UNCENSORED DISCOURSE IS NOT JUST FOR POLITICS

Calvin Massey[*†]

Winston Churchill once said that the Soviet Union "is a riddle wrapped in a mystery inside an enigma."[1] What might he have said of the Supreme Court's opinion in *Sorrell v. IMS Health Inc.*?[2]

Vermont prohibited the disclosure for value of "regulated records containing prescriber-identifiable information," barred anyone from using "records containing prescriber-identifiable information for marketing or promoting a prescription drug, unless the prescriber consents," and specifically banned "[p]harmaceutical manufacturers and pharmaceutical marketers" from using "prescriber-identifiable information for marketing or promoting a prescription drug unless the prescriber consents."[3] The first part of this law bans the sale of information; the second part prohibits a specific use of identified information; the third part is a speaker-specific ban on using the identified information for a precise purpose. Although the Supreme Court has defined commercial speech as "speech which does 'no more than propose a commercial transaction,'"[4] the Court treated the Vermont statute as a restriction on commercial speech.[5] It did so in part because the Court concluded that Vermont's purpose was to restrict the speech of pharmaceutical sales representatives in promoting to physicians the use of the drugs manufactured by their employers.[6] Not only does the speech that Vermont sought to prohibit do more than propose a commercial transaction,[7]

---

* Professor of Law, University of California, Hastings.

† I thank the University of New Hampshire Law School and the Vermont Law School for hosting this conference and providing the opportunity to share ideas on this topic.

1. BARTLETT'S FAMILIAR QUOTATIONS 665 (Justin Kaplan ed., 17th ed. 2002) (quoting the broadcast from October 1, 1939).

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

3. VT. STAT. ANN. tit. 18, § 4631(d) (Supp. 2011).

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

Id.

4. Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 762 (1976) (quoting Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376, 385 (1973)).

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

6. *Id*.

7. Sales representatives (also called "detailers") also use the banned information to discuss the claimed medical benefits of specific drugs.

prior doctrine also holds that the purpose or motive of Vermont's legislature is irrelevant to determination of the constitutional validity of the law.[8] While *Sorrell* may not be a riddle wrapped in a mystery inside an enigma, it does pose a bit of a puzzle. Why did the Court see the statute as a commercial-speech restriction? Why did the Court probe Vermont's motive, and of what significance was that inquiry into motive?

The Court perceived the Vermont statute as seeking to prevent pharmaceutical sales representatives (referred to by the Court as "detailers") from knowing or using the prescribing habits of Vermont physicians while simultaneously permitting medical researchers, insurers, and state employees seeking to persuade physicians to use generic alternatives to brand-name drugs to obtain and use that information.[9] To accomplish that purpose, Vermont forbade sale of prescriber data and, no matter how obtained, prohibited the use of that data to promote sales of pharmaceutical drugs.[10] The sale ban was an asymmetrical disclosure ban—owners of that data could not sell it but could give it away. The use restrictions, however, were designed to prevent detailers, and only detailers, from using prescriber data even if they obtained it gratuitously.

The disclosure ban might be treated as subject to the cases invalidating bans on disclosure of true information, a line of authority extending from *Cox Broadcasting Corp. v. Cohn*,[11] through *Florida Star v. B.J.F.*,[12] to *Bartnicki v. Vopper*.[13] The use bans bear more relationship to commercial speech, although their breadth extends well beyond advertising—the unvarnished invitation to a commercial transaction. Perhaps it was the joinder of the disclosure and use bans in a single statutory scheme that caused the Court to focus on Vermont's motive, and thus for the Court to treat the law as a regulation of commercial speech.

The first question was whether Vermont was regulating a commercial practice and, if so, whether the impact of its regulation on speech was "incidental" to regulation of the commercial activity.[14] The distinction matters, of course, because a regulation of a commercial practice is presumed to be valid; to void it a challenger must prove either that the government has no legitimate reason for the regulation or that the regulatory means selected

---

8. "It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." United States v. O'Brien, 391 U.S. 367, 383 (1968).

