William & Mary Bill of Rights Journal

Volume 21 | Issue 4 Article 8

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Repository Citation

Andrew J. Wolf, *Detailing Commercial Speech: What Pharmaceutical Marketing Reveals About Bans on Commercial Speech*, 21 Wm. & Mary Bill Rts. J. 1291 (2013), http://scholarship.law.wm.edu/wmborj/vol21/iss4/8

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DETAILING COMMERCIAL SPEECH: WHAT PHARMACEUTICAL MARKETING REVEALS ABOUT BANS ON COMMERCIAL SPEECH

Andrew J. Wolf*

INTRODUCTION

Pharmacies maintain a "potpourri" of records about the prescriptions people bring to be filled, including the drugs, dosages, and prescribers.[1] Eventually, this information ends up in the hands of pharmaceutical companies, who use the data to market or detail new medications to physicians based on their prescribing history. Because the data are packaged by prescribing physicians,[2] the data are commonly referred to as prescriber-identifying information. New Hampshire, Vermont, and Maine responded to this practice by passing legislation to ban the use of prescriber-identifying information for *marketing* or *commercial* purposes.[3] Because pharmaceutical companies are the largest purchasers of prescriber-identifying information and data processing companies' largest source of income, two data processing companies immediately challenged the legislation as a violation of the First Amendment.[4] The data processing companies argued that the legislation impermissibly limited their ability to disseminate information.[5] The Supreme Court agreed, but did so under the framework of viewpoint discrimination, casting aside the commercial speech analysis on which the lower courts had based their rulings.[6]

While the outcome of *Sorrell v. IMS Health*[7] is but another example of the Court's effort to erode the commercial speech doctrine, *Sorrell* pushes the commercial speech doctrine ever closer to that used to analyze noncommercial speech. Noncommercial

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* J.D. candidate, William & Mary Law School, 2013. B.A., Case Western Reserve University, 2010. I would like to thank my parents for everything they have done to support me, David Mattern for his comments on this Note, and the editors of the *William & Mary Bill of Rights Journal* for their editing and support. All mistakes are my own.

[1] IMS Health Inc. v. Ayotte, 550 F.3d 42, 45 (1st Cir. 2008), *cert. denied*, 129 S. Ct. 2864 (2009).

[2] *See id.*

[3] ME. REV. STAT. tit. 22, § 1711-E (2) (2012); N.H. REV. STAT. ANN. § 318:47-f (2013); VT. STAT. ANN. tit. 18, § 4631(d) (2011), *declared unconstitutional by* Sorrell v. IMS Health Inc., 131 S. Ct. 2653 (2011).

[4] *Ayotte*, 550 F.3d at 47–48 (noting that the complaint was filed within one month of the law's effective date).

[5] *Sorrell*, 131 S. Ct. at 2661–62 (2011).

[6] *Id.* at 2663.

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

speech currently enjoys greater judicial scrutiny than commercial speech,[8] but the Court and commentators have questioned the foundations for that division. While some argue that commercial speech is less valuable than political speech, and therefore undeserving of strict scrutiny,[9] others question the commercial-noncommercial divide and go so far as to advocate eliminating the commercial speech doctrine entirely.[10] I propose that commercial speech restrictions fit neatly into two classes: restrictions which limit the time, place, or manner of expression, and holistic bans on a class of speech. I argue that the Court should evaluate bans under the rubric of strict scrutiny, while reserving the Court's intermediate review under *Central Hudson Gas & Electric Corp. v. Public Service Commission*[11] for less restrictive time, place, or manner restrictions. Evaluating commercial speech along these lines has the advantage of greater consistency in the doctrine, while balancing the values that underlie the First Amendment and commercially motivated speech.

Part I explores the parallel paths of commercial speech and the content-based analysis that is central to noncommercial speech. Part II examines the legislation enacted in New Hampshire, Vermont, and Maine, as well as the subsequent split between the First and Second Circuits. It then analyzes *Sorrell*, emphasizing the ways in which the Supreme Court has demonstrated its desire to alter the commercial speech doctrine. Part III then develops the reasons why commercial speech deserves greater protection in the context of outright bans. By examining the policies that support a separate commercial speech doctrine and the policies that support consolidation, I propose a middle ground that balances the values underlying an evolving area of Constitutional Law. Finally, Part IV demonstrates the application of this framework to pharmaceutical detailing.

I. MODERN COMMERCIAL AND NONCOMMERCIAL SPEECH DOCTRINES

A. Content-Based Speech Restrictions

Within the Court's First Amendment doctrine, commercial speech and noncommercial speech form two separate tracks under which a court may evaluate a law or

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[8] *See, e.g.*, Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 472–73 (1996).

[9] *See, e.g.*, Mitchell N. Berman, *Commercial Speech and the Unconstitutional Conditions Doctrine: A Second Look at "The Greater Includes the Lesser,"* 55 VAND. L. REV. 693 (2002); Thomas H. Jackson & John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1 (1979); Frederick Schauer, *Commercial Speech and the Architecture of the First Amendment*, 56 U. CIN. L. REV. 1181 (1988).

[10] *See, e.g.*, R.H. Coase, *Advertising and Free Speech*, 6 J. LEGAL STUD. 1 (1977); Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech*, 76 VA. L. REV. 627 (1990); Daniel E. Troy, *Advertising: Not "Low Value" Speech*, 16 YALE J. ON REG. 85 (1999).

[11] 447 U.S. 557 (1980).

regulation that restricts speech.[12] Within the noncommercial track of the First Amendment, the road again splits into content-based restrictions and content-neutral restrictions.[13] Content-neutral restrictions are imposed without reference to the content of the speech.[14] In other words, the speech limit at issue is content-neutral if the government's justification for regulating the speech is not based on what is being said.[15] Content-based regulations are subjected to heightened or strict scrutiny, where the government must articulate a compelling interest and demonstrate that the means employed are the least restrictive means to further that interest.[16]

Content-neutral regulation that merely restricts the time, place, or manner of speech is subjected to less rigorous scrutiny.[17] Such restrictions are constitutional provided that they "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information."[18] In determining whether to apply this form of intermediate scrutiny, the Court evaluates whether the government's purpose is substantially related to the content of the speech.[19] For example, in *Ward v. Rock Against Racism*,[20] the Court found that mere sound restrictions without regard to the particular performance in Central Park were content-neutral time, place, or manner restrictions.[21]

Viewpoint discrimination is an "especially egregious" type of content-based discrimination in which the government limits speech based on disagreement with a particular opinion the speaker holds.[22] To illustrate the difference, the government may pass a law prohibiting threats against the President, but the government may not enforce a law that only prohibits threats against the President that also mention an objection to a particular policy.[23] While the ban on threatening the President may further a compelling governmental interest, the requirement that the would-be

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[12] *See, e.g.*, R. GEORGE WRIGHT, SELLING WORDS 54–55 (1997).

[13] RODNEY A. SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH § 3:9 (2012).

[14] *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

[15] *Id.*

[16] *See, e.g.*, Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989); *see also* R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid.").

[17] *See, e.g.*, *Ward*, 491 U.S. at 791.

[18] *Id.* (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)).

[19] *See id.* at 798–99.

[20] 491 U.S. 781 (1989).

[21] *Id.* at 792.

[22] SMOLLA, *supra* note 13, § 3:9.

[23] *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 379–80, 388 (1992) (invalidating a state statute which criminalized cross burning "which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender" on the grounds that the list of bases was underinclusive, going beyond mere content-based regulation to viewpoint discrimination).

violator also voice objection to a specific government policy has nothing to do with the government purpose and impermissibly discriminates based on the speaker's viewpoint.[24] Because viewpoint discrimination thwarts the very goals that the First Amendment seeks to achieve, "it is all but dispositive to conclude that a law is content-based and, in practice, viewpoint-discriminatory."[25]

Unlike noncommercial speech, commercial speech, most clearly exemplified by advertising, is thought to be both less important and less susceptible to unjustified governmental intrusion.[26] In other words, protecting an individual who chooses to speak out against the government's action in a war, for example, is far more important than granting a corporation wide latitude to advertise its products in any way it desires. The harm to public discourse that comes from silencing individuals is far greater than the harm that arises when a company cannot advertise a particular product in a particular way. Under this rationale, commercial speech was arguably unprotected for nearly two centuries.[27]

B. Commercial Speech

Commercial speech is generally defined as speech that proposes a commercial transaction.[28] But, differentiating commercial and noncommercial speech may be more difficult than it first appears.[29] The Supreme Court has repeatedly recognized that most commercial speech contains forms of both commercial and noncommercial speech.[30] For example, speech during a labor dispute is "primarily economic" despite its clear political and social implications, and advertisements generally contain at least some message beyond the attempt to encourage a sale.[31] The Court has proposed that the distinction for the purpose of determining the difference

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[24] *See id.* at 388.

[25] Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2667 (2011).

[26] *See, e.g.*, Bigelow v. Virginia, 421 U.S. 809 (1975).

[27] *See id.* For a critique of the Court's first proclamation that commercial speech is not protected, see Kozinski & Banner, *supra* note 10, at 627 (arguing that the Court "plucked the commercial speech doctrine out of thin air").

[28] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 562 (1980).

[29] *See* Nat Stern, *In Defense of the Imprecise Definition of Commercial Speech*, 58 MD. L. REV. 55, 79 (1999).

[30] *See, e.g.*, City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 419 (1993) ("This . . . case illustrates the difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category."); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762–65 (1976). *But see, e.g.*, *Cent. Hudson*, 447 U.S. at 561 (characterizing a ban on advertisements encouraging the use of electricity as "related solely to the economic interests of the speaker and its audience").

