THE COMMERCIAL SPEECH DOCTRINE BARELY SURVIVES *SORRELL*

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INTRODUCTION

In First Amendment jurisprudence, strict scrutiny is the toughest meter courts use to evaluate laws that burden one of our most prized rights—the freedom of speech. Wary that governments might discriminate against unpopular ideas by censoring speech, courts rarely allow laws to stand that make distinctions based on viewpoint or content.

Commercial speech is different. Since 1980, when the United States Supreme Court handed down *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*,[1] courts have used a form of intermediate scrutiny when evaluating the First Amendment implications of commercial speech restrictions. Whereas strict scrutiny, which is applied

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1. 447 U.S. 557 (1980).

to restrictions on fully-protected speech, requires the government to show that its law is narrowly tailored to promote a compelling state interest, and that there is no other less restrictive means for achieving its goal, *Central Hudson* dials back the government's burden in justifying commercial speech restrictions. The four-part *Central Hudson* test allows some deference to state actors when they regulate commercial speech, which historically has been viewed as less valuable than other protected speech.

The *Central Hudson* test has had its critics on the Court ever since its inception.[2] One reason for the test's unpopularity is that its vague contours allow for inconsistent decisions. A recent circuit split over the constitutionality of state regulations on alcohol advertisements in college and university newspapers is illustrative. *Pitt News v. Pappert* and *Educational Media Co. at Virginia Tech v. Swecker* provided the Third and Fourth Circuits, respectively, with nearly identical challenged laws accompanied by nearly identical facts.[3] Both courts employed *Central Hudson*; the Third Circuit struck down the Pennsylvania law and the Fourth Circuit let the Virginia law stand.[4]

Another reason for the test's unpopularity, some argue, is that it does not give enough protection to commercial speech that is informative and not misleading or impermissibly aggressive.[5] While a lower level of scrutiny should always attach to commercial speech regulations that seek to protect consumers from deceptive advertising, critics say, a standard First Amendment analysis is appropriate when a law restricts commercial speech for any other reason.[6] A standard First Amendment analysis consists of strict scrutiny for content-based restrictions and intermediate scrutiny for content-neutral restrictions. A law that restricts alcohol advertisements in order to lower consumption, then, would not automatically be afforded the more lenient *Central Hudson* intermediate scrutiny; rather, like

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2. *See, e.g.*, Greater New Orleans Broad. Assn., Inc. v. United States, 527 U.S. 173, 197 (1999) (Thomas, J., concurring in judgment); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 501, 510–14 (1996) (joint opinion of Stevens, Kennedy, and Ginsburg, JJ.); *id.* at 517 (Scalia, J., concurring in part and concurring in judgment); *id.* at 518 (Thomas, J., concurring in part and concurring in judgment).

3. *Compare* Educ. Media Co. at Virginia Tech, Inc. v. Swecker, 602 F.3d 583 (4th Cir. 2010), *with* Pitt News v. Pappert, 379 F.3d 96 (3d Cir. 2004).

4. *Id*.

5. *See, e.g.*, Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 571–72 (2001) (Kennedy, J., concurring) (expressing concern that the test gives insufficient protection to truthful, non misleading commercial speech).

6. *See, e.g.*, 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 501 (Stevens, J., concurring) (stating that "less that strict review" is appropriate when a state regulates to protect consumers, but that "rigorous review" is appropriate when the state prohibits truthful commercial information for reasons unrelated to the presentation of a fair bargaining process).

noncommercial speech restrictions, it would face strict scrutiny if it were content-based and intermediate scrutiny if it were content-neutral.

In June 2011, the Supreme Court came down with a decision that has the potential to change dramatically the course of the commercial speech doctrine.[7] In *Sorrell v. IMS Health, Inc.*, the Court reviewed a Vermont law that regulated the sale of prescription-prescriber data to pharmaceutical marketers. Read conservatively, *Sorrell* at least clarifies one factor of the *Central Hudson* test by holding that a state's method of achieving its stated goal cannot include intentionally keeping its citizens in the dark.[8] That is, a law that seeks to influence people's behavior by keeping truthful commercial information from them cannot withstand even the lower level of scrutiny applied under *Central Hudson.*

In vague but potentially hugely significant language, the *Sorrell* Court also discussed instances where commercial speech might warrant strict scrutiny. While the Court acknowledged with approval that content-based distinctions in commercial speech restrictions are permissible so long as the government satisfies the *Central Hudson* test, it qualified this application of *Central Hudson* scrutiny in two important ways. First, the Court made clear that the longstanding rule that viewpoint discrimination is presumptively fatal to a speech restriction applies with equal force to commercial speech restrictions.[9] Second, the Court suggested that the only government interest sufficiently weighty to warrant deference (in the form of the more lenient level of scrutiny) is consumer protection.[10] In other words, it might be the case post-*Sorrell* that *Central Hudson* scrutiny applies only to laws motivated by consumer protection, and all other commercial speech laws receive the same scrutiny as do restrictions of fully-protected speech.

This Note seeks to explain the significance of *Sorrell* and evaluate its effect on the future of the commercial speech doctrine. Part I explores the winding and shaky history of commercial speech law in First Amendment jurisprudence, culminating in an evaluative test that has proven difficult to apply. Problems with the test have produced inconsistent holdings not only across the district and circuit courts, but also within the Supreme Court's own case law. The first Part of this Note examines those inconsistencies and highlights one facet of the test with which courts have had particular trouble. Part II describes the circuit split resulting from *Pitt News* and *Swecker* in order to illustrate the areas of *Central Hudson* that are sufficiently vague and unworkable to permit inconsistent holdings. Part III introduces and explains *Sorrell*, making careful note of the take-away lessons relevant to the commercial speech doctrine. Part IV applies the

7. Sorrell v. IMS Health, Inc., 131 S. Ct. 2653, 2670 (2011).
8. *Id.* at 2670.
9. *Id*. at 2664.
10. *Id*. at 2672.

lessons from *Sorrell* to the alcohol advertisement bans in order to see the new rules in practice. Finally, this note concludes in Part V by taking stock of the newest developments in the commercial speech doctrine and highlighting the ends left loose by *Sorrell*.

I. HISTORY AND DEVELOPMENT OF THE COMMERCIAL SPEECH DOCTRINE

The treatment of commercial speech[11] in First Amendment jurisprudence has been described pejoratively as consisting merely of "ad hoc subject-specific examples of what is permissible and what is not."[12] Though its exact place under the umbrella of constitutional protection is still unsure, commercial speech has at least escaped its original position alongside incitement, threats, and other forms of speech that are wholly unprotected by the First Amendment. In 1942, the Supreme Court upheld a New York ban on the dissemination of "advertising matter,"[13] thereby beginning a 33-year period in which commercial speech remained completely outside the purview of any First Amendment protection. During that time, some lower courts queried whether commercial speech is always without the kind of value that would merit constitutional recognition.[14] Then, in a 1975 7-2 opinion, the Supreme Court announced that an advertisement providing information for women seeking abortion services did more than simply propose a commercial transaction, and

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11. Though the Court has not given a precise definition of "commercial speech," its decision in *Bolger v. Youngs Drug Products Corp.* describes at least three characteristics generally common to the category: (1) it advertises something, (2) it refers to a specific product, and (3) the speaker has a profit motive. 463 U.S. 60, 67 (1983). For a discussion of speech outside advertising that could be considered "commercial speech," *see generally* Steven Shiffrin, *The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212 (1983).

12. Alex Kozinski and Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 631 (1990).

13. Valentine v. Chrestensen, 316 U.S. 52 (1942). The regulation in question, Section 318 of the Sanitary Code, reads:

> "Handbills, cards and circulars—No person shall throw, cast or distribute, or cause to permit to be thrown, cast or distributed, any handbill, circular, card, booklet, placard or other advertising matter whatsoever in or upon any street or public place, or in a front yard or court yard, or on any stoop, or in the vestibule or any hall of any building, or in a letterbox therein. . . . This section is not intended to prevent the lawful distribution of anything other than commercial and business advertising matter."

Id. at 53 n.1 (citing CITY ADMIN. CODE & CHARTER §§ 16–18(5)).

14. *See, e.g.*, Barrick Realty, Inc. v. City of Gary, 491 F.2d 161 (7th Cir. 1974).

therefore merited some defense under the First Amendment.[15] The *Bigelow* Court declined to opine on the constitutionality of *all* commercial speech, but it noted approvingly that the advertisement was not deceptive or fraudulent, did not relate to illegal activity, and did not invade the privacy or infringe the rights of other citizens.[16]

The next year, writing for the first time in approving language about the value of commercial advertising generally, the Court drew on language from previous noncommercial speech cases and held that "speech does not lose its First Amendment protection because money is spent to project it."[17] Advertising may seem tasteless and excessive at times, the Court wrote in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, but it is "nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable."[18] While paving the way for constitutional protection of advertising, the Court did not, in that case, provide limits or interpretive guidelines; the Court simply noted that "whatever may be the proper bounds" of permissible commercial advertising regulations, they were in that case "plainly exceeded."[19]

For a short time following *Virginia Pharmacy*, commercial speech enjoyed considerable protection.[20] Then, in 1978, the Court began to set some limits on commercial speech protection by relegating evaluation of commercial speech restrictions to a level somewhere below "strict scrutiny" but above a "rational basis" test. Upholding an attorney's

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15. Bigelow v. Virginia, 421 U.S. 809 (1975) (internal citations omitted).