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

10. *Id.*

11. Cox Broad. Corp. v. Cohn, 420 U.S. 469 (1975).

12. Fla. Star v. B.J.F., 491 U.S. 524 (1989).

13. Bartnicki v. Vopper, 532 U.S. 514 (2001).

14. *Sorrell*, 131 S. Ct. at 2664–65.

are not rationally connected to some hypothetical governmental interest.[15] But if the regulation is of truthful, non-misleading commercial speech, the government must prove that its regulation is "directly related" to the accomplishment of a substantial government interest and that the scope of the regulation is the least speech-restrictive way of achieving the government's objective.[16]

If the Vermont law regulated a commercial practice, it was the practice of detailers making sales calls on physicians. The problem with this characterization is that the law focuses on the dissemination and use of information.[17] Without a physician's consent, it forbade disclosure of prescriber data for marketing purposes and barred pharmaceutical manufacturers and their sales representatives from using prescriber data for marketing or promotion.[18] The law said nothing about sales calls or sales practices. Detailers remained free to do anything that they wished during a sales call to a physician except use information about the physician's prescribing habits. The Court saw this as a law designed to limit information and to limit it in an asymmetrical way.[19] Insurers and state employees were free to use prescriber information to persuade physicians that generic drugs were better than their brand-name alternatives (or at least cheaper). However, detailers were denied the opportunity to use that same information to persuade physicians that generic drugs are in fact not the same as the branded product and that the branded drug is more medically effective.[20] If Vermont feared that detailers would mislead the physicians, Vermont was free to prohibit misleading sales pitches, but that is not what Vermont did. The banned information was true and not misleading. It pertained to a lawful activity—prescribing drugs to arrest disease, prolong life, and alleviate pain.

In dissent, Justice Breyer advanced three reasons why the Vermont law should have been treated as a regulation of a commercial activity. Each of them is either wrong or irrelevant. First, he claimed that the law "neither forbids nor requires anyone to say anything."[21] At best, that is a half-truth: Detailers calling on a physician were forbidden to say anything that derived

---

15. *See, e.g.*, New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (per curiam); Ferguson v. Skrupa, 372 U.S. 726, 733 (1963) (Harlan, J., concurring); Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 491 (1955); United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938).

16. The basic test is articulated in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 566 (1980). The least-restrictive-alternative prong has been most clearly set forth in *Thompson v. Western States Medical Center*, 535 U.S. 357, 371–73 (2002).

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

18. *Id*. at 2660.

19. *Id*. at 2663.

20. *Id*. at 2680 (Breyer, J., dissenting).

21. *Id*. at 2675.

from knowledge of the physician's prescribing habits, and it was precisely that speech that detailers wished to utter.[22] Second, he relied on the fact that Vermont's law was "part of a traditional, comprehensive regulatory regime" concerning "the manner in which drugs can be advertised and sold."[23] The regulations to which Justice Breyer referred are, of course, the FDA's requirement that drugs be proven "safe" and "effective" before being permitted use.[24] But nobody argued that Vermont was trying to ensure safety or effectiveness; it wanted to cut costs by hampering the sale of what (insofar as the FDA was concerned) were equally safe and effective branded drugs. Finally, Justice Breyer thought that because the prescriber information "exists only by virtue of government regulation," selective prohibition of use of the information ought to be valid.[25] But this cannot possibly be universally true. Elections law requires that a political donor disclose his identity, occupation, and address, but a law that permitted Republicans access to this information but not Democrats would be dead on arrival. Perhaps Justice Breyer meant that selective prohibition of the use of such information is valid if it is commercial information, but if so, he has already slid into the territory of quasi-commercial speech.

The Court has never said that commercial information, as such, is commercial speech. Commercial information comprises a wide spectrum of speech, and a lot of it is commercially useful data: which web sites a person has accessed, purchasing habits of a demographic group, and per capita income by zip code, to give but a few examples. The prescription history of physicians is but another data set. By itself, this data is not commercial speech, but it is undeniably a platform for commercial speech. If Vermont had simply forbidden disclosure of this data to anyone, the restriction might have been analyzed like the prohibitions upon publication of crime victims' identity in *Cox Broadcasting* or *Florida Star*[26] or like the prohibition upon publication of an intercepted cell phone conversation in *Bartnicki*.[27] But Vermont made its motive clear in the statute itself. The law was not about disclosure; it was all about preventing pharmaceutical companies from making a more effective sales pitch to physicians, and that motive—embedded in the statutory scheme itself—convinced the Court to apply commercial-speech doctrine.

