

## FOREWORD

### CONSTITUTIONAL CONSTRAINTS ON STATE HEALTH CARE & PRIVACY REGULATION AFTER *SORRELL V. IMS HEALTH*

John M. Greabe\*

One of the joys of teaching Conflict of Laws (yes, you read that correctly) lies in introducing students to the surprising frequency with which one can helpfully illuminate a difficult legal problem by framing it in choice-of-law terms. Students often assume that the sole purpose of a Conflict of Laws course is to canvass exotic jurisdiction-selecting rules that decide which laws to apply to disputes arising from transactions or occurrences with multistate dimensions. But upon being introduced to the modern approaches to choice of law, students discover, often with great satisfaction, that the topic is implicated *whenever* litigants asserting claims, defenses, or other requests for relief disagree over which of two or more mutually exclusive rules governs a given set of facts—even when the rules vying for application issue from the same sovereign and the putative conflict is therefore entirely “domestic.”<sup>1</sup>

This point, although basic, conduces to an appreciation that a court must employ a two-step process whenever it is required to choose between or among rules that cannot simultaneously apply but have been proffered by the parties as applicable. First, the court must determine whether it is plausible, as a *prima facie* matter, that more than one of the proffered rules

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\* Professor, University of New Hampshire School of Law. I thank Jonathan Voegele and the staff of the *Vermont Law Review* for their excellent editorial assistance. I also thank the staffs of the *University of New Hampshire Law Review* and the *Vermont Law Review*, especially Jonathan Foskett, Jonathan Voegele, Katie Polonsky, and Emily Steinhilber, for their tireless work in putting together a first-class Symposium. Finally, I extend special thanks to the Symposium’s keynote speaker, the Honorable Jeffrey Howard of the U.S. Court of Appeals for the First Circuit, and to its distinguished panelists: Bridget Asay, Ash Bhagwat, Linda Cohen, Tom Julin, Michael Loucks, Steve Maier, Calvin Massey, Abigail Moncrieff, Tamara Piety, Ted Ruger, Dr. Gary Sobelson, Representative Sharon Treat, John Verdi, and Ernie Young.

1. The casebook from which I teach uses the case of *Marek v. Chesny*, 473 U.S. 1 (1985), to introduce this point. *Marek* raised the question whether attorney’s fees incurred by a plaintiff subsequent to a defendant’s offer of settlement under Federal Rule of Civil Procedure 68 must be paid under 42 U.S.C. § 1988, which permits a prevailing civil rights plaintiff to recover attorney’s fees, when the plaintiff recovers a judgment less than the offer. Thus, the case put the Supreme Court to the choice of applying one of two *federal* laws—either Rule 68 or § 1988. Judge Richard Posner, writing for a panel of the U.S. Court of Appeals for the Seventh Circuit, concluded that the substantive purposes of § 1988 would be undermined by application of the necessarily procedural Rule 68 to the facts in question. *See Chesny v. Marek*, 720 F.2d 474 (7th Cir. 1983). But the Supreme Court, in an opinion by Chief Justice Warren Burger, reversed. *See Marek v. Chesny*, 473 U.S. 1 (1985). The case is discussed in the excellent Conflicts casebook, DAVID P. CURRIE ET AL., CONFLICT OF LAWS 117–22 (8th ed. 2010).

could govern the facts in question. Second, if so, the court must apply second-order rules or principles to choose between or among the potentially applicable rules.<sup>2</sup> When viewed in this way, the choice-of-law process reveals itself as nothing more or less than an act of *legal interpretation*—i.e., an act requiring analysis of multiple proffered rules of decision to see whether they apply to authorize the relief requested or to immunize the target of the claim.<sup>3</sup>

Of course, this insight merely leads to the difficult heart of the matter: How do we identify or formulate the second-order rules or principles that must serve as the tiebreakers between or among rules that might plausibly, but cannot simultaneously, govern a set of facts?<sup>4</sup> Unfortunately, as readers well know, courts sometimes fail to acknowledge that they confront plausible but mutually exclusive options at this crucial point in the decisional process. The inherent difficulty of choosing between or among inconsistent laws that facially apply sometimes leads courts to succumb to the temptation of manipulating the elements of legal reasoning so as to simply place the operative facts into one outcome-determinative category or

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2. Much of modern conflicts scholarship addresses what those second-order rules or principles should be and how the choice between plausible but mutually exclusive rules should be made. See *infra* notes 3–4.