[31] *Virginia State Bd. of Pharmacy*, 425 U.S. at 762–65.

between commercial and noncommercial speech is dictated by "common sense,"[32] and has considered factors such as the extent to which economic motives drive the speech or whether the speech references a specific product.[33] Even when the Court examines laws that bar advertising a price—something that appears exclusively commercial—the Court finds a mix of commercial and noncommercial speech.[34] For example, in *44 Liquormart, Inc. v. Rhode Island*,[35] the Court found that Rhode Island barred advertising the price of alcohol merely because it wished to discourage alcohol consumption.[36] Scholars have argued that even the test which asks whether the speech proposes a commercial transaction can produce unintended results, especially when advertisements do not directly promote the product or reveal its price.[37] Once a court determines that the speech at issue is commercial or noncommercial, what is the effect of accompanying speech?[38] In other words, if some part of the speech proposes a commercial transaction, is everything the actor said commercial speech, or only the part that directly proposes a commercial transaction?[39] Few court cases analyze the commercial-noncommercial distinction, however, simply choosing one and moving to the more developed areas of the Court's doctrine.[40]

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[32] Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455–56 (1978). The common-sense distinction may also be understood as whether the speech contributes to the marketplace of ideas or the marketplace of goods and services. *See* Jackson & Jeffries, *supra* note 9, at 2.

[33] Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60 (1983). For a critique of the Court's doctrine on the question of classifying speech as commercial or noncommercial, see WRIGHT, *supra* note 12, at 54–57.

[34] *See* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996).

[35] 517 U.S. 484 (1996).

[36] *Id.* at 499 ("[T]he State retains less regulatory authority when its commercial speech restrictions strike at 'the substance of the information communicated' rather than the 'commercial aspect of [it].'" (quoting Linmark Assocs., Inc. v. Twp. of Willingboro, 431 U.S. 85, 96 (1977); Carey v. Population Servs. Int'l, 431 U.S. 678, 701 n.28 (1977))).

[37] Kozinski & Banner, *supra* note 10, at 63. Judge Kozinski and Professor Banner ask whether the following television commercial really proposes a commercial transaction:

> An attractive woman knocks on the door of [Michael J. Fox's] apartment and asks if he has a Diet Pepsi. He tells her he does, but opens his refrigerator and discovers that he doesn't; this sets him off down the fire escape and through a series of close calls and near mishaps before he obtains a can of Diet Pepsi and returns to his apartment, soaking wet and exhausted, to give the can to his startled neighbor.

Id. For a more extensive critique of the commercial-noncommercial distinction, see *id.* at 638–48.

[38] *See* Victor Brudney, *The First Amendment and Commercial Speech*, 53 B.C. L. REV. 1153, 1157–58 (2012).

[39] *See id.*

[40] *See, e.g.*, Schauer, *supra* note 9, at 1184–85 ("[T]he Supreme Court, for all it *has* said about commercial speech, has conspicuously avoided saying just what it is."). Professor Nat Stern argues that the apparent imprecision of the commercial-noncommercial distinction plays little role in the doctrine because in most cases the distinction is easy to discern. Stern,

Throughout most of the First Amendment's history, courts consistently found that commercial speech was not entitled to any protection under the First Amendment.[41] In 1975, in *Bigelow v. Virginia*,[42] the Court signaled its intent to extend some protection to commercial speech when it invalidated a Virginia statute that prohibited advertising abortions.[43] Recognizing that the *Bigelow* Court may have been motivated by the advocacy of abortion, rather than a pure desire to expand First Amendment protection to advertising, the Court clarified that the First Amendment provides at least some protection for purely commercial speech.[44] *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*[45] reasoned that "[a]dvertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information."[46] The Court struck down a Virginia law prohibiting the advertisement of prescription medication prices, finding that the ban did not "directly affect" the State's interest in maintaining the professional standards of pharmacists.[47]

In *Central Hudson*, the Court articulated a new test to determine whether commercial speech restrictions violate the First Amendment.[48] First, the court asks whether the speech at issue is misleading or concerns unlawful activity.[49] If neither is true, then the court determines whether the government's interest in passing the law is substantial.[50] Finding a substantial government interest, the last two inquiries test the tailoring of the law or regulation by asking whether the law or regulation "directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest."[51] In *Central Hudson*, the Court struck down the regulation as improperly tailored to the government interest.[52] The Court has since clarified that the fourth prong of the *Central Hudson* test, like time,

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supra note 29, at 94–101. Even when commentators could criticize the Court's answer to the commercial-noncommercial question, commentators tend to fault the Court for its tailoring analysis. *Id.* at 96–98.

[41] *See, e.g.*, Schauer, *supra* note 9, at 58 (citing Valentine v. Chrestensen, 316 U.S. 52 (1942)).

[42] 421 U.S. 809 (1975).

[43] *Id.*

[44] Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 760–61 (1976).

[45] 425 U.S. 748 (1976).

[46] *Id.* at 765.

[47] *Id.* at 769.

[48] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566, 568 (1980) (striking down a regulation that banned advertising to "promote the use of electricity").

[49] *Id.* at 566.

[50] *Id.*

[51] *Id.*

[52] *Id.* at 569–71 (finding that the State's interest in maintaining its current electric service structure was not directly served by the regulation and that the regulation was so extensive it actually prohibited advertising that would have served the government's interest in conserving energy).

place, and manner restrictions, does not require the least restrictive means possible.[53] Rather, the law or regulation must not "burden substantially more speech than is necessary to further the government's legitimate interests."[54]

Because the Court afforded commercial speech less protection than that given to noncommercial speech, some laws and regulations took advantage of the different standards.[55] One such case made it to the Supreme Court in 1992.[56] The City of Cincinnati revoked permits allowing freestanding newsracks to display advertisement-heavy magazines, but continued to extend permits to newsracks that displayed newspapers.[57] Cincinnati argued that revoking the permits furthered the substantial government purpose of increasing the safety and appearance of city streets and sidewalks.[58] The Supreme Court struck down Cincinnati's ban on the use of newsracks by magazines, arguing that the commercial-noncommercial distinction bore no relation to the purported interests of the city.[59] Along the lines of *44 Liquormart*, the government may not regulate commercial speech because of the message it conveys,[60] whether that message is the promotion of alcohol or a "naked assertion that commercial speech has 'low value.'"[61]

A pattern emerges from each of these cases: the Court found the speech to be commercial but nevertheless struck down the law or regulation under the purportedly more lenient commercial speech doctrine. In some cases, the Court found the law improperly tailored to the government's interest;[62] in others, the Court focused on the government's apparent interests.[63] Regardless of the reason, it was clear that the Court gave the First Amendment salience in the area of commercial speech.

II. PRESCRIBER-IDENTIFYING INFORMATION & COMMERCIAL SPEECH

A. Prescriber-Identifying Information

Prescriber-identifying information groups data about the particular drugs and dosages a physician prescribes so that data-analyzing companies can discern any

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[53] Bd. of Trs. v. Fox, 492 U.S. 469, 478 (1989).

[54] *Id.* (quoting Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989)).

[55] *See, e.g.*, City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993).

[56] *Id.*

[57] *Id.* at 412–13.

[58] *Id.* at 412.

[59] *Id.* at 424 ("Not only does Cincinnati's categorical ban on commercial newsracks place too much importance on the distinction between commercial and noncommercial speech, but in this case, the distinction bears no relationship *whatsoever* to the particular interests that the city has asserted.").

[60] 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 499 (1996).

[61] *Discovery Network*, 507 U.S. at 429.

[62] *See, e.g.*, *44 Liquormart*, 517 U.S. at 507; Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 769 (1976).

[63] *See, e.g.*, *Discovery Network*, 507 U.S. at 424.

patterns.[64] Pharmacies then remove any personal information about the patient, package the data, and sell the data to data processing companies.[65] Data processing companies then analyze the data and sell it to researchers and pharmaceutical companies.[66] Pharmaceutical companies who purchase the data use it in detailing, a process in which marketing representatives market the company's products directly to doctors.[67] By examining the prescribing practices of physicians, detailers can develop marketing strategies to push certain products, either encouraging doctors to prescribe a drug when they otherwise would not, or encouraging doctors to replace certain drugs with those of the pharmaceutical company.[68]

Although detailers are more effective with prescriber-identifying information, detailing itself is expensive.[69] Due to expense, pharmaceutical companies typically only detail patent-protected, name-brand drugs.[70] Generic brands, by contrast, generally do not generate adequate profit margins to support marketing through one-on-one visits with physicians.[71] IMS Health Inc. (IMS), the company-party in *Sorrell*, estimates that in 2004 alone, pharmaceutical companies spent $27.7 billion on marketing activities, compared to $29.6 billion on research and development.[72] Almost sixty percent of all money spent on marketing goes toward detailing.[73] Primary care physicians receive an average of twenty-eight detailer visits per week, and specialists receive fourteen.[74] Detailing is without a doubt a crucial component of a pharmaceutical company's budget.

In response to the growth of the pharmaceutical-detailing business, Maine, New Hampshire, and Vermont enacted laws to prevent the use of such data for marketing

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[64] IMS Health Inc. v. Sorrell, 630 F.3d 263, 267 (2d. Cir. 2010), *aff'd*, 131 S. Ct. 2653 (2011).

[65] Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2660 (2011). Data processing companies are pejoratively referred to as "data miners." *See, e.g.*, IMS Health Inc. v. Ayotte, 550 F.3d 42, 45 (1st Cir. 2008), *cert. denied*, 129 S. Ct. 2864 (2009).

[66] *Ayotte*, 550 F.3d at 73–74.

[67] *Sorrell*, 131 S. Ct. at 2659–60.

[68] *Ayotte*, 550 F.3d at 46.

[69] *Sorrell*, 131 S. Ct. at 2660.

[70] *Id.*

[71] *Ayotte*, 550 F.3d at 46.

[72] Marc-André Gagnon & Joel Lexchin, *The Cost of Pushing Pills: A New Estimate of Pharmaceutical Promotion Expenditures in the United States*, 5 PLOS MED. 29, 29 (2008), *available at* http://www.plosmedicine.org/article/info:doi/10.1371/journal.pmed.0050001.

[73] BYRON SCHLOMACH, GOLDWATER INSTITUTE, A POUND OF CURE: HOW ACADEMIC DETAILING COULD LIMIT ACCESS TO PHARMACEUTICALS 2 (2012), *available at* http://goldwaterinstitute.org/sites/default/files/policy%20Brief%20032712%20drug%20Detailing.pdf.