16. *Id.* at 828.

17. Va. St. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 761 (1976). In stating this proposition, the Court cited, *inter alia*, New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964) (preceding the commercial speech doctrine but prophesying its coming by holding that an "editorial" advertisement, which sought support on behalf of a movement that was of public interest and concern, was not without First Amendment protection simply because it was paid for).

18. *Va. State Bd. of Pharmacy*, 425 U.S. at 765.

19. *Id.* at 771.

20. This protection was based mostly on the *Virginia Pharmacy* Court's assertion that a state cannot seek to manipulate behavior by keeping the public in the dark about truthful information. *Id.* at 773. *See also* Linmark Assocs., Inc. v. Twp of Willingboro, 431 U.S. 85, 97 (1977) (holding that a township's goal of preventing the flight of white residents was "laudable," but its ordinance prohibiting "For Sale" and "Sold" signs impermissibly restricted the free flow of commercial information).

censure for improper advertising to potential clients, the Court in *Ohralik v. Ohio State Bar Association* stated that "commercial speech [has] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values."[21] Two years later in *Central Hudson*, the Court promulgated its "supposedly precise"[22] balancing test that remains a benchmark for evaluation of commercial speech regulations today.[23]

The Court in *Central Hudson* struck down a state regulation that, in order to conserve fuel, banned promotional advertising by electrical utilities. The Court started by affirming that commercial speech warrants some First Amendment protection, but that the Constitution "accords a lesser protection to commercial speech than to other constitutionally guaranteed expression."[24] Accordingly, the government's burden in defending a law that restricts commercial speech is lower than its burden in cases of protected speech. A law that restricts commercial speech stands if four conditions are met:

> 1. The commercial speech "must concern lawful activity and not be misleading" to be entitled to any first amendment protection (if it is false, it can be regulated or banned and the rest of the test is not applicable);
> 2. The government's interest in regulating the commercial speech must be "substantial;"
> 3. The regulation must "directly advance[] the governmental interest asserted;" and
> 4. The regulation must not be "more extensive than is necessary to serve that interest."[25]

The New York regulation failed on the fourth prong of the test. The state did not meet its burden of demonstrating that the "interest in conservation cannot be protected adequately by more limited regulation of . . . commercial expression."[26] The burden of proof is on the government to justify its restriction of commercial speech.[27]

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21. 436 U.S. 447, 456 (1978).

22. Mark A. Conrad, *Board of Trustees of the State University of New York v. Fox - the Dawn of A New Age of Commercial Speech Regulation of Tobacco and Alcohol*, 9 CARDOZO ARTS & ENT. L.J. 61, 72 (1990).

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

24. *Id.* at 563.

25. Conrad, *supra* note 22, at 72 (citing *Cent. Hudson*, 447 U.S. at 563–66). The Court considers this test a form of "intermediate scrutiny." *See* Fla. Bar v. Went For It, Inc., 515 U.S. 618, 623 (1995).

26. *Cent. Hudson*, 447 U.S. at 570.

27. The Court reaffirmed this allocation of burden of proof in subsequent cases. *See, e.g.*, Edenfield v. Fane, 507 U.S. 761, 770 (1993).

From the outset, the test had its critics within the Court.[28] Perhaps the most vocal was Justice Rehnquist, who believed the majority had given commercial speech *too much* constitutional protection. His lone dissent "encapsulated the main problem with the four-part *Central Hudson* test by stating that it 'elevates the protection accorded commercial speech that falls within the scope of the First Amendment to a level that is virtually indistinguishable from that of noncommercial speech.'"[29] Rehnquist chastised the majority for "unlock[ing] a Pandora's Box" by—as he saw it—inappropriately elevating advertising to the level of political speech.[30] Value judgments about his criticism aside, Rehnquist was at least right about the Pandora's Box.

Inconsistency has marred commercial speech jurisprudence following *Central Hudson*.[31] Over the course of time and across various jurisdictions, courts have had different views about what the latter three *Central Hudson* prongs actually require.[32] For example, courts struggled over whether the

28. *See id*. at 573 (Blackmun, J., concurring) (calling the test "inadequate").

29. Conrad, *supra* note 22, at 73 (citing *Cent. Hudson*, 447 U.S. at 591 (Rehnquist, J., dissenting)).

30. *Cent. Hudson*, 447 U.S. at 598 (Rehnquist, J., dissenting).

31. See, *e.g.*, Kozinski and Banner, *supra* note 12, at 630–31 (citing cases); R. George Wright, *Freedom and Culture: Why We Should Not Buy Commercial Speech*, 72 DENV. U. L. REV. 137, 162–66 (1994) (citing cases).

32. The first prong of the test, requiring that speech is true and about legal activity before it warrants any protection, receives little attention in case law. One reason for this could be, as Professor Erwin Chemerinsky posits, that the law on this point is clearly established. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 11.3.7.5, at 1095 (3d ed. 2006). Though the Supreme Court has not decided a case concerning false and deceptive ads, Chemerinsky writes, courts accept that they are outside constitutional protection. *Id.* This point might not be quite so clear-cut. Although the *Central Hudson* majority said advertisements that are misleading or about illegal activity are excluded from First Amendment protection, other opinions suggest this speech may sometimes warrant intermediate scrutiny. For example, Justice Blackmun in his *Central Hudson* dissent suggested that intermediate scrutiny is appropriate for regulations of misleading and coercive commercial speech. *See Cent. Hudson*, 447 U.S. at 573 (Blackmun, J., dissenting) ("I agree with the Court that . . . intermediate scrutiny is appropriate for a restraint on commercial speech designed to protect consumers from misleading or coercive speech"). Justice Stevens echoed this view in *44 Liquormart, Inc. v. Rhode Island*, where he wrote that something less than strict scrutiny, but presumably more than non-protection, is appropriate for misleading commercial speech. 517 U.S. 484, 501 (1996) ("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 justifies less than strict review"). *See infra* text accompanying notes 124–31 for more discussion on this point.

test's fourth prong, which requires that the law be no more extensive than necessary, calls for the government to show that its law is the least restrictive way to achieve its goal.[33] The answer to that problem was only very recently settled; *Central Hudson* scrutiny seems only to require a narrow tailoring.[34] Another problematic nuance of *Central Hudson* review is whether the test allows states to advance their goals by limiting truthful information available to the public. A detailed look at the case law on this issue is helpful not only to determine how courts should treat restrictions that operate by withholding information, but also to appreciate the dramatic differences in how much (or little) value various courts and judges ascribe to commercial speech.

A. Can The State Regulate By Keeping Citizens In The Dark?

In one of its seminal commercial speech cases, *Virginia Pharmacy Board*, the Court ruled that commercial speech regulations are not acceptable if they operate by keeping truthful, noncoercive information from people for what the government perceives to be the people's own good.[35] In response to "whether a State may completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its

33. *See* Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 476–77 (1989).

34. The Court in *Board of Trustees of the State University of New York* held that the fourth prong does not require that the government use least restrictive means, but rather "a means narrowly tailored to achieve the desired objective." *Id.* at 480. However, the Court later found in *Rubin v. Coors Brewing Co.* that a commercial speech regulation failed on the fourth prong because there existed regulation alternatives that "could advance the Government's asserted interest in a manner less intrusive to the respondent's First Amendment rights." 514 U.S. 476, 491 (1995). Just a few years later, though, the Court returned to its interpretation of the fourth prong that calls for a narrow tailoring, not the least restrictive means. In *Greater New Orleans Broadcasting Ass'n v. United States*, the Court expressly affirmed *Fox* in explaining that "[t]he Government is not required to employ the least restrictive means conceivable, but it must demonstrate narrow tailoring of the challenged regulation to the asserted interest." 527 U.S. 173, 188 (1999). Similarly, in *Lorillard Tobacco v. Reilly*, the Court stated that "'the least restrictive means' is not the standard; instead, the case law requires a reasonable fit between the legislature's ends and the means chosen to accomplish those ends." 533 U.S. 525, 556 (2001) (internal citations omitted).