There is irony in this. Had the Court treated the law as a ban on

22. VT. STAT. ANN. tit. 18 § 4631(d) (Supp. 2011).
23. *Sorrell*, 131 S. Ct. at 2676 (Breyer, J., dissenting).
24. 21 U.S.C. § 355(a), (b)(1), (d) (2006).
25. *Sorrell*, 131 S. Ct. at 2676 (Breyer, J., dissenting).
26. Cox Broad. Corp. v. Cohn, 420 U.S. 469, 471 (1975); Fla. Star v. B.J.F., 491 U.S. 524, 526 (1989).
27. Bartnicki v. Vopper, 532 U.S. 514, 523–24 (2001).

disclosure of true information, Vermont would have been forced to justify it by proving that the ban was necessary to a compelling governmental interest.[28] Once defined as a regulation of commercial speech, Vermont's task would have been the less difficult one of satisfying intermediate scrutiny. Regulation of true, non-misleading commercial speech that pertains to a lawful activity is presumptively void but can be justified by the government under the intermediate scrutiny standard of *Central Hudson Gas & Electric Corp. v. Public Service Commission*.[29] Under *Central Hudson*, the government must prove its interest is "substantial," the means chosen "directly advance[]" that interest, and the means are the least speech-restrictive way to achieve its objective.[30] The majority said it was applying that standard.[31]

Vermont claimed that its law served two objectives: medical privacy and improved public health via reduced health care costs.[32] The Court assumed that each of these objectives was substantial but found the law to be so poorly tailored to either objective that it violated the free speech guarantee.[33]

Medical privacy inhered, said Vermont, in "physician confidentiality, avoidance of harassment, and the integrity of the doctor-patient relationship."[34] But the law was hardly directly related to the interest of confidentiality because the law permitted prescriber information to be disclosed to a wide variety of people—"insurers, researchers, journalists, the State itself"[35]—just not pharmaceutical companies and their sales representatives. The physician consent feature of the statute was no help on this point because it gave doctors a "contrived choice: Either consent, which will allow your prescriber-identifying information to be disseminated and used without constraint; or, withhold consent, which will allow your

28. It is possible that Vermont could have surmounted this burden. A ban on disclosure of prescriber data to anyone might be thought necessary to protect the professional privacy of physicians. However, *Bartnicki* casts some doubt on this conclusion. There, the Court voided a federal law that prohibited disclosure of an illegally intercepted cell phone call if the person making the disclosure knew or had reason to know that the conversation was intercepted illegally. *Id*. at 523–24. Even though the Court acknowledged that privacy of communication was an important interest (it did not have to reach the question of whether that interest was compelling), it concluded that the ban, at least as applied to "truthful information of public concern," was too broad. *Id*. at 534. But the hypothesized Vermont statute would ban disclosure of truthful information that is likely not of public concern. *Cf*. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc. 472 U.S. 749, 751 (1985) (stating that a false credit report about a private party is not of public concern for purposes of a defamation action).

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

30. *Id*.

31. Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2667–68 (2011).

32. *Id*. at 2668.

33. *Id*.

34. *Id*.

35. *Id.*

information to be used by those speakers whose message the State supports."[36] This is not directed toward physician privacy, said the Court, but toward an entirely different goal: "burdening disfavored speech by disfavored speakers. . . . The limited range of available privacy options . . . reflects the State's impermissible purpose to burden disfavored speech."[37]

Vermont's argument that the law addressed sales harassment failed because the law was not the least speech-restrictive alternative available to deal with the problem, even assuming its existence. Sufferance of unpleasant or unwelcome speech is an unfortunate byproduct of a robust free speech guarantee, and, in any case, physicians are free to deny access to detailers, toss them from their offices if they become abusive, or at least tell them to shut up. The First Amendment need not be shriveled into a raisin in order to protect the most timid among us.

Finally, Vermont contended that the use of prescriber information by detailers breached the integrity of the physician-patient relationship because it permitted detailers to influence treatment decisions.[38] But the same objection could be made about efforts by Vermont government employees (or others opposed to the use of branded drugs) to influence physicians to treat patients with generic drugs, actions permitted under the statute so long as the prescriber information was given to them. In any case, said the Court, "[i]f pharmaceutical marketing affects treatment decisions, it does so because doctors find it persuasive. Absent circumstances far from those presented here, the fear that speech might persuade provides no lawful basis for quieting it."[39]

Vermont's second objective—that its law "advances important public policy goals by lowering the costs of medical services and promoting public health"[40]—fared no better. Vermont's goal was to dissuade physicians from the use of branded drugs, which it contended were "more expensive and less safe than generic alternatives."[41] The Court conceded that these goals "may be proper," but concluded that Vermont's law "does not advance them in a permissible way."[42] It was hardly direct for Vermont to "seek[] to achieve its policy objectives through the indirect means of restraining certain speech by certain speakers—that is, by diminishing detailers' ability to influence prescription decisions."[43]