3. In the case of a multistate choice-of-law problem, the proffered rules of decision issue from different sovereigns simply because the operative facts happen to have multistate dimensions. But the process of selecting the appropriate rule to apply mirrors the process used in the context of a domestic choice-of-law dispute. See CURRIE ET AL., *supra* note 1, at 134 (crediting Professor Brainerd Currie with the “central insight . . . that the process of determining whether a state’s law applies in a particular multistate case ‘is essentially the familiar one of construction or interpretation’” (quoting BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 178 (1963))). Currie and his coauthors elaborate:

A complaint is filed alleging certain facts and claiming a right to relief. Whether the plaintiff is entitled to the relief sought depends on whether some rule of law so provides—something the court determines by interpreting and applying the laws proffered by the parties. According to [most modern choice-of-law theories], this same process should be followed in multistate cases, only instead of asking questions like whether the plaintiff must prove that the defendant was negligent or not acting within the scope of employment, we ask questions concerning spatial elements of a claim, like whether the plaintiff must prove that he or she is from the state or that the accident occurred there.

*Id.*; see also *id.* at 135 n.1 (observing that most—although not all—modern conflicts scholars agree “that the first step in a [multistate] choice of law case should be to determine, in light of their underlying purposes, which states’ laws should be read to apply”).

4. Modern conflicts scholars have proposed a number of approaches to answering this question. See *generally id.* at 117–200 (discussing, *inter alia*, “interest analysis,” the theory of “comparative impairment,” the “better law” theory, and the amalgam of approaches employed in the *Restatement (Second) of Conflict of Laws* (1971)).

another.<sup>5</sup> And the considerations informing that initial act of characterization are left for the reader to infer, as the crucial choice that the court has made serves (misleadingly) as the point of departure.

Consider, for example, First Amendment speech and association jurisprudence. The doctrines that govern First Amendment disputes frequently require judges to make *ex ante* categorizing decisions—e.g., whether the regulated conduct is sufficiently expressive or associational to implicate the First Amendment,<sup>6</sup> whether conduct that is expressive or associational may nonetheless be regulated for non-speech-related reasons,<sup>7</sup> whether a regulation of speech or expressive conduct should be treated as content-based or content-neutral<sup>8</sup>—that dictate the level of scrutiny that is to be applied to a regulation challenged as an unlawful abridgement of a party’s speech or associational rights. Typically, these *ex ante* characterizations are outcome-determinative. But as any law student can attest, courts writing First Amendment opinions often fail to discuss, or sometimes even to acknowledge, the competing social background facts and values that could plausibly ground an alternative (although mutually exclusive) initial categorization. As a consequence, one is frequently left with the impression that those with contending viewpoints in difficult First Amendment cases are largely talking past one another.<sup>9</sup>

A problem of this sort may fairly be seen to lie at the root of the disagreement between the majority and the dissenting opinions in *Sorrell v. IMS Health Inc.*,<sup>10</sup> the Supreme Court decision that grounded the wonderful

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5. I do not here use the word “manipulate” in a pejorative sense—even as I criticize the practice of unexplained, *ex ante* categorization—because *all* legal reasoning requires manipulation of its constituent elements. *See generally* LIEF H. CARTER & THOMAS F. BURKE, *REASON IN LAW* ch. 1 (8th ed. 2010) (explaining how judges necessarily use their “fact freedom” and the inherently discretionary power of characterization to combine the elements of legal reasoning—the case facts, the social background facts, the rules of law, and moral values—to make “the choices that legal reasoning confronts”).