35. Va. State Bd. of Pharmacy v. Va. Consumer Council, 425 U.S. 748 (1976). The Court held that Virginia could not pursue its goal of encouraging people to consult only "professional" pharmacists by "keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering." *Id.* at 770.

recipients," the Court wrote, "we conclude that the answer to this [question] is in the negative."[36]

Until the birth of the *Central Hudson* test, this was generally the rule. In *Linmark Associates, Inc. v. Township of Willingboro*, for example, the Court confronted a city ordinance that prohibited "For Sale" signs to prevent "the flight of white home-owners from a racially integrated community."[37] An abundance of "For Sale" signs, the city worried, would cause panic selling.[38] Though the Court found the city's goal "vital," it nonetheless struck down the ordinance saying that the "First Amendment disable[s] the State from achieving its goal by restricting the free flow of truthful information."[39]

Then, in *Central Hudson*, the rule from *Virginia Pharmacy* and *Linmark* fell out of focus. The Court in that case evaluated New York's ban on utility companies' promoting the use of electricity.[40] The purpose of the state's ban was to reduce energy consumption; the Court found the interest legitimate. The ban failed the test's fourth prong, because it was more extensive than necessary, but on the third prong the Court found a "direct link" between advertising and energy consumption. Justice Blackmun explained in his dissent that by calling the relationship between lessened demand and restricted information a "direct link," the Court seemingly approved of this method as a possible avenue for the state to achieve its goals.[41] By not striking down the law because it operated by keeping people in the dark, the majority "[left] open the possibility that the State may suppress advertising of electricity in order to lessen demand for electricity."[42] For Blackmun, suppression of truthful information simply because the government fears its persuasiveness is not permissible.[43]

Following *Central Hudson,* the Court evaluated several laws that operated by keeping people in the dark, but its analyses were not always consistent and tended not to locate the issue in any of test's four prongs. In *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*[44] and *United States v. Edge Broadcasting Co.,*[45] the Court confronted laws restricting advertising of casinos and lotteries in a jurisdiction where both were legal. Though the laws were premised on the assumption that people are better off with less information, the Court upheld both. Even in *Rubin*

36. *Id.* at 773.
37. 431 U.S. 85, 86 (1977).
38. *Id.*
39. *Id.* at 94, 95.
40. Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 558 (1980).
41. *Id.* at 573.
42. *Id.* at 573.
43. *Id.* at 573–74.
44. 478 U.S. 328 (1986).
45. 509 U.S. 418 (1993).

v. Coors Brewing Co., where the Court struck down a federal law prohibiting brewers from stating alcohol content on beer labels, it did not do so because the law operated by keeping people in the dark.[46] Instead, the Court believed that the "puzzling" regulatory scheme would likely fail to achieve the government's goal of eliminating strength wars (competition on the basis of alcohol content) between brewers.[47] In other words, the Court did not hold, as it had in *Linmark*, that the state cannot "achiev[e] its goal by restricting the free flow of truthful information."[48]

Yet in other cases and some separate opinions, the idea survived. The Court in *Bolger v. Youngs Drug Products Corp.*, examining a federal statute that prohibited the mailing of unsolicited advertisements for contraceptives, held that "the restriction of 'the free flow of truthful information' constitutes a 'basic' constitutional defect regardless of the strength of the government's interest."[49] The Court quoted *Linmark* in striking down the law. Similarly, Justice Brennan wrote in his *Posadas* dissent that he saw "no reason why commercial speech should be afforded less protection than other types of speech where, as here, the government seeks to suppress commercial speech in order to deprive consumers of accurate information concerning lawful activity."[50]

The Court had its opportunity to clear up the confusion in *44 Liquormart, Inc. v. Rhode Island*, but the case did not have a majority opinion and is therefore difficult to apply.[51] Holding a Rhode Island statute's blanket ban on liquor price advertising unconstitutional, Justice Stevens pronounced for the plurality that "a State's paternalistic assumption that the public will use truthful, nonmisleading commercial information unwisely cannot justify a decision to suppress it."[52] In a portion of the opinion joined by just two other justices, Stevens wrote that "[t]he First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good. That teaching applies equally to state attempts to deprive consumers of accurate information about their chosen products."[53] Stevens went on to review the statute with "special care"[54] under *Central Hudson* and found that it failed the test's third and fourth prongs.[55]

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46. 514 U.S. 476 (1995).

47. *Id.* at 489.

48. Linmark Assocs., Inc. v. Twp. of Willingboro, 431 U.S. 85, 95 (1977).

49. Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 75 (1983) (quoting *Linmark*, 431 U.S. at 95–96).

50. Posadas de P.R. Assocs. v. Tourism Co. of P.R., 478 U.S. 328, 350 (1986) (Brennan, J., dissenting).

51. 517 U.S. 484, 516 (1996).

52. *Id.*at 497.

53. *Id.* at 503.

54. *Id.* at 501. Stevens's "special care" version of *Central Hudson*, from how he described it, seems on par with strict scrutiny: "[W]e must review the price

Justice Thomas went even further in his *44 Liquormart* concurrence. "In cases such as this," Thomas wrote, "in which the government's asserted interest is to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace, the balancing test adopted in [*Central Hudson*] should not be applied, in my view. Rather, such an 'interest' is *per se* illegitimate and can no more justify regulation of 'commercial' speech than it can justify regulation of 'noncommercial' speech."[56] Thomas did not join the portion of the opinion in which Stevens made the similar pronouncement about paternalistic government assumptions, as Thomas was unwilling to sign onto a *Central Hudson* analysis of the regulation.[57] Both opinions, though, look disfavorably on governments restricting speech in order to manipulate behavior.

Justice Thomas remained vocal in later opinions about the appropriate application of strict scrutiny to regulations that operate by keeping people in the dark. In his *Lorillard* concurrence, he stressed that "when the government seeks to restrict truthful speech in order to suppress the ideas it conveys, strict scrutiny is appropriate, whether or not the speech in question may be characterized as 'commercial.'"[58] In the Court's most recent commercial speech decision, *Sorrell*, Thomas joined the majority in a decision that more clearly places off-limits a government's attempt to regulate by keeping people in the dark.[59]

Before delving into the details of *Sorrell*, though, a case study of a circuit split over a particular commercial speech issue decided under *Central Hudson* is presented below. The divergent analyses help to illustrate the test's troublesome ambiguities.

II. INCONSISTENT RESULTS UNDER *CENTRAL HUDSON*: CASE STUDY OF A CIRCUIT SPLIT OVER COMMERCIAL SPEECH

In two recent federal cases involving state regulation of alcohol advertisements in college newspapers, the Third and Fourth Circuits came

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advertising ban with 'special care,' . . . mindful that speech prohibitions of this type rarely survive constitutional review." *Id.* at 504 (internal citation omitted).

55. *Id.* at 506–07

56. *Id.* at 518 (Thomas, J., concurring).

57. *Id*. at 523. Specifically, Thomas believed that when a state's interest "is to be achieved through keeping would-be recipients of the speech in the dark," the advancement-of-state-interest prong of *Central Hudson* makes little sense. "Faulting the State for failing to show that its price advertising ban decreases alcohol consumption 'significantly,' . . . seems to imply that if the State had been *more successful* at keeping consumers ignorant and thereby decreasing their consumption, then the restriction might have been upheld." *Id.*

58. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 572 (2001) (Thomas, J., concurring).

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

down differently on the question of constitutionality under *Central Hudson*. In both cases, the state regulations at issue targeted truthful, nonmisleading advertisements concerning lawful activity, in satisfaction of the first *Central Hudson* prong.[60] Both courts also recognized a substantial government interest in preventing underage and abusive drinking among college students, satisfying the second *Central Hudson* prong.[61] The fork in the road came when each court asked whether the government had presented enough evidence to show that the state regulation would materially and directly advance its interest without burdening too much protected speech—the third and fourth prongs of the test.

Practically, these prongs give courts license to determine how much deference they are willing to grant the legislature. In the Third Circuit case, *Pitt News v. Pappert*, then-Judge Samuel Alito wrote for a unanimous three-judge panel that refused to take the government at its word when it claimed that the advertisement ban would have an appreciable effect on college drinking problems. In 2010, six years after *Pitt News*, the Fourth Circuit in *Educational Media Co. v. Swecker* upheld a similar ban based on little more than the government's assertion that the law was "common sense."[62]

A. *Pitt News v. Pappert*

The path to victory for the student-run newspaper at the University of Pittsburgh, *The Pitt News*, was arduous. The paper filed suit in 1999 against the state's attorney general, seeking an injunction forbidding the enforcement of a Pennsylvania law that banned advertisers from paying for the dissemination of "alcoholic beverage advertising" by media affiliated with a university, college, or other "educational institution."[63] The District Court refused to grant the injunction, saying that the paper lacked

60. The regulations concerned lawful activity, even though some potential viewers of the advertisements would be below the legal drinking age. Educ. Media Co. v. Swecker, 602 F.3d 583, 589 (4th Cir. 2010) (alteration in original) (The Virginia regulation "does not restrict commercial speech *solely* distributed to underage students; rather, it applies to commercial speech that, though *primarily* intended for underage students, also reaches of-age readers. Therefore, the commercial speech regulated by [the Virginia regulation] concerns lawful activity"); Pitt News v. Pappert, 379 F.3d 96, 106 (3d Cir. 2004) ("[T]he law applies to ads that concern lawful activity (the lawful sale of alcoholic beverages) . . .").

61. *Swecker*, 602 F.3d at 590; *Pitt News*, 379 F.3d at 106.

62. *Swecker*, 602 F.3d at 589–90.

63. *Pitt News*, 379 F.3d at 103–04.

standing.[64] On appeal, a Third Circuit panel affirmed—based not on lack of standing, but on the unlikelihood that *Pitt News* would succeed on the merits of its claim. On rehearing on remand, the District Court granted summary judgment for the state.[65] The paper appealed the grant of summary judgment; the case went to another Third Circuit panel.[66] In 2004, the paper finally received a favorable decision.

