoys. The cases went from acknowledging the “commonsense distinction” between commercial speech and noncommercial speech to quoting that line from precedent but almost with a grudging tone.²²⁵ The *Sorrell* Court held that content-based discrimination even in the commercial context is offensive enough to the First Amendment that any such governmental action triggers the very highest levels of scrutiny, just as it does with noncommercial speech. *Sorrell* has, at least outside of academia, flown more or less under the radar, especially compared to the firestorm that *Citizens United* generated. Despite the relative lack of attention it has garnered, this Note argues, *Sorrell* represents a major change in the commercial speech scheme.

Given that the Court maintained that it was doing nothing to apply new principles in commercial speech, lower courts’ reluctance to interpret the case as novel law is understandable. Nevertheless, the commercial speech framework espoused in *Sorrell* is much more stringent than recent prior cases, to say nothing of the framework as described in *Central Hudson*. The Obama Administration elected not to appeal its loss in *Caronia* to the Supreme Court, fearing an affirmation of the decision. This will only forestall the inevitable. Off-label marketing restrictions stand on flimsy ground after *Sorrell*, and other circuits will certainly face First Amendment challenges to such laws before long. The result will either be a series of circuit decisions striking down a federal law (despite case law in many circuits saying that *Sorrell* repre-

225. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n.24 (1976).

sents nothing new) or a circuit split that will end with the Supreme Court taking the next step in the commercial speech and striking down off-label marketing restrictions. The Second Circuit is correct that *Sorrell* is a novel and important development in commercial speech, and absent a dramatic change in Court personnel in the short term, that commercial speech stands approximately at parity with noncommercial speech in the level of protection it is afforded will grow clearer. The Second Circuit's *Caronia* decision vacating a conviction for off-label marketing may be the most significant regulatory casualty in *Sorrell's* wake thus far, but it almost certainly will not be the last. If the Court means what it says, then the already-pinched space between the protection accorded commercial and noncommercial speech will not stand for long.