---

36. *Id.* at 2669.
37. *Id.*
38. *Id*. at 2670.
39. *Id*. (citing Brandenburg v. Ohio, 395 U.S. 444, 447 (1969)).
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*

This objection is fallacious. If pharmaceutical detailers are a principal avenue by which physicians are persuaded to prescribe brand-name drugs, Vermont's approach is not particularly indirect. Nor did it seem indirect to Justice Breyer, who observed that the "statute helps to focus sales discussions on an individual drug's safety, effectiveness, and cost, perhaps compared to other drugs (including generics)" rather than on "prior prescription practices of the particular doctor to whom a detailer is speaking."[44]

While Justice Kennedy, writing for the Court, hung his analytical hat on the indirect peg, he actually missed that peg and used another one. The real problem with Vermont's law was that it was designed to suppress a particular viewpoint. For example, should a state attempt to reverse a disfavored trend in public opinion, it could not ban campaigning with slogans, picketing with signs, or marching during the daytime. Likewise, absent some highly important objective (e.g., preventing minors from using alcoholic beverages) 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. That the state finds expression too persuasive does not permit it to squelch the speech or to burden its messengers.[45]

Indeed, there appears to be a debate about the wisdom of using prescriber information in sales calls on physicians. The Court noted "that some Vermont doctors view targeted detailing based on prescriber-identifying information as 'very helpful' because it allows detailers to shape their messages to each doctor's practice."[46] The United States, though it supported Vermont, disputed Vermont's "unwarranted view that the dangers of [n]ew drugs outweigh their benefits to patients."[47] In the Court's view, "[u]nder the Constitution, resolution of that debate must result from free and uninhibited speech."[48]

The narrow construction of the Court's approach rests on the view that there are other less speech-restrictive alternatives available to Vermont. Indeed, the Court noted some of them: "Vermont may be displeased that detailers who use prescriber-identifying information are effective in promoting brand-name drugs," but Vermont "can express that view through its own speech."[49] If that is the tool used by the Court, it is no more than an

---

44. *Id.* at 2682 (Breyer, J., dissenting).

45. *Id*. at 2670–71 (majority opinion).

46. *Id*. at 2671.

47. *Id.* (quoting Brief for the United States as Amicus Curiae Supporting Petitioners at 24 n.4, Sorrell v. IMS Health Inc., 131 S. Ct. 2653 (2011) (No. 10-779), 2011 WL 719647, at *24 n.4).

48. *Id*. at 2671.

49. *Id.*

application of the principle firmly embraced in *Thompson v. Western States Medical Center*, in which the Court declared that when it comes to commercial-speech regulation, "if the Government [can] achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government must do so. . . . If the First Amendment means anything, it means that regulating speech must be a last—not first—resort."[50]

The broad construction of the Court's analysis is that the government may not impose content-based restrictions on commercial speech in order to promote its preferred views. Said the Court: "[A] State's failure to persuade does not allow it to hamstring the opposition. The State may not burden the speech of others in order to tilt public debate in a preferred direction."[51] The Court did leave open the possibility that a state could use content-based regulation of commercial speech if it could prove some "neutral justification" for its content-based discrimination.[52] But to muzzle commercial speech because the government finds that it persuades people to do what the state would prefer they not do is not a neutral justification.

So, what does it all mean? The doctrinal residue is that government regulation of truthful, non-misleading commercial speech on the basis of its content or viewpoint is subject to almost the same high burden of justification that applies to all other speech. That test, commonly called strict scrutiny, obliges the government to justify its regulation of speech on the basis of its content by proving that it has a compelling reason for doing so and that the particular regulation is necessary to achieve that compelling objective.[53] A bedrock principle of free speech law is that government discrimination on the basis of the content of speech is subject to strict scrutiny and almost always void.[54] An even firmer principle is that government regulation of speech on the basis of its viewpoint is subject to virtual per se invalidity.[55] The difference between the two, of course, is the difference between a ban on political speech and a ban on socialist speech. *Sorrell* amalgamates strict scrutiny and *Central Hudson*'s intermediate scrutiny to this extent: Regulation of commercial speech on the basis of viewpoint is subject to strict scrutiny and almost always void. And content-based regulation of commercial speech is viewpoint discrimination if its purpose is to squelch an idea that the government dislikes. By contrast, content-based discrimination

---

50. Thompson v. W. States Med. Ctr., 535 U.S. 357, 371, 373 (2002).

51. *Sorrell*, 131 S. Ct. at 2671.

52. *Id.* at 2672.

53. *See, e.g.*, United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 813 (2000).