The second Third Circuit panel, having first decided that the ban "clearly restricts speech,"[67] moved on to apply the four-part *Central Hudson* test.[68] The law applied to ads that concern lawful activity, the court said, and the asserted government interests—preventing underage drinking and alcohol abuse—are, "at minimum, 'substantial.'"[69] The law "founders, however, on the third and fourth prongs of the *Central Hudson* test."[70]

On the third prong of the test, under which the government must show that the regulation will alleviate the identified harm to a material degree, the Third Circuit held that Pennsylvania improperly relied on "nothing more than 'speculation' and 'conjecture.'"[71] The court said:

> We do not dispute the proposition that alcoholic beverage advertising in general tends to encourage consumption, and if [the regulation] had the effect of greatly reducing the quantity of alcoholic beverage ads viewed by underage and abusive drinkers on the Pitt campus, we would hold that the third prong of the *Central Hudson* test was met. But [the regulation] applies only

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64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 106 (alteration in original) ("The very purpose of [the regulation] is to discourage a form of speech (alcoholic beverage ads) that the Commonwealth regards as harmful. If government were free to suppress disfavored speech by preventing potential speakers from being paid, there would not be much left of the First Amendment. Imposing a financial burden on a speaker based on the content of the speaker's expression is a content-based restriction of expression and must be analyzed as such."). The state attempted to argue that the law was enforceable only against the advertiser and not the publications and applied only when the media received payment for an advertisement. But *The Pitt News* felt its immediate effects when one advertiser cancelled its advertising contract with the paper based on threats from the Pennsylvania State Police. *See* Bruce E. H. Johnson, *Alito as Judge: Paid Speech is Also Free Speech*, THE FIRST AMENDMENT CENTER, (Nov. 7, 2005), http://www.firstamendmentcenter.org/alito-as-judge-paid-speech-is-also-free-speech.

68. The court said the regulation must, at a minimum, satisfy *Central Hudson* scrutiny; it then went on to explain that strict scrutiny was applicable for an independent reason. That portion of the opinion is discussed in Part IV, *infra*.

69. *Pitt News*, 379 F.3d at 106. (internal citation omitted).

70. *Id.* at 107.

71. *Id.* at 108.

> to advertising in a very narrow sector of the media (i.e., media associated with educational institutions), and the Commonwealth has not pointed to any evidence that eliminating ads in this narrow sector will do any good.[72]

Even if students on the Pitt campus do not see alcoholic beverage ads in their student newspaper, the court continued, they will still be exposed to a "torrent of beer ads on television and the radio, and they will still see alcoholic beverage ads in other publications, including the other free weekly Pittsburgh papers that are displayed on campus together with *The Pitt News*."[73] What's more, "[c]ommon sense suggests that would-be drinkers will have no difficulty finding establishments [where alcohol can be purchased] despite [the regulation]."[74] The court's invocation of strong language here—reference to common sense—is notable. The Fourth Circuit six years later would invoke common sense too, holding that it is "common sense" that a similar regulation would in fact be successful in curbing student drinking.[75]

On the fourth prong, the court held that the regulation was not adequately tailored to achieve Pennsylvania's asserted objectives. The regulation "is both severely over- and under-inclusive," the court stated.[76] Because more than sixty-seven percent of Pitt students and more than seventy-five percent of the total university population were over the legal drinking age, the regulation prevented the communication to adults of truthful information about products that adults could lawfully purchase.[77] In other words, the regulation was over-inclusive because it burdened a substantial amount of protected speech. The regulation was under-inclusive in that it did not make use of other, better methods for achieving the state's goal, the court said. Pennsylvania could "combat underage and abusive drinking by other means that are far more direct and that do not affect the First Amendment. The most direct way to combat underage and abusive drinking by college students is the enforcement of the alcoholic beverage control laws on college campuses."[78]

Having found that the Pennsylvania regulation failed the third and fourth prongs of *Central Hudson*, the court enjoined enforcement of the regulation.[79]

B. *Educational Media Co. at Virginia Tech, Inc. v. Swecker*

72. *Id.* at 107 (alteration in original).

73. *Id.*

74. *Id.* at 107.

75. *See* Educ. Media Co. at Virginia Tech, Inc. v. Swecker, 602 F.3d 583, 590 (4th Cir. 2010).

76. *Pitt News*, 379 F.3d at 108.

77. *Id.*

78. *Id.*

79. *Id.* at 113.

In June of 2006, the American Civil Liberties Union of Virginia filed a lawsuit on behalf of two student newspapers, Virginia Tech University's *Collegiate Times* and the University of Virginia's *Cavalier Daily*, challenging a Virginia ban similar to the one that the Third Circuit struck down two years earlier in *Pitt News*.[80] The regulation prohibited college publications in Virginia from printing advertisements for beer, wine, or mixed beverages unless the ads were "in reference to a dining establishment."[81] The alcohol advertisements for dining establishments could use five approved words and phrases—including "A.B.C. [alcohol beverage control] on-premises," "beer," "wine," "mixed beverages," or "cocktails"—but could not refer to brand or price.[82] A federal magistrate judge found the ban unconstitutional, citing *Pitt News*; an appeal to the Fourth Circuit followed.[83]

The Fourth Circuit three-judge panel, like the panel in *Pitt News*, applied the *Central Hudson* test to determine whether Virginia's ban impermissibly burdened the newspapers' First Amendment rights. And, like the court in *Pitt News*, the Fourth Circuit court moved easily past the first two prongs.[84] On the third prong—which asks whether the advertising ban "directly and materially" advances the government's substantial interest—the Fourth Circuit began, like the Third, by saying that "the correlation between advertising and demand alone is insufficient to justify

80. Michael Beder, *Federal Court Strikes Down Ban on Alcohol Ads in Va. Campus Papers*, STUDENT PRESS LAW CENTER (April 1, 2008), http://www.splc.org/news/newsflash.asp?id=1730.

81. 3 VA. ADMIN. CODE § 5-20-40 (2011). The statute defined college student publications as those prepared, edited, or published primarily by its students; sanctioned as a curricular or extracurricular activity; and distributed primarily to persons under 21 years of age. *Id.* Both parties agreed that a majority of the readership of the college newspapers is over the age of 21. Nonetheless, the district court determined that both college newspapers were "college student publications" as defined by the regulation. On appeal, the Fourth Circuit held that the average readership age could preclude the college newspapers from qualifying as "college student publications," and thus from regulation under the law. However, in a pre-enforcement challenge, the papers needed only to demonstrate a credible threat of prosecution under the regulation; that credible threat came when "an Alcoholic Beverage Control Compliance Officer specifically advised *The Collegiate Times* that they *would* violate [the regulation] if they published a specific alcohol advertisement." Educ. Media Co. v. Swecker, 602 F.3d 583, 596 n.1 (4th Cir. 2010) (alteration in original).

82. § 5-20-40.

83. Two regulations were found unconstitutional at the district court level, but only the regulation that applied specifically to college publications was at issue on appeal. *Swecker*, 602 F.3d at 586. For the procedural history in prose, *see* Beder, *supra* note 79.

84. *Swecker*, 602 F.3d at 588–89.

advertising bans in every situation."[85] Again like the Third Circuit, the court next appealed to intuition—but in contrary fashion. According to the Fourth Circuit:

> "[A]lcohol vendors *want* to advertise in college student publications. It is counterintuitive for alcohol vendors to spend their money on advertisements in newspapers with relatively limited circulation, directed primarily at college students, if they believed that these ads would not increase demand by college students."[86]

The Fourth Circuit's intuition, it seems, is in conflict with the Third's.[87] For the Third Circuit, common sense dictated that college students would find drinking establishments despite the ban on alcohol ads in one news medium to which they had access. The Fourth Circuit did not seem to think "common sense" required it to consider the myriad other ways college students are informed of alcohol availability near campus. Further, on this prong of the test, the Fourth Circuit shifted the burden of persuasion onto the newspapers in a way that the Third Circuit had not.[88] In formulating the *Central Hudson* test, and in later commercial speech cases, the Court has explained that the burden is properly on the government to

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85. *Id.* at 590.

86. *Id.*

87. Judge Moon, in his dissent, recognized the problem with taking the state at its word. He likened the facts in *Swecker* to those in *Pitt News* and stated that Virginia, like Pennsylvania, relied on nothing more than speculation to satisfy the third *Central Hudson* prong. Moon noted that the state's expert had even admitted that "[t]here is . . . very little empirical evidence that alcohol advertising has any effect on actual alcohol consumption . . . . [And] that a ban on advertising in one medium generally results in greater advertising saturation in other media or forms of marketing." *Swecker*, 602 F.3d at 593 n. 5 (alteration in original). Even if the state's ban would reduce demand generally, there was no showing that the ban would specifically promote the state's asserted interest: "The Board's justification for the regulation is not to reduce general 'demand by college students,' a significant number of whom are of legal age to imbibe, but to reduce '*underage* and *abusive* drinking among college students.'" *Id*. at 596 (internal citation omitted).