[74] *Ayotte*, 550 F.3d at 47. The *Ayotte* court described the detailer's strategy as one in which the detailer "usually . . . present[s] herself as a helpful purveyor of pharmaceutical information and research." *Id.* at 46.

or commercial purposes.[75] While the details of each statute vary, all three states included an express ban on the use of prescriber-identifying information in the pharmaceutical detailing process.[76] Each of the three statutes allows companies to use the data absent prescriber-identifying information, and all three allow the use of such data for other, noncommercial or non-market purposes.[77] According to the Vermont statute, physicians had the option of opting in to disclose physician-identifying information,[78] while the Maine statute provided an opt-out procedure.[79] The statutes also elaborated on several justifications for these laws: protecting physician confidentiality[80] and minimizing the biased information available to prescribers.[81] Finally, the statutes purported to reduce prescription drug costs by minimizing marketing fees.[82] Almost immediately after each statute passed the state legislature, data processing companies sued for violations of the First Amendment, arguing that the states had violated their rights to disseminate information.[83]

In New Hampshire, the District Court, applying the test in *Central Hudson*, found that the statute was not adequately tailored to pass intermediate scrutiny.[84] The First Circuit reversed, finding that the statute regulated conduct rather than

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[75] ME. REV. STAT. tit. 22, § 1711-E (2) (2012) ("any marketing purpose"); N.H. REV. STAT. ANN. § 318:47-f (2013) ("any commercial purpose"); VT. STAT. ANN. tit. 18, § 4631 (d) (2011) ("marketing or promoting a prescription drug"), *declared unconstitutional by* Sorrell v. IMS Health Inc., 131 S. Ct. 2653 (2011).

[76] ME. REV. STAT. tit. 22, § 1711-E (2) (limiting the regulation to use "for any marketing purpose"); N.H. REV. STAT. ANN. § 318:47-f (allowing use for "pharmacy reimbursement; formulary compliance; care management; utilization review by a health care provider, the patient's insurance provider or the agent of either; health care research; or as otherwise provided by law"); VT. STAT. ANN. tit. 18, § 4631 (e)(1) (allowing use for "the sale, license, exchange for value, or use, of regulated records for the limited purposes of pharmacy reimbursement; prescription drug formulary compliance; patient care management; utilization review by a health care professional, the patient's health insurer, or the agent of either; or health care research").

[77] ME. REV. STAT. tit. 22, § 1711-E(2); N.H. REV. STAT. ANN. § 318:47-f (2013); VT. STAT. ANN. tit. 18, § 4631(e).

[78] VT. STAT. ANN. tit. 18, § 4631(c), (d).

[79] ME. REV. STAT. tit. 22, § 1711-E (4) (repealed 2012).

[80] ME. REV. STAT. tit. 22, § 1711-E (1-B) (repealed 2012); VT. STAT. ANN. tit. 18, § 4631(a).

[81] ME. REV. STAT. tit. 22, § 1711-E (1-B.A) (repealed 2012) (claiming that decreased influence of drug representatives "will build patient and prescriber confidence in the health care system"); VT. STAT. ANN. tit. 18, § 4631(a).

[82] ME. REV. STAT. tit. 22, § 1711-E (1-B.B) (repealed 2012); VT. STAT. ANN. tit. 18, § 4631(a).

[83] *See, e.g.*, IMS Health Inc. v. Ayotte, 550 F.3d 42, 47–48 (1st Cir. 2008), *cert. denied*, 129 S. Ct. 2864 (2009).

[84] IMS Health Inc. v. Ayotte, 490 F. Supp. 2d 163, 181–83 (D.N.H. 2007), *rev'd*, 550 F.3d 42, *cert. denied*, 129 S. Ct. 2864 (2009).

speech.[85] The court stated that "[w]hile the plaintiffs lip-synch the mantra of promoting the free flow of information, the lyrics do not fit the tune."[86] Absent speech, the court applied rational basis review, finding the New Hampshire statute constitutional.[87] The First Circuit went on to find that even if the law regulated speech, it would pass First Amendment scrutiny under *Central Hudson*.[88] The Court of Appeals similarly denied IMS's appeal in the Maine case, finding that, like the New Hampshire Law, Maine's statute was consistent with the First Amendment.[89] The Court went on to say that Maine's law was even more narrowly tailored because physicians had more protection from sharing data about their prescribing practices.[90]

In Vermont, the District Court, also applying *Central Hudson*, found the statute constitutional.[91] The Second Circuit reversed, finding that the Vermont law did not pass intermediate scrutiny under *Central Hudson*.[92] The Second Circuit dismissed the State's interest in medical privacy as "too speculative"[93] and found that the statute did not "advance the state's interests in public health and reduc[e] costs in a direct and material way."[94] Due to the split between the First and Second Circuits, the Supreme Court granted certiorari to resolve the conflict.[95]

B. The Supreme Court and Prescription Detailing

1. Commercial Speech?

Justice Kennedy, writing for the majority of the Court, found that the Vermont statute constituted content-based viewpoint discrimination because it prevented detailers from obtaining prescriber-identifying information.[96] In defending the statute,

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[85] *Ayotte*, 550 F.3d at 51–52 ("We say that the challenged elements of the Prescription Information Law principally regulate conduct because those provisions serve only to restrict the ability of data miners to aggregate, compile, and transfer information destined for narrowly defined commercial ends.").

[86] *Id.* at 53.

[87] *Id.* at 54 (describing the law as "a species of economic regulation").

[88] *Id.* at 60.

[89] IMS Health Inc. v. Mills, 616 F.3d 7, 18–19 (1st Cir. 2010), *vacated sub nom.* IMS Health, Inc. v. Schneider, 131 S. Ct. 3091 (2011).

[90] *Id.* at 19.

[91] IMS Health Inc. v. Sorrell, 631 F. Supp. 2d 434, 440 (D. Vt. 2009), *rev'd*, 630 F.3d 263 (2d. Cir. 2010), *aff'd*, 131 S. Ct. 2653 (2011).

[92] *Sorrell*, 630 F.3d at 267.

[93] *Id.* at 276.

[94] *Id.* at 277.

[95] *Sorrell*, 131 S. Ct. at 2662 (2011).

[96] *Id.* at 2663. This holding has already been criticized for confusing the commercial speech doctrine and especially what constitutes a protected "viewpoint." *See* Tamara R. Piety, *"A Necessary Cost of Freedom"? The Incoherence of* Sorrell v. IMS, 64 ALA. L. REV. 1, 4, 6 (2012).

Vermont argued that detailers "convey messages that 'are often in conflict with the goals of the state.'"[97] The Court reacted to this defense by finding that the statute went "beyond mere content discrimination, to actual viewpoint discrimination" because it discriminated both on the content of the message and the specific speaker.[98] Finding both content and viewpoint discrimination, the Court subjected the Vermont statute to "heightened scrutiny."[99]

Vermont argued that even if the speech is not content-neutral, the statute should be subjected to minimum scrutiny because it constitutes commercial speech.[100] Acknowledging that commercial speech was entitled to less judicial scrutiny, the Court found that "the outcome is the same"[101] and moved on to analyze the State's interests and the law's tailoring to serve those interests.

2. Vermont's State Interests

Vermont asserted that physicians have reasonable expectations that their prescription practices remain confidential, disclosed only to the patient and his or her pharmacist.[102] While agreeing that physicians may have that expectation, the Court skipped over the question of whether the State's interest was substantial or important to find that the statute was in no way tailored to serve that interest.[103] Specifically, the Court found that because prescriber-identifying information was available for any purpose save pharmaceutical detailing, physicians' expectations of privacy were still not met.[104] Rejecting Vermont's interest in physician confidentiality, the Court turned to examine the State's interests in "lowering the costs of medical services and promoting public health."[105]

Vermont argued that preventing prescription detailing would sufficiently undermine name-brand pharmaceutical sales, resulting in greater prescriptions for safer and less expensive generic medications.[106] The Court never said whether this state interest is important or substantial, but stated that decreasing healthcare costs "may be proper."[107] The importance of the state interest was irrelevant because the Court

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[97] *Sorrell*, 131 S. Ct. at 2663 (quoting 2007 Vt. Acts & Resolves 80, § 1(3)).

[98] *Id.* (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992)).

[99] *Id.* at 2664 (citing Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

[100] *Id.* at 2667.

[101] *Id.*

[102] *Id.* at 2668.

[103] *Id.*

[104] *Id.* at 2668–69 ("Vermont has given its doctors a contrived choice: Either consent, which will allow your prescriber-identifying information to be disseminated and used without constraint; or, withhold consent, which will allow your information to be used by those speakers whose message the State supports.").

[105] *Id.* at 2670.

[106] *Id.*

[107] *Id.*

rejected the statute by characterizing its tailoring as an "indirect means of restraining certain speech by certain speakers."[108] The majority latched on to the Court's previously stated objections to paternalistic laws[109] and characterized the law as an effort to prevent doctors from making bad decisions—to prescribe name-brand medication—by hiding truthful information.[110] In other words, the state sought to promote generic medications by hampering the marketing efforts of competing name-brand drugs.

3. Viewpoint Discrimination

Although the Court acknowledged Vermont's stated interests, the opinion focuses on characterizing the statute as viewpoint discriminatory. First, the Court found that the statute discriminated based on the message conveyed by pharmaceutical companies.[111] While use of prescriber-identifying information was barred for "marketing purposes,"[112] other sections of the statute permitted such data to be used in "educational communications."[113] The Court also noted that the statute discriminated against the promotion of name-brand pharmaceuticals, favoring generic substitutes.[114] Characterizing the name-brand versus generic medication debate as an issue of public importance, the majority accused Vermont of "hamstring[ing]" the opposition to generic drugs due to the State's failure to persuade physicians to accept its own view.[115]

In addition to finding discrimination against the message of pharmaceutical detailers, the Court also found discrimination against the speakers themselves—pharmaceutical companies.[116] At oral argument, Vermont reinterpreted the statute to apply to other entities like health insurers, but the Court rebuffed this reinterpretation as "too late in the day."[117] Even if Vermont's new interpretation were true, the

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[108] *Id.*

[109] *See, e.g.*, 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 503 (1996) ("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.").

[110] *Sorrell*, 131 S. Ct. at 2670–71.

[111] *Id.* at 2663.

[112] *Id.* at 2659.

[113] *See id.* at 2663 (quoting VT. STAT. ANN. tit. 18, § 4631(e)(4) (2012), *declared unconstitutional by Sorrell*, 131 S. Ct. 2653).