54. *See, e.g.*, *Playboy*, 529 U.S. at 813; Sable Commc'ns of Cal. v. FCC, 492 U.S. 115, 126 (1989); R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992).

55. *Cf. R.A.V.*, 505 U.S. at 391 ("The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects.").

that is carefully designed to address the effects of commercial speech that are themselves legitimate subjects of regulation is subject to the intermediate scrutiny standard of *Central Hudson*. To illustrate, if a state wished to prevent fraud it might choose to prohibit certain statements in advertisements of securities, such as "Absolutely Guaranteed to Double Your Money Every Month," but it could not prohibit a true, non-misleading statement that "ABC Fund has averaged a 7% annual return for the past ten years, but past performance is no guarantee of future performance," simply because the state would prefer investors to buy state-issued bonds.

Sorrell can also be understood as an application of the principle announced in *R.A.V. v. City of St. Paul*.[56] In *R.A.V.*, the Court ruled that categories of speech that are denied constitutional protection—such as obscenity or fighting words—may not be subjected to viewpoint-based regulations, or even content-based regulations that are irrelevant to the reason the category is denied constitutional protection.[57] For example, while governments may ban obscenity, they may not ban only obscenity that portrays President Obama as a socialist tyrant, or President Bush as a war criminal. Governments can, however, ban only obscenity that is particularly lascivious, because that is the reason obscenity is denied constitutional protection. Applied to *Sorrell*, the claim is this: Commercial speech enjoys a reduced form of constitutional protection, but if the government wishes to regulate commercial speech on the basis of its content or viewpoint, it must use content or viewpoint limits that correspond tightly with the reason why commercial speech receives less constitutional protection.

Preventing commercial speakers from using truthful information to spread their message is not one of those reasons. Preventing commercial speakers from misleading the public or committing fraud is a reason to deny any protection to commercial speech. Between these poles lies the terrain of *Central Hudson*. If the government has a sufficiently important legitimate objective (e.g., to prevent vulnerable accident victims from unscrupulous attorneys), it may adopt speech restrictions that directly relate to accomplishment of that objective (e.g., a bar disciplinary rule that prevents lawyers from recommending their services to laymen).[58] But the line between that which is directly related and that which is not so direct is extremely thin and flexible, as illustrated by *Lorillard Tobacco Co. v. Reilly*.[59] Massachusetts banned indoor point-of-sale tobacco advertisements that were less than five feet above floor level any place within 1,000 feet of a school or

56. *Id*. at 391–92.
57. *Id*.
58. *See* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 449–50 (1978).
59. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 547 (2001).

playground, but this ban was insufficiently directly related to accomplishment of the goal of preventing minors from using tobacco.[60] But Massachusetts' requirement that tobacco products be placed behind counters and accessible only through salespersons was sufficiently directly related to achievement of that objective.[61]

Vermont, however, was trying to prevent pharmaceutical companies from using the truth to persuade others of the efficacy of their products, and that is akin to banning only obscenity that depicts Michele Bachmann or Hillary Clinton as evil harridans. Thus, the Court in *Sorrell* charted a larger terrain for the doctrinal pole that applies strict scrutiny to regulations of commercial speech.

This is a salutary development. If Vermont thinks that disclosure of prescriber information is deleterious to medical privacy or a threat to good medical practices, it has options. Vermont can prohibit disclosure of prescriber information to anyone. To be sure, that ban would still have to pass muster under *Central Hudson*, but it is intermediate scrutiny that would apply, not the effectively strict scrutiny that the Court applied in *Sorrell*. The general principle in free speech law—that the government may not skew public debate to amplify its preferred message—should apply to the commercial realm that has brought prosperity to the nation. Not only is it good policy—an open, robust, uninhibited commercial discourse is apt to promote innovation and development, the spurs of economic growth—it is basic political theory. Allowing governments to censor public debate to serve their own ends is a recipe for the loss of personal liberty. A price of free speech is that you use your own mind to evaluate speech. Physicians are well-educated professionals and should be quite able to decide whether the detailers' sales pitches are valuable or useless bunk. Assessing the worth of what we hear and read is not a big price to pay for free speech. If Vermont thinks that physicians are being duped by detailers, it is free to counter their message with its own. Part of the value of free speech is the freedom to rebut speech with which we disagree with our own arguments. Only those who are afraid of their own arguments wish to muzzle their opponents.

We should be pleased that in *Sorrell* the Supreme Court preserved space for public debate, free of the closed-minded government censor.

---

60. *Id*. at 534–36, 550.
61. *Id*.