88. *Compare Swecker*, 602 F.3d at 590 ("The college newspapers fail to provide evidence to *specifically* contradict this link or to recognize the distinction between ads in mass media and those in targeted local media."), *with* Pitt News v. Pappert, 379 F.3d 96, 107–08 (3d Cir. 2004) ("Common sense suggests that would-be drinkers will have no difficulty finding those establishments [where alcohol can be purchased] despite [the regulation], and the Commonwealth has not pointed to any contrary evidence. In contending that underage and abusive drinking will fall if alcoholic beverage ads are eliminated from just those media affiliated with educational institutions, the Commonwealth relies on nothing more than 'speculation' and 'conjecture.'").

prove that its restriction directly advances its interests.[89] Instead of following this guideline in the third prong analysis, the court accepted on intuition that the law would materially advance the state's interest, and then asked the newspaper to rebut.[90]

The Fourth Circuit's reasoning also diverged from the Third Circuit's on the final *Central Hudson* prong—asking whether the regulation is narrowly tailored to fit the government's asserted interest. Unlike the court in *Pitt News*, the *Swecker* court did not address the under-inclusivity of the regulation based on the numerous other publications that could deliver to the student body information about alcohol specials and prices. In fact, the court commented on this point approvingly: "[T]he restriction only applies to 'college student publications'—campus publications targeted at students under twenty-one. It does not, on its face, affect all possible student publications on campus. Therefore, [the regulation] is sufficiently narrow."[91] The Fourth Circuit's other justifications for finding the Virginia law narrowly tailored were based on facts that differed from those in *Pitt News*.[92]

Having decided the last two *Central Hudson* prongs in Virginia's favor, the Fourth Circuit reversed the district court's granting of an injunction, allowing Virginia to enforce its regulation of alcohol advertisements in college newspapers.[93]

III. *SORRELL V. IMS HEALTH, INC.*

Sorrell v. IMS Health, Inc., decided in June 2011, can be read not only to resolve the circuit split described above, but also to elevate the value of commercial speech to a new level nearly on par with fully-protected speech.

The Vermont law at issue in *Sorrell* regulated pharmaceutical marketing by forbidding entities that gather information about prescription-prescriber habits (like pharmacies) from selling that information, absent physician

89. *See, e.g.*, Cent. Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557, 570 (1980) and Edenfield v. Fane, 507 U.S. 761, 770 (1993).

90. *Swecker*, 602 F.3d at 590.

91. *Id.* at 591.

92. The Fourth Circuit said the ban did not completely prevent restaurants from communicating their prices because it allowed some alcohol advertisements. On this point in *Pitt News*, the Pennsylvania regulation was over-inclusive, as it was a complete ban. The Fourth Circuit also said, approvingly, that Virginia implemented non-speech related mechanisms to serve its interest—education and enforcement programs. On this point in *Pitt News*, the Third Circuit said the Pennsylvania regulation was under-inclusive specifically because it was *not* complemented by other drinking-law enforcement mechanisms. *Compare Swecker*, 602 F.3d at 590–91, *with Pitt News*, 379 F.3d at 108.

93. *Swecker*, 602 F.3d at 591.

consent, to companies that would use it commercially (like data miners and detailers).[94] The statute also forbade the commercial entities, should they gain access to prescriber data, from using it for marketing without consent.[95] At the same time, exceptions in the statute allowed for the information's dissemination for other purposes, such as research and educational communication.[96] Pharmaceutical companies use the data Vermont had in mind under this law to make sales pitches to physicians for their branded product. Vermont's stated reasons for banning this practice were to protect the public health of Vermonters, preserve physician privacy, and lower healthcare costs.[97]

To label *Sorrell* a case about commercial speech, without qualification, does not tell the whole story. The Court first considered whether data (specifically, prescription-prescriber identifying information contained in databases) even counts as speech for the purposes of First Amendment review.[98] Vermont argued on several alternative theories that prescriber-identifying data is not speech: The law regulates commerce, the sale of data and use for detailing, that has merely an incidental burden on speech;[99] the law does not regulate speech, but simply access to information;[100] or the law regulates conduct, and it should not matter for the purpose of constitutional review whether the object of that conduct is data or "beef jerky."[101]

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94. Sorrell v. IMS Health, Inc., 131 S. Ct. 2653, 2660–61 (2011). (Pharmacies receive "prescriber-identifying information" when processing prescriptions. Pharmacies sell the information to "data miners," who produce reports on prescriber behavior and sell those reports to pharmaceutical manufacturers. Pharmaceutical manufacturers promote their drugs to doctors through a process called "detailing," which involves using data from the reports to refine marketing tactics and increase sales to doctors.).

95. *Id.*

96. *Id.*

97. *Id*. (Breyer, J., dissenting) (citing VT. STAT. ANN., tit. 18, § 4631(a) (2009)).

98. *Id*. at 2664.

99. *Id.* at 2664–65. This is also the main position of the case's dissenters. Justice Breyer described this as a regulatory case "where the government seeks typical regulatory ends (lower drug prices, more balanced sales messages) through the use of ordinary regulatory means (limiting the commercial use of data gathered pursuant to a regulatory mandate). The speech-related consequences here are indirect, incidental, and entirely commercial." *Id.* at 2685 (Breyer, J., dissenting).

100.*Id.* at 2665.

101. *Id.* at 2666 (citing IMS Health Inc. v. Ayotte, 550 F.3d 42, 52–53 (1st Cir. 2008) *abrogated by Sorrell*, 131 S. Ct. 2653).

The *Sorrell* Court implied that database information probably does count as speech,[102] but ultimately said it did not matter whether or not it found the data at issue to be speech for First Amendment review.[103] Even if the data itself is not speech, the Court said, Vermont's law nonetheless warranted strict scrutiny because it burdened something that was undoubtedly "speech"—the pharmaceutical detailers' pitches—in a content-discriminatory way.[104] In other words, even if the prescriber-identifying data is just a commodity, the law was speaker-based because it dictated that some speakers (researchers, for example) could have access to the speech-enhancing commodity and others (marketers) could not. Laws that make distinctions based on identity of the speaker warrant strict scrutiny, the Court said.[105]

Although the Court was content to strike down the law under strict scrutiny for that reason, it nonetheless went on to entertain Vermont's argument for application of *Central Hudson* scrutiny and strike down the law under that test, too. "In the ordinary case it is all but dispositive to conclude that a law is content-based and, in practice, viewpoint-discriminatory," the Court said, but "[t]he State argues that a different analysis applies here because, assuming [the law] burdens speech at all, it at most burdens only commercial speech."[106] If the law burdened commercial speech, the Court explained, it could survive only if it satisfied the familiar *Central Hudson* test.[107]

In its discussion of why Vermont's law failed even the more lenient *Central Hudson* level of scrutiny, the Court made a few important statements (and implications) about the commercial speech doctrine

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102. *Sorrell*, 131 S. Ct. at 2667 ("This Court has held that the creation and dissemination of information are speech within the meaning of the First Amendment.").

103. *Id.* ("[T]his case can be resolved even assuming, as the State argues, that prescriber-identifying information is a mere commodity.").

104. *Id.* It is important to note here that the Court's discussion of heightened scrutiny in the first half of the opinion applies only to its consideration of the law as it affects noncommercial speech. In other words, the Court's analysis starts anew in Part B of the opinion with the *commercial speech* doctrine, and the opinion's earlier statements about content-based distinctions triggering heightened scrutiny in *noncommercial speech* cases do not apply.

105. *Id. See also* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 658 (1994) (explaining that strict scrutiny applies to regulations reflecting an "aversion" to messages from "disfavored speakers") and Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 583–83 (1983) (applying strict scrutiny to a speaker-based financial burden).

106. *Sorrell*, 131 S. Ct. at 2667.

107. *Id.* at 2667–68 ("To sustain the targeted, content-based burden [the law] imposes on protected expression, the State must show at least that the statute directly advances a substantial governmental interest and that the measure is drawn to achieve that interest.").

generally. The opinion's first important take-away about the commercial speech doctrine is that states cannot regulate by keeping citizens in the dark. On the third prong of its *Central Hudson* analysis, which asks whether the law directly advances the state's interest, the Court relied on an idea first laid out in *Virginia Pharmacy*: "The choice 'between the dangers of suppressing information, and the dangers of its misuse if it is freely available' is one that 'the First Amendment makes for us.'"[108] The Court explained that while Vermont's stated policy goals may have been proper, the law did not advance them in a permissible way and therefore failed on the third prong of *Central Hudson.*[109] "[T]he fear that people would make bad decisions if given truthful information cannot justify content-based burdens on speech."[110] For example, "the State may not seek to remove a popular but disfavored product from the marketplace by prohibiting truthful, non-misleading advertisements that contain impressive endorsements or catchy jingles."[111] The commercial speech doctrine as it stands following *Sorrell*, then, prohibits a state from regulating the free flow of truthful information based on its belief that the public is better off without that information. Any law premised on that paternalistic assumption fails the means-ends inquiry and is therefore invalid.[112]

The opinion's next important take-away regards the appropriate level of scrutiny in commercial speech cases, but requires some reading between the lines because the Court threw in the imprecise term "heightened scrutiny" instead of the more familiar language of strict and intermediate scrutiny. The take-away is that content-based distinctions in commercial speech regulations, unlike in regulations of fully-protected speech, do not automatically trigger strict scrutiny. Content-based commercial speech laws must pass muster under *Central Hudson*, not strict scrutiny.[113] At an early point in the opinion, the Court said that the "First Amendment requires heightened scrutiny whenever the government creates 'a regulation of speech because of disagreement with the message it conveys,'" and that

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108. *Id.* at 2671 (quoting Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976)).