[114] *Id.* ("[T]he Vermont Legislature explained that detailers, in particular those who promote brand name drugs, convey messages that 'are often in conflict with the goals of the state.'" (quoting 2007 Vt. Acts & Resolves 80, § 1(3))).

[115] *Id.* at 2671 ("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.").

[116] *Id.* at 2663.

[117] *Id.* at 2662. Vermont had not previously asserted that the law applied to health insurers. *Id.*

statute still prohibits pharmaceutical companies and health insurers from speaking while simultaneously allowing "academic researchers" access to the same forum.[118] Finding inadequate justification for discrimination against both a particular viewpoint and specific speakers, the Court struck down Vermont's statute as a violation of the First Amendment.[119]

III. WHEN COMMERCIAL SPEECH DESERVES STRICT SCRUTINY

The commercial and noncommercial speech doctrines are not as distinct as they appear. While the language of some cases gives the impression that the choice between labeling the speech at issue "commercial" or "noncommercial" is the difference between the law being upheld and the law being struck down, the holdings of those cases are far more mixed. Instead, content- and speaker-neutral speech parallels classic commercial speech—speech intended primarily or solely to "propose a commercial transaction."[120] Both are afforded intermediate scrutiny unless there is some reason to render the speech suspect.[121] But, certain commercial speech regulations, those which have been characterized as "paternalistic"[122] or "overbroad,"[123] have frequently been struck down under a standard that appears more stringent than intermediate scrutiny.[124] This inexplicit "heightened scrutiny" appears to closely track the content-based speech doctrine. In short, the Court generally reviews speech restrictions, whether commercial or otherwise, using a form of intermediate scrutiny, but elevates that scrutiny to strict or "heightened" when certain red flags indicate that the restriction may encroach on a speaker's First Amendment rights.

The commercial speech doctrine developed because it was thought that certain kinds of speech do not contribute so significantly to public discourse that they deserve strict protection under the First Amendment.[125] That commercial speech was

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[118] *Id.*

[119] *Id.* at 2659.

[120] Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973).

[121] *See, e.g.*, Kagan, *supra* note 8, at 479–80.

[122] *See, e.g.*, 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 507 (1996).

[123] *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 564 & n.6 (1980) (quoting Bates v. State Bar, 433 U.S. 350, 381 (1977)).

[124] ROBERT L. KERR, THE CORPORATE FREE-SPEECH MOVEMENT 230–31 (2008); *see also* Charles Fischette, *A New Architecture of Commercial Speech Law*, 31 HARV. J.L. & PUB. POL'Y 663, 675 (noting that the "third and fourth prongs of the *Central Hudson* test must do essentially all of the work").

[125] *See* Bigelow v. Virginia, 421 U.S. 809, 826 (1975) ("The relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas.") In fact, the case normally cited for the proposition that the First Amendment extends no protection to commercial speech lacks any analysis of the policy reasons or First Amendment doctrines that support the Court's decision. *See* Valentine v. Chrestensen, 316 U.S. 52 (1942);

already highly regulated further justified its lack of protection.[126] In fact, the Court prior to 1975 found that the First Amendment did not protect any commercial speech.[127] The Court, however, rejected the view that commercial speech does not contribute to public discourse in *Virginia State Board of Pharmacy*, finding that commercial information in a free enterprise economy is part of the public discourse.[128] The Court stated that "[i]t is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed."[129] Subsequent cases emphasized the informational role of advertising, which served as the primary reason for affording it First Amendment protection.[130] Clarifying the commercial speech doctrine thus demands attention to the policies that underlie both the reasons to afford it First Amendment protection and the policies that favor separating commercial speech due to its comparatively lower value.

I begin by defining what types of commercial speech should be evaluated under the content-based First Amendment doctrine. I then argue that this change is both similar to recent commercial speech cases and more consistent with the values that underlie freedom of speech. Finally, I conclude by demonstrating how the proposal would have affected the rationale in *Sorrell*.

A. Bans

Laws and regulations that enact a ban, whether directly or indirectly, prohibit the dissemination of particular facts without regard to the manner in which those facts are communicated. For example, a law barring the advertisement of cigarettes is different than a law which permits advertising tobacco products but requires those advertisements to lack features which have the potential to encourage children to smoke. Similarly, a law that bars advertising used cars is different than a law which

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supra note 41 and accompanying text. Many scholars still argue that elevating commercial speech to the level of political speech may dilute the value of political speech, making it necessary to maintain separate tracks for commercial and noncommercial speech. *See, e.g.*, Berman, *supra* note 9; Jackson & Jeffries, *supra* note 9, at 6; Schauer, *supra* note 9.

[126] *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 562 (1980).

[127] *See, e.g.*, *Valentine*, 316 U.S. at 54 (upholding a New York law prohibiting the distribution of advertising materials upon any street); *see also* Samuel A. DiLullo, *The Present Status of Commercial Speech: Looking for a Clear Definition*, 90 DICK. L. REV. 705, 707–12 (1986). The Supreme Court was "squarely" confronted with the issue of First Amendment protection for commercial speech in 1976. *Id.* at 712.

[128] Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976).

[129] *Id.* The Court continued, stating that the free flow of information in the economy is essential to informing decisions about how the economy should be "regulated or altered." *Id.*

[130] *See, e.g.*, Rubin v. Coors Brewing Co., 514 U.S. 476, 481–82 (1995); *Cent. Hudson*, 447 U.S. at 563; *see also* Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 1 (2000).

would allow advertisements, but only if those advertisements accurately depicted the condition of the product being sold. Whether a law or regulation bars a class of information is, in a way, a question about the breadth of the law. Does the law prohibit a particular kind of advertising altogether, or does it afford the speaker a way to advertise, so long as certain other requirements are met? Those other requirements could include prohibiting information likely to mislead a person or mandating additional disclosures or warnings. The content of the requirements is immaterial so long as the speaker is afforded an opportunity to spread the information.

For a real world example, consider the facts of *Rubin v. Coors Brewing Co.*,[131] a 1995 Supreme Court case. Coors Brewing Company challenged a federal regulation barring beer companies from placing the alcoholic content of beer on their bottles.[132] The government justified the regulation by arguing that allowing beer companies to advertise the alcoholic content would create "strength wars" between beer companies, each striving to increase the alcoholic content of their product.[133] The regulation at issue in *Coors* effectively banned breweries from advertising the alcoholic content of beer.[134] Alternatives could have included requiring warnings about consuming excess alcohol or limiting the size of the disclosure on the can or bottle, so that alcoholic content did not become the focus of any company's packaging. Both strategies would have arguably furthered the government's interest, but still allowed beer companies to distribute information about the alcoholic content of their products. Ultimately, the Supreme Court struck down the regulation as insufficiently tailored to the government's interest.[135]

B. Two Doctrinal Paths?

On its face, applying strict scrutiny to commercial speech appears to dramatically change how the Court has interpreted the First Amendment, but many of the same factors will enter into courts' analyses. The *44 Liquormart* Court first explained why the commercial speech doctrine appears to be applied inconsistently:

> When a State regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices, or requires the disclosure of beneficial consumer information, the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech and therefore

[131] 514 U.S. 476 (1995).

[132] *Id.* at 478–81.

[133] *Id.* at 483. The government also asserted a state interest in preserving its regulatory power over the alcohol industry in light of the Twenty-First Amendment, but the Court dismissed that interest as insubstantial. *Id.* at 485–86.

[134] *Id.* at 478.

[135] *Id.* at 490.

> justifies less than strict review. However, when a state entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands.[136]

1. Pretextual Laws

Courts have implicitly applied the distinction in *44 Liquormart* by engaging in a detailed analysis of the state interests alleged to support the law at issue.[137] Courts appear to approach the State interests holistically in an effort to discern the true purpose of a speech restriction. Since the relevant purpose is the State's actual interest, rather than any legitimate purpose, courts are on the lookout for government purposes that serve as a pretext for achieving some other unstated goal. Such pretextual laws have arisen in two contexts: restrictions that strive to undermine an entire industry that produces a potentially harmful product[138] and restrictions that limit commercial speech merely because it is commercial.[139]

Alcohol is a prime example of a product that poses safety concerns, both to those who consume it and to those who come into contact with the consumer on the road, for example. Few would question a state's decision to impose restrictions on the consumption of alcohol or the activities in which a person who has consumed it engages. Because the state's interest in preventing dangers arising from alcohol consumption is so strong, the question of the constitutionality of a law that limits speech about alcohol is primarily one of tailoring. Does banning *advertisements* for alcoholic beverages actually further the state's interest in preventing the dangers that arise from the *consumption* of alcohol? The *44 Liquormart* Court recognized that the State's interest at issue was minimizing the consumption of alcohol, rather than protecting citizens from any direct harm caused by the way liquor companies spoke about their products: "[B]ans often serve only to obscure an 'underlying governmental policy' that could be implemented without regulating speech."[140] The Court further observed that targeting truthful, nonmisleading speech rarely protects consumers from the harms that the State seeks to prevent anyway.[141] Thus, by subjecting

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[136] 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 501 (1996).

[137] *See, e.g.*, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762–64 (1976) (observing that few commercial messages lack any public interest element).

[138] *See, e.g.*, *44 Liquormart*, 517 U.S. 484.

[139] *See, e.g.*, City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993).

[140] *44 Liquormart*, 517 U.S. at 503 (quoting Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 n.9 (1980)); *see also Coors Brewing Co.*, 514 U.S. 476 (striking down a federal regulation barring the labeling of beer with its alcoholic content).

[141] *44 Liquormart*, 517 U.S. at 503.

the State's interest to heightened scrutiny, the Court implicitly reviewed whether the speech at issue was really speech deserving of protection.

A similar inquiry influenced the *Sorrell* Court. The Court saw Vermont's law as an effort to shift the market from one that favored high-priced name-brand drugs to a market that was more favorable to lower-priced generic drugs.[142] Although the Court ultimately chose to decide the case under the framework of viewpoint discrimination,[143] it recognized that the Vermont law would fail the *Central Hudson* test under the tailoring analysis.[144] The State's interest in confidentiality was not furthered by the law because anyone other than pharmaceutical companies could purchase the data,[145] and the State's interest in lowering the costs of medical services was only indirectly furthered by limiting the effectiveness of detailing.[146] The Court's in-depth review into the mechanisms through which Vermont intended to accomplish its stated purposes reveals more than a cursory review, although the Court purported to apply a lesser form of judicial scrutiny.[147] The Court's opinion demonstrates that its commercial speech analysis entails a different level of scrutiny by label only. *Sorrell* and *44 Liquormart* are but two examples of how the Court has used the tailoring analysis under *Central Hudson* to conduct a detailed evaluation of whether the speech restriction directly furthers the purported state interest or whether the speech restriction is a pretext for achieving a distantly related objective.[148]

In an extreme case, the Court ignored that the speech was commercial altogether when it appeared that the commercial aspect was a mere pretext for furthering another unrelated government interest. The law at issue in *City of Cincinnati v. Discovery Network, Inc.*[149] was a Cincinnati ordinance that removed all freestanding magazine racks from the city, while allowing similar newspaper dispensers to remain.[150] The City argued that it was furthering an interest in maintaining safe and aesthetically pleasing streets.[151] It chose to eliminate only magazine racks, however, because magazines contained predominantly advertisements, instead of noncommercial news.[152] The Court found the relationship between the law and the state interest so distant that the majority did not even analyze the four factors under the *Central Hudson*

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[142] Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2663 (2011).

[143] *Id.* ("Vermont's law goes even beyond mere content discrimination, to actual viewpoint discrimination"(quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992)) (internal quotation marks omitted)).

[144] *Id.* at 2667–68.

[145] *Id.* at 2668.

[146] *Id.* at 2670.

[147] *See id.* at 2667.

[148] For more examples of the Court's use of *Central Hudson* tailoring to strike down overbroad laws, see KERR, *supra* note 124, at 230–31.

[149] 507 U.S. 410 (1993).

[150] *Id.* at 412–15.

[151] *Id.* at 418–19.

[152] *Id.* at 412–13, 424.

test.[153] *Discovery Network* therefore highlights the Court's reluctance to follow its own established test and to engage in more rigorous scrutiny when a speech restriction bears less than a direct connection to the purported state interest.

2. Paternalism

In addition to using *Central Hudson*'s tailoring analysis to subject commercial speech restrictions to more exacting scrutiny, the Court has shown little patience for laws it deems overly paternalistic.[154] In *Virginia State Board of Pharmacy*, the Court suggested that the state could employ professional standards to protect the integrity of pharmacists rather than the "highly paternalistic approach" of banning price advertisements outright.[155] The Court found the State's effort to protect its interest by suppressing information was exactly the kind of law that the First Amendment sought to prevent.[156] *44 Liquormart* adopted the same standard: "[The] State's paternalistic assumption that the public will use truthful, nonmisleading commercial information unwisely cannot justify a decision to suppress it."[157] The Court, in effect, drew a line between regulations that completely ban communication of particular classes of information and laws that regulate the manner in which the information is conveyed.[158] Theoretically, the State in *44 Liquormart* could require stores to display the accurate price of alcoholic beverages or mandate other disclosures for the protection of consumers, but it could not ban any mention of the price in an advertisement.

Sorrell tracked the reasoning in *44 Liquormart*. While Vermont could require pharmaceutical detailers to report accurate information and impose other restrictions against undue influence, indirectly banning the practice of detailing impermissibly encroached on the First Amendment rights of pharmaceutical companies.[159] The

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[153] *See generally Discovery Network*, 507 U.S. 410. The majority cites *Central Hudson* four times, each for the proposition that commercial speech is generally afforded less protection under the First Amendment. *See id.* at 415, 416, 422, 423.

[154] Post, *supra* note 130, at 50–53.

[155] Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976).

[156] *Id.*

[157] 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 497 (1996).

[158] *Id.* at 501 ("[W]hen a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands.").

[159] Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2669 (2011). The Court also suggested that doctors who wished to avoid undue pressure from detailers could simply post "No Detailing" signs on their doors or instruct their receptionists to send them away. *Id.* at 2670. The Supreme Court recognized the First Amendment rights of corporate entities in *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010); *see also* Tamara R. Piety, Commentary, Citizens United *and the Threat to the Regulatory State*, 109 MICH. L. REV. FIRST IMPRESSIONS 16 (2010).

Court noted that Vermont "offer[ed] no explanation" for why it chose not to pursue content-based remedies.[160] Arguably, Vermont could have limited the way in which detailers presented information to physicians, but it could not entirely suppress physician-identifying information "for what [it] perceives to be their own good."[161]

The concern for paternalistic laws also overlaps with the fourth prong of the *Central Hudson* test, which requires that the State's interest could not be served by a more limited restriction.[162] More limited means, such as content-based restrictions, are preferred over overly broad bans.[163] Judicial skepticism toward paternalistic, overbroad bans originated with *Virginia State Board of Pharmacy* and became central to the commercial speech doctrine leading up to *Sorrell*. The tailoring analysis required by *Central Hudson* has thus served as a means for the Court to scrutinize commercial speech more than mere rational basis.

3. Analogy to Time, Place, and Manner

Finally, restrictions barring misleading advertising are analogous to the time, place, or manner restrictions that receive intermediate scrutiny review.[164] In *Ward v. Rock Against Racism*,[165] the Court upheld a law requiring performers to play their music at non-disruptive volumes.[166] The ordinance at issue in *Ward* did not control what could be the subject of the concert; it only limited the manner in which the concert could be performed.[167] Similarly, commercial speech, like pharmaceutical detailing, could be limited by requirements that the speech not mislead or unduly influence the targets of the advertising. By requiring an advertisement to convey truthful information, governments do not control what may or may not be included in an advertisement, but merely limit how that information is conveyed. Analyzing certain commercial speech under noncommercial speech doctrines, therefore, will not dramatically alter the results of commercial speech cases, but will offer benefits over the current approach.

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[160] *Sorrell*, 131 S. Ct. at 2669.

[161] *44 Liquormart*, 517 U.S. at 503.

[162] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 564 (1980).

[163] *See id.* at 565–66.

[164] Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). *See generally* Mark Spottswood, *Falsity, Insincerity, and the Freedom of Expression*, 16 WM. & MARY BILL RTS. J. 1203, 1211–13 (2008) (describing why untruthful or misleading speech receives less protection under the First Amendment). Judge Kozinski and Professor Banner argue that even under strict scrutiny, it would be simple to uphold laws requiring advertisements to be non-misleading because the government has a substantial interest in preventing consumer fraud. Kozinski & Banner, *supra* note 10, at 651.

[165] 491 U.S. 781 (1989).

[166] *See id.* at 789–90.

[167] *Id.* at 787 & n.2

C. Bans and Overbreadth

Recognizing that outright bans are almost always overbroad injects simplicity into an otherwise complicated set of parallel doctrines in several ways. First, the current focus on "overbreadth" has resulted in contradictory outcomes among multiple circuits.[168] Changing the judicial inquiry to a question of whether the regulation is an outright ban would eliminate much of the balancing under *Central Hudson* and produce more consistent results. The pharmaceutical detailing cases highlight this point. In *Ayotte*, the First Circuit concluded that under *Central Hudson*, New Hampshire's law barring the use of physician-identifying information for any commercial purpose was the least restrictive means to accomplish the State's goal, and therefore sufficiently tailored.[169] The Supreme Court, applying the same doctrine to similar facts, however, reversed, finding that alternative, less restrictive means were available to further the State's interest.[170] *Central Hudson* balancing would have been unnecessary had the courts recognized that bans, like the ban on physician-identifying information for marketing or commercial purposes, are worthy of strict scrutiny.

Second, the focus on overbreadth forces the courts to delve into detailed, fact-specific inquiries based on the type of regulation at issue. For example, in *Coors*, the Court had to consider the competitive nature of the beer market, consumer perceptions of the alcohol content of particular beers, the extent to which consumers relied on advertisements (as opposed to labels) in determining which beer to purchase, and how the federal law varied in application based on different state regulatory schemes.[171] The Court also discussed parallel practices in the spirits market and the effect of labeling beer "malt liquor" to circumvent the statute.[172] This fact-intensive analysis reduces the precedential value of commercial speech cases because few cases are likely to share nearly identical facts. An unpredictable and fact-intensive analysis also hurts individual parties who will be unable to determine whether the First Amendment protects what they intend to say without even a list of "relevant factors." This doctrinal confusion ultimately causes a chilling effect on potential commercial speakers.

Third, the fact-intensive analysis to determine whether the government's chosen method of regulation is the least restrictive means is only one of four factors that must be weighed under *Central Hudson*.[173] Courts must also determine whether the government proposes a substantial government interest, whether the regulation directly advances that government interest, and whether the proposed transaction is

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[168] *Compare, e.g.*, IMS Health Inc. v. Sorrell, 630 F.3d 263, 279–82 (2d. Cir. 2010), *rev'd*, 131 S. Ct. 2653 (2011), *with* IMS Health Inc. v. Ayotte, 550 F.3d 42, 60 (1st Cir. 2008), *cert. denied*, 129 S. Ct. 2864 (2009).

[169] *Ayotte*, 550 F.3d at 60.

[170] *Sorrell*, 131 S. Ct. 2653.

[171] Rubin v. Coors Brewing Co., 514 U.S. 476, 487–88 (1995).

[172] *Id.* at 487.

[173] *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980).

lawful and not misleading.[174] Of course, the content-based First Amendment tests also involve weighing government interests and analyzing how the regulation furthers those interests, but the *Central Hudson* test adds additional factors that unnecessarily complicate the analysis when a ban should already signal the need to apply strict scrutiny.

Fourth, as courts develop particular doctrines, they fill in gray areas and increase clarity. Two parallel doctrines have resulted in two underdeveloped legal tests with substantial gray areas. Because commercial speech was not even protected until 1975,[175] courts have had few opportunities to articulate a clear application of the doctrine. Collapsing part of what was formerly considered "commercial speech" into the more developed content-based speech doctrine would eliminate some of the ambiguities that plague current commercial speech cases.