109. *Id.* at 2670.

110. *Id.* at 2670–71 (internal citation omitted).

111. *Id*. at 2671.

112. Of course, a law premised on keeping people in the dark would also fail strict scrutiny's ends-means inquiry, which is at least as stringent as *Central Hudson*'s intermediate scrutiny.

113. *Sorrell*, 131 S. Ct. at 2667–68 ("Under a commercial speech inquiry, it is the State's burden to justify its content-based law as consistent with the First Amendment. To sustain the targeted, content-based burden [the law] imposes on protected expression, the State must show at least that the statute directly advances a substantial governmental interest and that the measure is drawn to achieve that interest.") (internal citation omitted).

"[c]ommercial speech is no exception."[114] At first blush this language could suggest that content-based distinctions in commercial speech laws trigger the *same kind* of heightened scrutiny that content-based distinctions in noncommercial speech laws trigger (which, of course, is strict scrutiny). Justice Breyer in dissent similarly interpreted the majority's language about "heightened scrutiny" to mean that content-based distinctions in commercial speech laws require something more stringent than *Central Hudson* scrutiny, if not quite strict scrutiny.[115] However, once the Court reached the point in its opinion where it considered the law as a burden on commercial speech, the "heightened scrutiny" the Court used to evaluate the law was nothing more than the *Central Hudson* test.[116]

Finally, the opinion's third important take-away is that while content-based but viewpoint-neutral restrictions[117] on commercial speech are permissible if the state satisfies *Central Hudson*, content-based restrictions that lack a neutral justification are not.[118] Put another way, viewpoint discrimination (a particularly egregious kind of content-based discrimination[119]) will trigger the highest scrutiny even in commercial speech cases. For example, a state could permissibly regulate commercial speech in one industry and not another based on the neutral justification that a greater risk of fraud existed in the former but not the latter.[120]

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114. *Sorrell*, 131 S. Ct. at 2664 (internal citations omitted).

115. *Id.* at 2677 (Breyer, J., dissenting) ("The Court (suggesting a standard yet stricter than *Central Hudson*) says that we must give *content-based* restrictions that burden speech 'heightened' scrutiny.").

116. *Id.* at 2667–68 ("[T]he State must show at least that the statute directly advances a substantial governmental interest and that the measure is drawn to achieve that interest.").

117. Content-neutrality and viewpoint-neutrality are not one in the same. Professor Volokh provides a simple way to understand the difference: "Remember that a law *may be content-based even if it's viewpoint-neutral*. A ban on profanity, for instance, is viewpoint-neutral, but content-based. Speech restrictions fall into three categories: (1) content-neutral (and therefore viewpoint-neutral), (2) content-based but viewpoint-neutral, and (3) viewpoint-based (and therefore content-based)." Eugene Volokh, *Content Discrimination and the First Amendment (Including the "Secondary Effects" Doctrine)*, THE VOLOKH CONSPIRACY (June 21, 2010), http://volokh.com/2010/06/21/content-discrimination-and-the-first-amendment-including-the-secondary-effects-doctrine/.

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

119. *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995) ("Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.").

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

However, a state cannot, as Vermont did, regulate commercial speech in a content-based way because of "a difference of opinion."[121]

Read carefully, this portion of the opinion about viewpoint neutrality might also suggest that the only neutral state justification sufficiently important to warrant deferential *Central Hudson* scrutiny is consumer protection.[122] The Court held that "Vermont has not shown that its law has a neutral justification" because "[t]he State nowhere contends that detailing is false or misleading within the meaning of this Court's First Amendment precedents[, n]or does the State argue that the provision challenged here will prevent false or misleading speech."[123] If *Sorrell* does stand for the proposition that only consumer protection interests warrant deferential *Central Hudson* scrutiny, it would not be the first time the idea was championed in commercial speech jurisprudence; but it would mark the idea's birth into a majority opinion.

Justice Stevens wrote in his *44 Liquormart* plurality opinion that *Central Hudson* intermediate scrutiny is applicable only when a state's law targets commercial speech based on its tendency to mislead or cause other consumer harms.[124] "When a State regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices, or requires the disclosure of beneficial consumer information," Stevens wrote, "the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech and therefore

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121. *Id.*

122. *See id.* ("Indeed the government's legitimate interest in protecting consumers from commercial harms explains why commercial speech can be subject to greater governmental regulation than noncommercial speech.") (internal citations omitted). Of course, the *Sorrell* Court did apply *Central Hudson* scrutiny to Vermont's commercial speech restriction, which the Court said was not based on neutral consumer protection interests. However, the Court had already completed its strict scrutiny analysis, and explicitly stated that it entertained the *Central Hudson* analysis only at Vermont's urging to show that the regulation also failed more deferential scrutiny. Going forward in future cases, a court's decision not to employ *Central Hudson* when it finds that a commercial speech restriction is based on something other than consumer protection would not necessarily be inconsistent with *Sorrell.*

123. *Id.* (internal citation omitted).

124. 44 Liquormart, Inc. v. R.I., 517 U.S. 484, 501 (1996) (citing Rubin v. Coors Brewing Co., 514 U.S. 476, 491–92 (1995) (Stevens, J., concurring)). This view is in tension with *Central Hudson*'s holding that speech concerning unlawful activity, or speech that is misleading, is completely outside the protection of the First Amendment. The first prong of the *Central Hudson* test requires that speech is not misleading and does not refer to illegal activity in order for the court to confer any protection, including intermediate scrutiny. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980) ("For commercial speech to come within [the First Amendment], it at least must concern lawful activity and not be misleading").

justifies less than strict review."[125] However, when a state restricts commercial speech 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."[126] That is, the same First Amendment analysis typically applied to a regulation of protected speech is also applicable to a commercial speech regulation unless the regulation targets false, misleading, or aggressive commercial speech. Only in those latter cases is *Central Hudson* intermediate scrutiny applicable.[127]

Justice Stevens was not the first to propose that *Central Hudson* applies only to laws aimed at consumer protection. Defense of this view goes all the way back to *Central Hudson* itself, in which Justice Blackmun wrote in his concurrence: "Permissible restraints on commercial speech have been limited to measures designed to protect consumers from fraudulent, misleading, or coercive sales techniques."[128] And other Justices have recently expressed sympathy to Stevens's view; for example, Justice Kennedy wrote in his *Lorillard Tobbacco* concurrence that he had "continuing concerns that the [*Central Hudson*] test gives insufficient protection to truthful, non-misleading commercial speech."[129]

Of course, this view proffered by Stevens, Blackmun, and others does not imply that all commercial speech regulations unrelated to consumer protection warrant strict scrutiny. Instead, those regulations unrelated to consumer protection simply face the same First Amendment analysis as do other forms of protected speech. That is, if the regulation is content-neutral, it receives intermediate scrutiny.[130] If the regulation is content-

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125. *44 Liquormart*, 517 U.S. at 501 (citing *Rubin*, 514 U.S. at 491–92 (Stevens, J., concurring)).

126. *Id.*

127. For another example of Stevens's argument, *see Rubin*, 514 U.S. at 491–92 (1995) (Stevens, J., concurring) ("In my opinion the 'commercial speech doctrine' is unsuited to this case, because the Federal Alcohol Administration Act (FAAA) neither prevents misleading speech nor protects consumers from the dangers of incomplete information. A truthful statement about the alcohol content of malt beverages would receive full First Amendment protection in any other context; without some justification tailored to the special character of commercial speech, the Government should not be able to suppress the same truthful speech merely because it happens to appear on the label of a product for sale.").

128. *Cent. Hudson*, 447 U.S.at 574 (1980) (Blackmun, J., concurring).

129. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 571–72 (2001) (Kennedy, J., concurring).

130. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994) ("[R]egulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny, because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue.") (internal citation omitted).

based, it receives strict scrutiny.[131] Practically, the result of this framework puts commercial speech on par with noncommercial speech, except when the commercial speech is targeted because it is false, misleading, or proposes an illegal transaction, in which case *Central Hudson* applies.

In sum, the lessons learned from *Sorrell* are: a state cannot legislate the withholding of truthful commercial information from its citizens for what it perceives to be their own good;[132] content-based, viewpoint-neutral distinctions in commercial speech regulations, unlike in regulations of fully-protected speech, do not automatically trigger strict scrutiny;[133] but content-based, viewpoint-discriminatory distinctions in commercial speech regulations do trigger strict scrutiny.[134] Finally, though not stated explicitly in the opinion, *Sorrell* might mark a turn in the jurisprudence of commercial speech such that *Central Hudson* intermediate scrutiny will be applied only in cases where the state's interest is consumer protection (and all other commercial speech restrictions would be treated as if they restricted fully-protected speech).[135]

IV. THE TAKE-AWAYS FROM *SORRELL* IN APPLICATION

To see these lessons from *Sorrell* in action, this Note returns now to the circuit split over alcohol advertising bans in state college and university newspapers. If *Pitt News* and *Swecker* had been decided after *Sorrell*, the analyses contained therein would be very different. The most straightforward differences in how those cases would be decided center on the states' attempts to withhold truthful commercial information, and on the laws' viewpoint discrimination. But further, if we assume that *Sorrell* adopts Stevens' point that *Central Hudson* applies only to consumer-protection-motivated commercial speech laws, analysis of the alcohol ad bans would proceed under strict scrutiny. The ways that *Sorrell* would change the alcohol ad ban case analyses are explored below.[136]

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131. *Id.* ("Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content.")

132. *See* Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2671 (2011).

133. *See id.* at 2667–68.

134. *See id.* at 2672.

135. *See id.*

136. This Note does not address whether the state can regulate alcohol advertising in college and university papers by virtue of its capacity as educator. That is, newspapers at state colleges and universities might enjoy lesser First Amendment protection than their professional newspaper counterparts because of their situation in an educational environment, and therefore the state might be able to regulate alcohol ads in those papers even if it would not be able to regulate the same ads in professional papers. That topic is outside the scope of this Note, which does not seek to address the intersection of government-as-sovereign and government-as-educator for the purposes of the alcohol advertisement statutes. It

A. Prohibition on Paternalism

Both the *Pitt News* court and the *Swecker* court assumed that the First Amendment allows a state, in an effort to curb excessive drinking, to restrict truthful advertising available to consumers. The states, in both cases, explicitly asserted that they sought to decrease demand for alcohol by limiting the information newspaper readers received about alcohol sold in the area.[137] The Third and Fourth Circuits came down differently on whether a restriction of this sort would be successful, but neither court found the means constitutionally impermissible.[138]

The *Sorrell* decision, which came down a year after *Swecker*, establishes that Pennsylvania's and Virginia's method of trying to control behavior by cabining available information is impermissible. The *Sorrell* Court discussed this principle in its analysis of the third prong of *Central Hudson*, explaining that the "direct advancement" requirement of the third prong is not met when the state restricts information because it fears how people will use it.[139] In *Sorrell*, Vermont argued that the force and persuasiveness of the commercial speech at issue in that case justified the state's attempt to

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is important to note, though, that some courts have acknowledged the full spectrum of First Amendment rights for college newspapers. *See, e.g.*, Joyner v. Whiting, 477 F.2d 456, 460 (4th Cir. 1973) ("Censorship of constitutionally protected expression cannot be imposed [at a college or university] by suspending the editors [of student newspapers], suppressing circulation, requiring imprimatur of controversial articles, excising repugnant material, withdrawing financial support, or asserting any other form of censorship oversight based on the institution's power of the purse.")

137. Pitt News v. Pappert, 379 F.3d 96, 107 (3d Cir. 2004) (The state suggested that "the elimination of alcoholic beverage ads from *The Pitt News* and other publications connected with the University will slacken the demand for alcohol by Pitt students."); Educ. Media Co. v. Swecker, 602 F.3d 583, 589–90 (4th Cir. 2010) ("The Board asserts that history, consensus, and common sense support the link between advertising bans in college newspapers and a decrease in demand for alcohol among college students. The Board cites judicial decisions recognizing this general link and argues that, here, this link is extraordinarily strong because college newspapers, a targeted form of media bearing the name of the college, attract more attention among college students than other forms of mass media.").

138. The Fourth Circuit in *Swecker* clearly understood the state's method (keeping consumers in the dark) to be valid, as the court upheld the law. Recall, also, that the Third Circuit said it would condone this method if it had a chance at success: "We do not dispute the proposition that alcoholic beverage advertising in general tends to encourage consumption, and if [the regulation] had the effect of greatly reducing the quantity of alcoholic beverage ads viewed by underage and abusive drinkers on the Pitt campus, we would hold that the third prong of the *Central Hudson* test was met." *Pitt News*, 379 F.3d at 107 (internal citation omitted).

139. Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2670 (2011).

stifle it.[140] "This reasoning is incompatible with the First Amendment," the Court held, and "[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."[141]

Under the *Sorrell* rule prohibiting paternalistic prohibitions on the dissemination of truthful commercial information, the laws at issue in *Pitt News* and *Swecker* fail.

B. Viewpoint Discrimination Triggers Strict Scrutiny

The *Sorrell* opinion suggests that content-based, viewpoint-discriminatory restrictions on commercial speech at least warrant strict scrutiny, and maybe are even *per se* unconstitutional.[142] That is, if the state banned all advertisements about a certain issue (content-based, viewpoint-neutral), the regular commercial speech test would attach; but if the state banned just one side of the issue (content-based, viewpoint-discriminatory), strict scrutiny would attach. Applied to state bans on alcohol advertisements, this rule means that a court would review with strict scrutiny a state law that prohibited ads promoting drinking but allowed ads promoting temperance.

Under this rule, the Pennsylvania and Virginia regulations at issue in *Pitt News* and *Swecker* both warrant strict scrutiny. They target commercial promotions of alcohol but leave unregulated similar content that is either editorial (noncommercial) or that is commercial but accords with the state's preferred message.[143] In other words, the regulations disfavor a particular content (commercial advertising) and viewpoint (promotion of alcohol).

C. No Consumer Protection Interest, No *Central Hudson* Deference

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140. *Id.* at 2671.

141. *Id.* (emphasis added).

142. *Id.* at 2672. The Court, describing viewpoint-discriminatory laws as especially suspicious, has implied that such laws are never permissible. *See, e.g.*, Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995) ("The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."). Even if not *per se* unconstitutional, viewpoint-discriminatory laws at least warrant strict scrutiny. *See, e.g.*, Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 530, 537 (1980) (Explaining that the First Amendment is hostile both to prohibitions of public discussion of an entire topics (content-discrimination) and to restrictions on particular viewpoints (viewpoint-discrimination)).

143. For example, the regulation permits advertisements providing notice that the "alcohol beverage control" is on-premise. *See* 3 VA. ADMIN. CODE § 5-20-40(A)(3) (2011).

The final take-away from *Sorrell* discussed above is that the *Central Hudson* lower level of scrutiny attaches only if the government's interest is consumer protection. The Court did not state this rule outright, but it justified application of deferential *Central Hudson* scrutiny because of the "government's legitimate interest in protecting consumers from commercial harms."[144] If *Sorrell* does stand for the proposition that only consumer protection interests warrant deferential *Central Hudson* scrutiny, then all commercial speech regulations unrelated to consumer protection face the same First Amendment analysis as fully-protected speech. That is, content-neutral laws get intermediate scrutiny[145] and content-based laws get strict scrutiny.[146]

The Pennsylvania and Virginia laws banning most alcohol advertisements in college and university newspapers were not premised on consumer protection interests. The states' interest was to reduce underage and abusive drinking among college students.[147] In other words, the states did not regulate alcohol advertisements because they were false or misleading to consumers, but rather because the state believed that a prevalence of advertisements in college newspapers contributed to a high incidence of underage and abusive drinking.

Applying Justice Stevens' view, given at least some backing in *Sorrell*, that commercial speech restrictions unrelated to consumer protection ought to receive the same analysis as fully-protected speech, a court would treat the alcohol ad laws like restrictions on fully-protected speech and examine them for discrimination based on speaker, content, or message that would trigger strict scrutiny. As already discussed in the preceding section, Pennsylvania's and Virginia's laws were viewpoint-based and therefore warrant strict scrutiny. But they warrant strict scrutiny for other reasons, too: the laws discriminate based on speaker and content.

When a law burdens protected speech and discriminates based on the identity of the speaker, strict scrutiny attaches.[148] Because the Pennsylvania and Virginia laws single out specific speakers for regulation—college newspapers, as opposed to all newspapers and other advertising venues[149]—a court should apply strict scrutiny in reviewing the

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

145. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994).

146. *Id.*

147. Educ. Media Co.. v. Swecker, 602 F.3d 583, 590 (4th Cir. 2010); Pitt News v. Pappert, 379 F.3d 96, 106 (3d Cir. 2004).

148. *See, e.g., Turner Broad.*, 512 U.S. at 658 (1994) (explaining that strict scrutiny applies to regulations reflecting an "aversion" to messages from "disfavored speakers") and Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 583–84 (1983) (applying strict scrutiny to a speaker-based financial burden).

149. The Pennsylvania law applied only to advertisers running ads in media affiliated with educational institutions. It was undoubtedly even narrower in

laws. In fact, then-Judge Alito posited this line of reasoning in *Pitt News*, arguing that a financial burden on one particular segment of the media triggers a higher burden of persuasion for the government.[150] A law that "single[s] out the press" or "a small group of speakers" can survive only if "[it] is necessary to achieve what the Court has described as an overriding government interest and an interest of compelling importance."[151] In other words, the regulation must pass muster under strict scrutiny.

The other reason for strict scrutiny, in addition to viewpoint discrimination and content discrimination based on speaker identity, is the laws' content discrimination based on whether speech is commercial or noncommercial. In other words, the Pennsylvania and Virginia regulations at issue in *Pitt News* and *Swecker* restricted commercial promotions of alcohol but left unregulated promotion of alcohol in noncommercial forums (like editorials or news sections).