D. Why Subject Bans to Greater Scrutiny?

This Section outlines the ways in which a ban on commercial speech differs from other limitations on commercial speech. It emphasizes how bans implicate concerns under the First Amendment in ways that other more limited restrictions do not. First, because bans have a more significant effect on the speaker's ability to communicate, they are more likely to be driven by the message, rather than the mode of speaking. Second, bans necessarily restrict the information available in the marketplace of ideas, whereas other restrictions are less restrictive or may even increase the information available. Finally, protecting commercial speech is more consistent with the Framers' understanding of the First Amendment.

First, restricting commercial speech by means of a ban is more likely to be motivated by the subject matter of the transaction than any particularly bad speech practice.[176] Over-encompassing prohibitions allow the state to assert a negative aspect about a particular practice, product, or industry and use that fact to justify any restrictions on a broader category of speech. As now-Justice Kagan observed, "content-neutral laws often have content-based effects—and sometimes these are quite dramatic."[177] Outside the commercial speech realm, Kagan considers an example of a law that prohibits all political parties from using billboards in a campaign.[178] Kagan's example has a catch: only Democrats were using billboards to campaign.[179] A content-neutral ban can have a drastic content-based effect.[180] Because bans need not explicitly state their purpose, they are more likely to endanger free speech while

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[174] *See id.*

[175] *See supra* note 127 and accompanying text.

[176] *See* Fischette, *supra* note 124, at 686 (suggesting that bans on certain types of commercial speech may conceal the legislature's goals).

[177] Kagan, *supra* note 8, at 446.

[178] *Id.*

[179] *Id.*

[180] *See id.*

appearing innocuous.[181] The *Central Hudson* Court recognized this possibility when they incorporated the overbreadth factor into the traditional commercial speech test,[182] but *Central Hudson* does not allow courts to skip the other factors when overbreadth so clearly signals a need to apply strict scrutiny. The following examples illustrate how legislatures have used overbroad limitations to target the speech of an entire industry.

In *44 Liquormart*, the Court found that Rhode Island's motivation for barring stores from advertising the prices of alcoholic beverages was a desire to promote temperance.[183] The prices themselves had little to do with the State's motivation, but because alcohol can have a substantial negative effect on society, the Rhode Island legislature restricted the industry's advertising power.[184] The same anti-alcohol policy drove the regulation at issue in *Coors*, where the government believed that fear of "strength wars" among breweries justified banning any advertisement that referred to the alcoholic content of the beer.[185] Neither the liquor store in *44 Liquormart* nor the breweries in *Coors* sought First Amendment protection for inaccurate or misleading marketing techniques; they both sought simply the ability to include certain information in their advertising materials. The speech restrictions at issue sought to do more than ensure the accuracy of alcohol advertisements: they sought to curb alcohol consumption. *44 Liquormart*'s discussion of promoting temperance best illustrates this point.[186] In both cases, the government sought to limit the advertisements because they advertised alcohol, not because of any problem with the way the advertisements promoted the underlying products. The alcoholic content provided the justification for the restriction in the same way that the content in *R.A.V.* prompted the regulation on cross burning.[187] Had the Court evaluated either *44 Liquormart* or *Coors* under content-based tests, the Court would have surely concluded that neither restriction was content-neutral, thus demanding strict scrutiny.

Similarly, prohibiting prescription drug detailers from misrepresenting the similarities between the drugs they are pushing and the drugs a doctor prefers to prescribe is different from banning prescription detailing outright. In the first case, the government policy furthered is minimizing deceptive or misleading practices which may negatively impact the prescribing practices of a particular physician. In the second case, the government appears to take issue with the entire process of prescription detailing. The restriction at issue in *Sorrell* is particularly compelling because

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[181] *See* Fischette, *supra* note 124, at 686 (discussing how speech restrictions can be employed to accomplish a legislature's purpose while avoiding deliberation about whether the legislature's purpose is legitimate).

[182] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980).

[183] 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 504 (1996).

[184] *Id.* at 504–08.

[185] Rubin v. Coors Brewing Co., 514 U.S. 476, 483–84 (1995).

[186] *44 Liquormart*, 517 U.S. at 504–08.

[187] R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992).

the states appeared not only to target content—prescriber-identifying information—but also particular speakers.[188] The majority emphasized that due to the expense of engaging in detailing, companies generally only detail "high-profit brand-name drugs protected by patent."[189] More explicitly, the legislative history of the Vermont law revealed that an explicit purpose in passing the law was to reduce the effectiveness of pharmaceutical companies' efforts to market name-brand drugs.[190] *Sorrell* was thus correct to point out that the Vermont law not only engaged in content-based restrictions, but also sought to thwart particular speakers from spreading information. The outright ban imposed by Vermont could thus be seen as a red flag that the state sought to further an illegitimate purpose.

Second, bans directly limit the information that is available to the public. One of the hallmarks of free speech is its ability to spread information.[191] As Alexander Meiklejohn noted, "The First Amendment is . . . a device for the sharing of whatever truth has been won. Its purpose is to give to every voting member of the body politic the fullest possible participation in the understanding of those problems with which the citizens of a self-governing society must deal."[192] In *Virginia State Board of Pharmacy*, the Court explained that its purpose in extending protection to commercial speech was to encourage the free flow of information in the market place.[193] Information in the market place serves a dual function: it informs consumers about the products and services they purchase, and it provides information about how the market functions for those who might seek to modify the market through regulation. The information provided by commercial speech, even commercial speech that is purely motivated by profit, contributes to "enlighten[ing] public decisionmaking in a democracy."[194]

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[188] Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2663 (2011).

[189] *Id.* at 2660.

[190] *Id.* at 2663 ("Formal legislative findings accompanying § 4631(d) confirm that the law's express purpose and practical effect are to diminish the effectiveness of marketing by manufacturers of brand-name drugs."). On the danger of laws that attempt to equalize the speech market, see Kagan, *supra* note 8, at 464–72.

[191] *See, e.g.*, Coase, *supra* note 10, at 1 (agreeing with Justice Holmes that the best test of truth is the marketplace of ideas). However, some scholars argue that the promotion of more information in the marketplace does not promote a more informed class of consumers because the information is unbalanced to favor those with greater financial abilities to spread information. *See, e.g.*, KERR, *supra* note 124, at 5. The threat of unbalanced information can be substantially offset by regulations requiring that advertisements be non-misleading.

[192] ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM 75 (1948).

[193] Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976); *see also* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 495 (1996) ("Even in colonial days, the public relied on 'commercial speech' for vital information about the market.").

[194] *Virginia State Bd. of Pharmacy*, 425 U.S. at 765 (stating that commercial speech is "indispensible to the formation of intelligent opinions as to how that system ought to be regulated or altered").

Commentators who have dubbed commercial speech the "*Lochner*" of the First Amendment[195] ignore this function of commercial speech. Such commentators also fail to recognize that commercial speech—either as the Court currently protects it or as I propose—does not preclude any regulation of advertising at all. Rather, by subjecting only outright bans to strict scrutiny, the commercial speech doctrine can more clearly serve its function of ensuring a more informed marketplace.

Blanket bans necessarily restrict speech that is not misleading or false. False or misleading advertising negatively affects consumers by inducing them to enter into contracts or purchase certain goods that they would not otherwise purchase had they been given more truthful information.[196] Indeed, Courts initiate the *Central Hudson* test by asking whether the speech at issue is in any way misleading.[197] The difference between bans and limitations on the manner or truthfulness of information dispensed aligns with the Court's original justification for expanding First Amendment protection to commercial speech. Increasing the free flow of information increases the public's awareness about the characteristics of a product or service, allowing them to make better decisions about what they wish to purchase. Banning types of information, whether the alcoholic content of beer, the prices of prescription drugs, or physician-identifying information, removes information from public discourse. By contrast, requiring truthful advertising ensures that consumers have access to information and ensures that the information is more accurate. Required warnings, also subject to regulation,[198] increase information about products and services in the market, thus directly increasing the information available to consumers. In fact, the Court has never afforded untruthful or misleading advertising protection under the First Amendment.[199]

Third, protecting commercial speech aligns with the Framers' original understanding of speech at the time they drafted the First Amendment. Inspired by Locke, many of the Framers understood free government to be founded by a connection between property rights and free speech.[200] Troy notes that the history of the colonial

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[195] *See, e.g.*, Richard Samp, Sorrell v. IMS Health*: Protecting Free Speech or Resurrecting* Lochner*?*, 2011 CATO SUP. CT. REV. 129, 129.

[196] *See* Jackson & Jeffries, *supra* note 9, at 8–9 (arguing that protecting non-political speech is absurd because it presumptively assumes that conspiracy, solicitation, perjury, and fraudulent misrepresentation are protected).

[197] Rubin v. Coors Brewing Co., 514 U.S. 476, 483 (1995) (beginning by observing that the speech at issue is "only truthful, verifiable, and nonmisleading factual information").

[198] Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781, 796–97 (1988) (finding that the Constitution protects "the decision of both what to say and what *not* to say"); *see also* Jennifer L. Pomeranz, *Compelled Speech Under the Commercial Speech Doctrine: The Case of Menu Label Laws*, 12 J. HEALTH CARE L. & POL'Y 159, 182–88 (2009).

[199] KERR, *supra* note 124, at 235. *But see* United States v. Alvarez, 132 S. Ct. 2537 (2012) (overturning a conviction under the Stolen Valor Act for a defendant who falsely claimed to receive the Congressional Medal of Honor).

[200] Troy, *supra* note 10, at 94 ("This sacred privilege is so essential to free government, that the security of property; and the freedom of speech, always go together; and in those

press is a history of ubiquitous advertising, and papers like the *New-York Mercury* filled as much as seventy percent of their pages with advertisements in 1766.[201] One of the best examples of early American activism, the protest of the Stamp Act, was likely motivated in part by the Act's effect on advertising.[202] The Stamp Act required a charge of an additional two shillings per advertisement,[203] and historians have argued that the colonists framed their protest on freedom of expression grounds.[204] That advertising dominated the press at a time when the colonists became fervent advocates of the freedom of expression at least hints that advertising was valued at the time of the founding. The connection between property rights and speech rights also suggests that the Court's later effort to sever commercial speech from other speech was inconsistent with the founders' views about the forms of valuable expression.