In the early development of the commercial speech doctrine, courts generally did not consider a regulation's distinction between commercial and noncommercial speech to be a "content-based" distinction warranting strict scrutiny,[152] but that appears to have changed. For example, in *City of Cincinnati v. Discovery Network, Inc.*, the Court said that commercial speech cannot be treated differently from noncommercial speech if both implicate the same government interest.[153] That kind of differential

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practice, then-Judge Alito wrote in *Pitt News*, considering alcohol advertisers are exceedingly more likely to run ads in papers at universities than in papers affiliated with elementary and secondary schools. *Pitt News*, 379 F.3d at 111. The Virginia law applied only to college and university media, and was arguably more egregious than Pennsylvania's because Virginia's ban applied directly to the student publishers while Pennsylvania's law applied to advertisers directly and student publishers only indirectly. *See* Brief for Student Press Law Center and College Newspaper Business and Advertising Managers as Amici Curiae Supporting Plaintiffs-Appellees, *Swecker*, 602 F.3d 583 (4th Cir. 2010) (No. 08-1798).

150. *Pitt News*, 379 F.3d at 109. Judge Alito first applied *Central Hudson* scrutiny, saying the statute must "[a]t a minimum" satisfy that test. *Id.* at 106. After completing that analysis (holding that the statute failed *Central Hudson* scrutiny), Judge Alito began a new analysis under the "additional, independent" reason that the statute violated the First Amendment: "[I]t unjustifiably impose[d] a financial burden on a particular segment of the media, i.e., media associated with universities and colleges." *Id.* at 109.

151. *Id.* (internal citation omitted).

152. In *Metromedia, Inc. v. San Diego*, for example, a plurality of the Supreme Court asserted that "our recent commercial speech cases have consistently accorded noncommercial speech a greater degree of protection than commercial speech." 453 U.S. 490, 513 (1981). The plurality also said, as an obiter dictum, that "an ordinance totally banning commercial billboards but allowing noncommercial billboards would be constitutional." *Id.* at 536 (Brennan, J., with whom Blackmun, J. joined, concurring in the judgment).

153. 507 U.S. 410, 410 (1993).

treatment "seriously underestimates the value of commercial speech."[154] At least where commercial and noncommercial speech implicate the same government interest, then, the government cannot regulate only the former on the ground that it is supposedly less valuable.[155]

Applying that logic to the alcohol advertising bans, strict scrutiny is triggered by the governments' differential treatment of commercial speech (advertisements) and noncommercial speech (editorials, for example) that implicated its interest in curbing underage and abusive drinking. Of course, editorials and news stories that focus on alcohol frequently tend to decry the ills of excessive consumption—and so would not implicate the government's interest in the same way as do advertisements promoting alcohol. But not always. Take, for example, the drink-specials report that *Pitt News* defiantly ran in its news section after U.S. District Court Judge William Standish upheld the Pennsylvania ban on alcohol advertising in student newspapers. Dubbed the "booze beat" by the Associated Press, the list of "Today's Drink Specials" featured more than a "dozen places with specials including half-price margaritas, vodka shots for $1.50 and one called 'Kick the Keg.'"[156] It is hard to imagine editorial content that would more implicate the government's interest in curbing excessive student drinking than students themselves encouragingly reporting to other students where they can get dollar-fifty vodka shots. Yet the first of the Third Circuit panels to hear the case reasoned with approval that under the Pennsylvania law the newspaper was free to run its booze beat.[157] Accordingly, two different kinds of speech that each implicated the government's interest—alcohol advertisements and a "booze beat"—were treated differently based only on the fact that one is commercial and the other is not. That differential treatment, according to *Discovery Network*,

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154. *Id.* at 410–11.

155. *Id.* The *Sorrell* opinion lends further support to this rule. The *Sorrell* majority cited *Discovery Network* approvingly, *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2664 (2011), and said that Vermont's law would have fared better had it restricted the use of prescriber data broadly, instead of just restricting commercial use. *Id.* at 2672 ("If Vermont's statute provided that prescriber-identifying information could not be sold or disclosed except in narrow circumstances then the State might have a stronger position.").

156. *College Paper Skirts Alcohol-Ad Ban By Reporting Drink Specials*, THE ASSOCIATED PRESS, Feb. 21, 2003, a*vailable at* http://www.firstamendmentcenter.org/college-paper-skirts-alcohol-ad-ban-by-reporting-drink-specials.

157. Pitt News v. Fisher, 215 F.3d 354, 366 (3d Cir. 2000) ("*The Pitt News* could, for instance, contact area bars, find out what their nightly drink specials are, and publish a weekly listing of goings-on about town—so long as *The Pitt News* did not receive any consideration for doing so. There is thus no direct limitation on the freedom of *The Pitt News* to publish alcohol-related information.").

is an "impermissible means of responding to [the government's] interests."[158]

V. CONCLUSION AND LOOSE ENDS

The status of commercial speech in First Amendment jurisprudence has been significantly elevated since the mid-twentieth century. Slowly but surely, the Court has shown an increasing willingness to recognize the value of commercial speech and provide it with some constitutional protection. That seems especially true following *Sorrell*, as described above. Taking a step back now to evaluate the commercial speech doctrine as it stands today, there are areas of maturation and clarity, but there are also loose ends that need tidying.

This is what we do know about the commercial speech doctrine following the Court's recent decision: First, the First Amendment forbids the government from keeping truthful commercial information from people for what it perceives to be their own good. This principle faded in and out of vogue in decisions dating back to *Virginia Pharmacy*, but the Court in *Sorrell* provided it a majority backing. *Sorrell* located the principle in the third prong of the *Central Hudson* test, which asks whether the state's means directly advance its interest. The means-ends relationship, the Court said, cannot include keeping truthful information from people in order to manipulate their behavior. Of course, if this kind of means-ends relationship fails *Central Hudson* intermediate scrutiny, it is similarly fatal under a strict scrutiny analysis. We also know, following *Sorrell*, that content-based commercial speech restrictions do not automatically trigger strict scrutiny, unless they are also viewpoint-based. When a state regulates commercial speech because it disagrees with the advertiser's message, strict scrutiny attaches.

Still unclear, however, is what a court ought to do with commercial speech restrictions based on consumer protection interests such as truthful advertising. Following *Sorrell*, there are several different ways courts could interpret the commercial speech doctrine on this issue. Justice Stevens' approach is one possibility; he, and possibly the *Sorrell* majority, would apply *Central Hudson* scrutiny only to laws premised on consumer protection and treat all other commercial speech restrictions as if they applied to fully-protected speech. Alternatively, a court could simply apply *Central Hudson* scrutiny to all commercial speech restrictions (except those that are viewpoint-discriminatory, because we know from *Sorrell* that those warrant strict scrutiny). Still another way to interpret the doctrine would be to treat laws regulating false, misleading, or impermissibly aggressive commercial speech—in other words, laws based on consumer protection—as wholly outside any First Amendment scrutiny and to apply *Central*

158. Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 411 (1993).

Hudson scrutiny to all other commercial speech restrictions (except viewpoint-discriminatory laws).

The early iteration of the commercial speech doctrine did not protect false, misleading, and impermissibly aggressive speech. The *Virginia Pharmacy* Court held that "[u]ntruthful speech, commercial or otherwise, has never been protected for its own sake. Obviously, much commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to a State's dealing effectively with this problem."[159] The *Central Hudson* Court reinforced the principle that misleading advertisements (and also those promoting illegal activity) are not protected by any level of scrutiny under the First Amendment: "[T]here can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it, or commercial speech related to illegal activity."[160]

Other and more recent case law, however, leaves open the possibility that even deceptive and aggressive commercial speech warrants at least intermediate scrutiny. For example, Justice Blackmun's dissent in *Central Hudson* characterizes the majority's holding as having attached intermediate scrutiny to laws regulating misleading and coercive commercial speech.[161] Writing for a plurality in *44 Liquormart*, Justice Stevens similarly implied that even regulations of deceptive and coercive commercial speech warrant some level of scrutiny, as opposed to no protection whatsoever. Justice Stevens explained that commercial speech is protected under the First Amendment because of its informational value to consumers, and when a state regulates commercial speech 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 justifies less than strict review."[162] Notably, Justice Stevens did not write that regulations of deceptive or aggressive commercial speech warrant no constitutional protection. Instead, Justice Stevens suggested that a well-conceived test for permissible commercial speech appropriately accommodates the governmental interest in regulating false or misleading speech, but that

159. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976) (internal citation omitted).

160. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 563–64 (1980) (internal citation omitted).

161. *Id.* at 573 (Blackmun, J., concurring) ("I agree with the Court that . . . intermediate scrutiny is appropriate for a restraint on commercial speech designed to protect consumers from misleading or coercive speech").

162. 44 Liquormart, Inc. v. R.I., 517 U.S. 484, 501 (1996).

accommodation takes the form of a lower level of scrutiny, not a complete lack of protection.

Taking instruction from the trajectory of the commercial speech doctrine, which has continued to elevate the value and protection of commercial speech, we can conclude that a majority of the Court would afford intermediate (*Central Hudson*) scrutiny to laws based on consumer protection, as opposed to no protection at all. Then, again based on the increasing value placed on commercial speech in recent decades, it is also likely going forward that the Court will find ways to apply strict scrutiny, not *Central Hudson* scrutiny, to commercial speech restrictions not based on consumer protection. Although *Sorrell* points in this direction, commercial speech cases in the near future could cement this development in the doctrine. *Sorrell* has potential to mark a change in the tide, after which *Central Hudson* scrutiny is reserved only for consumer protection laws and commercial speech generally takes its place alongside other fully-protected speech.