E. Is Commercial Speech Less Valuable?

Many scholars have argued that even if the First Amendment generally values more information over less information, information about the market is simply less important than information about politics and other protected speech.[205] This argument is overstated for several reasons. First, information about the market is valuable for individual consumers. When advertisers emphasize certain qualities about their products, the public learns more generally about a product and the options that are available. Second, increasing available information allows the market to more accurately reveal what consumers demand, providing product designers with information vital to design new products. Third, advertising reveals information about the culture of the target audience.[206] Professor Daniel Halberstam argues that this information indirectly informs one's understanding of what is just and good, shaping the values that ultimately inform noncommercial speech.[207] By adopting particular

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wretched countries where a man cannot call his tongue his own, he can scarce call anything else his own." (quoting *Of Freedom of Speech*: *That the Same Is Inseparable from Publick Liberty*, *in* CATO'S LETTERS: ESSAYS ON LIBERTY, CIVIL AND RELIGIOUS AND OTHER IMPORTANT SUBJECTS 110 (London, Wilkins, Woodward, Walthoe & Peele 1720))).

[201] *Id.* at 99.

[202] *Id.* at 101.

[203] *Id.*

[204] ARTHUR M. SCHLESINGER, PRELUDE TO INDEPENDENCE: THE NEWSPAPER WAR ON BRITAIN 1764–1776, at 70–71 (1957).

[205] *See, e.g.*, Berman, *supra* note 9, at 795; Jackson & Jeffries, *supra* note 9, at 14 ("Measured in terms of traditional first amendment principles, commercial speech is remarkable for its insignificance."); Schauer, *supra* note 9, at 1201 (arguing that expanding the breadth of the First Amendment has little perceivable empirical effect, but dilutes psychological and social conceptions of free speech).

[206] *See* Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771, 810 (1999).

[207] *Id.* ("Indeed, the expansive view goes even further to hold that citizens must not only have access to information as input for their private calculus about the public good, but that

marketing strategies, advertising does more than inform us about the cheapest place to purchase a particular product. Fourth, commercial information is more than the prices or alcoholic content of beer, as the central commercial speech cases lead one to believe. Commercial information influences important decisions like where one lives, the school where one's children study, and how one invests their savings.[208] Whether commercial speech is valued for its indirect method of influencing more valued speech or for its information-distributing function, commercial speech has tremendous value in a democratic society.

The First Amendment also protects some kinds of speech that arguably contribute very little to political discourse. For example, one's trip to the grocery store could reveal a panoply of informative *Weekly World News* headlines, such as "Kim Jong-Il Killed by Chuck Norris!"[209] or "Aliens Support Ron Paul in Iowa."[210] The Court has also found that the First Amendment protects non-political expression like nude dancing, which arguably contributes little to either political discourse or the marketplace of information.[211] Even a cursory glance at protected expression renders the commercial-noncommercial distinction a curious place to draw the line between preferred and less valuable expression. There is no doubt that some forms of political speech are highly valuable, but how can protecting commercial speech dilute their value anymore than it is now?

Even if commercial speech is less important than other types of protected speech, the justification for greater scrutiny suffers from a false assumption.[212] Courts scrutinize restrictions on free expression out of fear that lawmakers occasionally suffer from impure motives and otherwise imprudent policy decisions.[213] Reduced scrutiny for restrictions on commercial expression assumes that the government will be so "competent in action and pure in motivation" that it can regulate commercial speech with reduced judicial oversight.[214] In reality, whether the expression at issue is commercial has little to do with lawmakers' propensity to regulate based on ill-conceived policy justifications or ulterior motives. Because lawmakers may regulate out of impure motives or poor policy decisions regardless of the commercial nature of the regulated expression, courts should protect commercial speech, or at least

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they must also be exposed to thoughts, beliefs, and ideas about the human condition in order to develop the critical faculties necessary to perform that calculus.").

[208] *See* Coase, *supra* note 10, at 14.

[209] Frank Lake, *Kim Jong-Il Killed by Chuck Norris!*, WKLY. WORLD NEWS, Dec. 19, 2011, http://weeklyworldnews.com/headlines/41548/kim-jong-ii-killed-by-chuck-norris/.

[210] Frank Lake, *Aliens Support Ron Paul in Iowa*, WKLY. WORLD NEWS, Jan. 3, 2012, http://weeklyworldnews.com/politics/41939/aliens-support-ron-paul-in-iowa/.

[211] *See, e.g.*, Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981).

[212] Coase, *supra* note 10, at 2.

[213] *Id.*

[214] *Id.*

particular types of commercial speech, with the same zeal with which they protect noncommercial speech.[215]

Commercial speech may also spread noncommercial information.[216] Advertisers are frequently motivated not only to encourage people to buy their products but also to increase support for the company among its workers or influence public opinion in a way that favors the business.[217] In some cases, the commercial speech may be difficult to distinguish from the noncommercial message. For example, if a company were to encourage voters to vote against a proposed issue affecting the company's business, is the company trying to influence politics, or is it merely marketing its product?[218] What if the advertisement sought to sell a book espousing certain ideas?[219] In addition to sorting out whether the speech in question is commercial or noncommercial, the facility of mixing the two may prevent commercial actors from engaging in protected noncommercial speech altogether.[220] A commercial actor, merely by promoting its product, may convert its entire message into commercial speech with less protection than the message would receive had the speaker not had a product to promote.[221] That commercial speech may be difficult to extract from a noncommercial context necessitates greater protection for commercial speech for the sake of the noncommercial speech even if the commercial speech is less valuable.

Subjecting bans on commercial speech to strict scrutiny does not hamstring legislators looking out for consumer interests either. I do not advocate eliminating bans on commercial speech or prohibiting all regulation of commercial speech; I would simply require courts to subject outright bans to more searching scrutiny. Most regulations on commercial speech, like warning labels or requirements that advertisements not mislead, would not be subject to strict scrutiny. Even bans, if narrowly tailored to further compelling government interests, could survive. Subjecting bans to strict scrutiny simply recognizes that bans are unlikely to be the least restrictive means of furthering government interests that are rarely relevant to the speech itself.

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[215] *See* Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982) (arguing that if some speech is afforded greater protection, that determination should be based on an individualized balancing inquiry between the merits of free expression and regulation, rather than a distinction that values some types of speech more than others).

[216] *See* Brudney, *supra* note 38, at 1157–58.

[217] *See, e.g.*, Coase, *supra* note 10, at 9.

[218] *See* Cammarano v. United States, 358 U.S. 498, 515 (1959) (Douglas, J., concurring) (noting that if Congress had denied deductions for claimants who engage in certain speech, it would be a violation of the First Amendment).

[219] *See* Coase, *supra* note 10, at 21.

[220] Brudney, *supra* note 38, at 1159 (observing that "virtually every public pronouncement by a seller of products or services that mentions or calls attention to those products or services can plausibly be portrayed as part of a sales effort that constitutes commercial speech").

[221] *Id.* at 1159–60.

But even if market-based information is all that commercial speech produces, affording commercial speech greater protection under the First Amendment does not detract from more valuable forms of speech.[222] If anything, the Court's apparent willingness to expand the scope of the First Amendment demonstrates a commitment to the values embodied within it.[223] Because the vast majority of laws invalidated under *Central Hudson* are rejected based on their tailoring to an otherwise important government interest, subjecting bans to strict scrutiny simplifies more than it complicates. And even if asking whether a law bans a class of commercial information creates an added step (to be followed by strict scrutiny), this approach follows an already well-established body of doctrine.

F. Why Maintain Central Hudson*?*

Central Hudson recognized that truly commercial speech differs in purpose from other forms of speech, affording protection because the speech serves only an "informational function."[224] The most common argument for maintaining a distinct commercial speech doctrine is discussed above—commercial speech is simply less valuable than political speech because it does not contribute to the democratic process.[225] Advertisements that do no more than propose a commercial transaction contribute little to debates about political and social issues. Advertisements play, at most, a minor role in checking power, a primary purpose of the First Amendment. In fact, commercial speech arguably endorses materialistic values contrary to democratic principles.[226]

Commercial speech is also more falsifiable than noncommercial speech.[227] Whether an individual can purchase the newest car model for a particular price can easily be verified by visiting the dealership and speaking with a salesperson. Whether the government should increase environmental regulations, by contrast, is a normative judgment that might be supported by facts but is itself unfalsifiable. That the content of commercial speech might be verified decreases the fear that regulation is based on disagreement with the content. Put differently, if regulations require the content

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[222] *See* Stern, *supra* note 29, at 109 (noting that any "dilution" of other speech protection is disparate and "exceedingly difficult to detect").

[223] Professor Nat Stern observes that the era of expanded commercial speech protection is also the era in which the Court expanded protection to individual rights and liberties. *Id.* at 109–10.

[224] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 563 (1980).

[225] *See, e.g.*, Edward J. Eberle, *Practical Reason: The Commercial Speech Paradigm*, 42 CASE W. RES. L. REV. 411, 461 (1992); Fischette, *supra* note 124, at 678–88; Post, *supra* note 130, at 4. *See generally* James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 VA. L. REV. 491 (2011) (promoting the democracy-based theory to explain the pattern of the Supreme Court's opinions).

[226] *See* Eberle, *supra* note 225, at 466.

[227] *See id.* at 470–71.

of commercial speech to be true, one can determine whether specific restrictions were valid by verifying the accuracy of the restricted statement. The practical simplicity of regulating commercial speech thus distinguishes commercial from non-commercial speech and makes regulating the former more defensible.[228]

Historically, there were also limits on speech short of outright bans. Inspired by Blackstone and the common law tradition, the colonies prohibited speech that contained a misrepresentation.[229] Thomas Jefferson considered the right to speak an unlimited right with the exception of "false facts affecting injuriously the life, liberty, property or reputation of others."[230] The common law did prohibit advertising "unlawful products" under doctrines barring solicitation of criminal behavior,[231] but similar laws would likely withstand strict scrutiny today. Thus, at the time the First Amendment was drafted, the Framers held the freedom of expression in the highest regard, but they understood that freedom to entail reasonable limits.

Central Hudson, or some lesser form of scrutiny, should be maintained for another reason: some commercial speech is in need of carefully limited regulation that may not survive strict scrutiny. For example, although the health threats of smoking cigarettes are well known, tobacco companies have been tremendously successful in marketing their products, especially to those who are too young to know the difference.[232] Underage smokers are easily persuaded by advertising and not easily dissuaded by textual warning labels.[233] To combat the power of advertising with the comparative failure of warning labels, regulators have a number of options, such as prohibiting tobacco advertisements on billboards or eliminating persuasive mascots like Joe Camel.[234] Preventing youths from starting an unhealthy addiction to cigarettes does not require a ban on all cigarette advertising, but it might require less restrictive limits on the places in which tobacco companies can advertise and the appearance or character of the advertisements.

In addition to limiting the undue influence of harmful products like cigarettes, misleading commercial speech, regardless of the advertised product, is harmful to

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[228] *See id.* at 476–83 (proposing a new commercial speech framework based on whether the information disseminating is true, true but misleading, or false).

[229] Troy, *supra* note 10, at 106.

[230] *Id.* (quoting 15 THE PAPERS OF THOMAS JEFFERSON 367, 367 (J. Boyd ed., 1958)).

[231] *Id.* at 107.

[232] *See* Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31 § 2, 123 Stat. 1776, 1777 (2009) (codified at 21 U.S.C. 387 (2006)) ("Virtually all new users of tobacco products are under the minimum legal age to purchase such products.").

[233] *See* Recent Case, *D.C. Circuit Holds that FDA Rule Mandating Graphic Warning Images on Cigarette Packaging and Advertisements Violates First Amendment*, 126 HARV. L. REV. 818, 819 (2013) (citing Required Warnings for Cigarette Packages and Advertisements, 75 Fed. Reg. 69,524, 69,531 (proposed Nov. 12, 2010)).

[234] For an argument that the billboard regulation and the prohibition against Joe Camel pass the *Central Hudson* test, see Donald W. Garner & Richard J. Whitney, *Protecting Children from Joe Camel and His Friends: A New First Amendment and Federal Preemption Analysis of Tobacco Billboard Regulation*, 46 EMORY L.J. 479 (1997).

all consumers.[235] Examples of regulations that prevent misleading advertising abound. For example, in the wake of the financial crisis, the SEC has promulgated rules limiting what companies can imply about the future performance of mutual funds.[236] States have also sought to limit advertisements by pregnancy care centers that misrepresent the health effects of abortion.[237] Others have called for greater accountability for misleading political advertisements.[238] Whether the advertiser seeks to win votes by misleading the electorate, overstate the upside potential of an investment, or downplay the risks of a health procedure, it is clear that some limits are necessary. The solution in these cases, however, is not to prohibit advertising about mutual funds, pregnancy care, or political office, but to impose more limited restrictions that protect consumers from misleading advertisements.

The problem with applying strict scrutiny to laws that prohibit misleading advertising or bar advertising schemes like Joe Camel is that those restrictions, while more limited than a ban, may not survive strict scrutiny. *Sorrell* itself makes clear that strict scrutiny is the death knell for regulations of free speech as the dissent argues that the Vermont law would withstand intermediate scrutiny under *Central Hudson*.[239] In fact, only twenty-two percent of all speech restrictions subjected to strict scrutiny have passed constitutional muster.[240]

Post-*Sorrell* commercial speech decisions support the trend, with courts striking down commercial speech restrictions under either strict scrutiny or "heightened" intermediate scrutiny. At least one lower court has interpreted *Sorrell* to require strict scrutiny, striking down the restriction at issue.[241] Other courts have applied a more searching form of intermediate scrutiny under *Central Hudson*, usually interpreting *Sorrell* to require the restriction to directly further the purported state interest.[242] And

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[235] *See generally* Helen Norton, *Secrets, Lies, and Disclosure*, 27 J.L. & POL. 641, 648–55 (2012).

[236] *See* Alan R. Palmiter & Ahmed E. Taha, *Mutual Fund Performance Advertising: Inherently and Materially Misleading?*, 46 GA. L. REV. 289, 292 (2012).

[237] *See* Jennifer M. Keighley, *Can You Handle the Truth? Compelled Commercial Speech and the First Amendment*, 15 U. PA. J. CONST. L. 539, 596–98 (2012).

[238] Gerald G. Ashdown, *Distorting Democracy: Campaign Lies in the 21st Century*, 20 WM. & MARY BILL RTS. J. 1085 (2012).

[239] Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2679 (2011) (Breyer, J. dissenting) ("I believe Vermont's statute survives application of *Central Hudson*'s 'intermediate' commercial speech standard . . . .").

[240] Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny*, 59 VAND. L. REV. 793, 815 (2006).

[241] *See* Wollschlaeger v. Farmer, 880 F. Supp. 2d 1251, 1262 (S.D. Fla. 2012) ("In *Sorrell v. IMS Health Inc.* the Supreme Court applied strict scrutiny to a law involving commercial speech . . . .").

[242] *See, e.g.*, Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Worchester, 851 F. Supp. 2d 311, 312, 318–19 (D. Mass. 2012) (invalidating a law that prohibited outdoor advertisements of tobacco products).

although the court did not analyze the question under commercial speech, the Fourth Circuit used strict scrutiny to strike down a law requiring providers of pregnancy-related services to post conspicuous signs advertising that the provider could refer patients to other physicians for birth control or abortion services.[243]

Not all advertisers have the greater good in mind when they decide how to market their products and services. The fact that commercial speech, by definition, proposes a commercial transaction, is evidence that the speaker has something else in mind. The solution is not to ban those speakers from sharing their message at all, but to limit the bad ways in which they could convey that message. Historically, strict scrutiny has not been friendly to such limited speech restrictions, and the recent history of applying *Sorrell* predicts that the trend will continue. Subjecting overbroad bans to strict scrutiny stabilizes the line between overzealous regulation of potentially informative commercial speech and ensuring that those who choose to engage in commercial speech do not take advantage of their listeners.

Although commercial speech is frequently falsifiable and not generally the most valued speech, the commercial-noncommercial division is not clean enough to support maintaining its current doctrinal divide. Pure commercial speech still has informational value and may contain an underlying political or social message.[244] By the same token, not all advertisements are so easily falsifiable. How does one prove that the newest sleep aid will give you the best sleep you have had in years, for example? Extending strict scrutiny to commercial speech bans best balances the need to prevent overbroad restrictions on commercial speech while maintaining the elevated value of noncommercial speech. The intermediate scrutiny of *Central Hudson* compromises by recognizing that when an overly broad ban is not at stake, the verifiability and nondemocratic nature of commercial speech require less exacting judicial protection.

IV. THE STRICT SCRUTINY–BAN TEST AND *SORRELL*

Now that I have laid out the reasons to prefer the strict scrutiny for commercial speech bans, an illustration of the test along the facts of *Sorrell* may prove useful. First, because *Sorrell* concerns physician-identifying information for marketing or commercial purposes, it falls within the realm of commercial speech. If the "commercial" label were not enough, *Sorrell*, in particular, concerns pharmaceutical detailing, a form of advertisement.[245] Advertisements are the quintessential form of commercial speech.[246] Furthermore, because the physician-identifying information

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[243] Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor and City Council of Balt., 683 F.3d 539, 548, 556 (4th Cir. 2012).

[244] For example, are advertisements for an abortion clinic political or social? *See* Bigelow v. Virginia, 421 U.S. 809 (1975).

[245] IMS Health Inc. v. Sorrell, 630 F.3d 263, 267 (2d Cir. 2010), *aff'd*, 131 S. Ct. 2653 (2011).

[246] *See, e.g.*, Schauer, *supra* note 9, at 1183.

is neither false nor misleading, it falls within the scope of commercial speech that the strict scrutiny–ban test is designed to analyze.

The first question—whether a ban on physician-identifying information constitutes a ban on a class of information—is satisfied because those with market or commercial purposes may not use prescriber-identifying information. While the laws technically only bar the use of such information for marketing purposes, they deprive any actor in the market from taking advantage of the information. The First Amendment protects such speech in the market precisely because the market functions more efficiently when actors, such as physicians, are well informed about the products and services available. Limiting the use of prescriber-identifying information to noncommercial purposes therefore deprives the market of such information.

While one could argue that limiting the ban to commercial or marketing purposes is more analogous to time, place, or manner restrictions, the legislative history of the Vermont statute refutes this point.[247] Specifically, the legislative history indicates that Vermont believed the message conveyed by pharmaceutical detailers to be "in conflict with the goals of the [S]tate."[248] The Vermont legislature demonstrated a clear intent to enact a ban harmful to detailers rather than to place limited restrictions on either the truthfulness of the message conveyed or the manner in which detailers visit physicians to market their products.[249] Absent these limitations, Vermont effectively enacted a ban on the dissemination of prescriber-identifying information. This simple preliminary question—whether the restriction is a ban—saves the four factor *Central Hudson* test and subjects the law to more exacting scrutiny.

CONCLUSION

The question of whether commercial speech sits on an even playing field with highly valued political speech is divisive. On one hand, political speech seems far more directly relevant to the values of democratic government, but on the other, commercial speech offers a wealth of information. That the question is difficult is reflected in the commercial speech doctrine, as the Court first proclaims that commercial speech was never protected, then finds reason to afford that speech minimal protection, and only later incrementally increases that protection. After *Sorrell*, the question is where the commercial speech doctrine will go next.

I offer a middle ground proposal for the next step in expanding protection for commercial speech. By drawing a distinction between outright bans of particular information and restrictions on how those facts are portrayed, I divide commercial speech into two classes. Because bans are far more sweeping and more likely to implicate the justifications for protecting political speech, the Court should recognize

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[247] *Sorrell*, 131 S. Ct. at 2663.
[248] *Id.* (quoting 2007 Vt. Acts & Resolves 80, § 1(3)).
[249] *Id.* at 2672.

that bans are suspect enough to justify strict scrutiny. By asking whether the speech constitutes a ban, the Court can easily avoid the four-factor balancing test that has led to mixed results in the lower courts. Instead, bans enter the traditional content-based doctrine, and only mere time, place, or manner restrictions remain under the *Central Hudson* test. Whether this test should be the ultimate commercial speech test is a separate question. What seems clear is that at least some commercial speech deserves more judicial protection. By elevating the scrutiny under *Central Hudson* to strict scrutiny when the law in question enacts a ban, courts can afford commercial speech more protection when the commercial speech appears most in need of judicial intervention. Whether the Court should expand strict scrutiny to commercial speech restrictions that stop short of a ban remains an open question.