6. *See, e.g.*, *City of Dallas v. Stanglin*, 490 U.S. 19 (1989) (holding that an ordinance licensing dance halls for minors on the condition that they limit admission to those between fourteen and eighteen years old and restrict their hours of operation does not infringe on interests that the First Amendment protects).

7. *See, e.g.*, *United States v. O’Brien*, 391 U.S. 367 (1968) (upholding against a First Amendment challenge a criminal conviction for burning a Selective Service registration certificate).

8. *See, e.g.*, *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (upholding a facially content-based zoning restriction targeting adult theaters because of its content-neutral purpose of regulating the non-speech-related “secondary effects” of such theaters).

9. *Cf.* *THIS IS SPINAL TAP* (Embassy Pictures 1984) (“Well, it’s one louder, isn’t it?” (quoting Nigel Tufnel and rejecting the suggestion that amplifiers with volume controls that go to eleven are not necessarily louder than conventional amplifiers the volume controls of which max out at ten)).

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

Symposium that this volume of the *Vermont Law Review* commemorates.<sup>11</sup> In *Sorrell*, the Supreme Court resolved a split between the First and Second Circuits about the constitutionality of similar (although not identical) state laws, enacted first in New Hampshire and subsequently in Maine and Vermont, that sought to constrain health care costs by limiting the ability of pharmaceutical companies to purchase from data-mining companies, and of data-mining companies to purchase from pharmacies, information about the prescription-writing patterns of the physicians to whom members of their sales forces, known as “detailers,” market newer drugs.<sup>12</sup> The principal theory animating these laws was that pharmaceutical companies were using this “prescriber-identifiable” information to direct their marketing efforts with precision at physicians who had track records of prescribing newer drugs still protected by patents, and successfully persuading these physicians to prescribe such drugs in circumstances where cheaper, off-patent generic drugs would be equally effective and perhaps safer.<sup>13</sup>

In a 6-3 decision, the Court struck down the Vermont law and abrogated the New Hampshire and Maine laws that the First Circuit had previously upheld. Justice Kennedy, writing for the majority, concluded that the law could not withstand the “heightened scrutiny” that the Court was obligated to apply because of the discriminatory content- and speaker-based burdens on protected expression that the statute had imposed on those who would use prescriber-identifiable data to market brand-name drugs.<sup>14</sup>

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11. The Symposium was jointly sponsored by the *University of New Hampshire Law Review* and the *Vermont Law Review* and was held at the University of New Hampshire School of Law on October 14, 2011.

12. Perhaps appreciating that a direct regulation of the detailing process was likely to raise significant First Amendment questions, the New Hampshire statute sought instead to regulate further upstream by making it unlawful for pharmacies to sell to data-mining companies and for data-mining companies to sell to pharmaceutical companies “prescriber-identifiable data . . . for any commercial purpose.” N.H. REV. STAT. ANN. § 318:47-f (2011); see also *IMS Health Inc. v. Ayotte*, 550 F.3d 42 (1st Cir. 2008), abrogated by *Sorrell*, 131 S. Ct. at 2653. The Maine and Vermont statutes also regulated upstream, but did so in different ways. The Maine statute provided regulatory proscriptions similar to the New Hampshire statute, but only for those prescription writers who “opted in” to the protections conferred by the statutory scheme. See ME. REV. STAT. ANN. tit. 22, § 1711-E(2-A) (2007); see also *IMS Health Inc. v. Mills*, 616 F.3d 7 (1st Cir. 2010), abrogated by *Sorrell*, 131 S. Ct. at 2653. The Vermont statute, by contrast, presumptively applied unless a prescription writer “opted out” of the statutory scheme by consenting to have his or her prescription-writing information sold. See VT. STAT. ANN. tit. 18, § 4631(d) (2007); see also *Sorrell*, 131 S. Ct. at 2653. Moreover, the Vermont statute also directly prohibited pharmaceutical companies from using prescriber-identifiable information for purposes of detailing absent the prescription writer’s consent. See VT. STAT. ANN. tit. 18, § 4631(d); see also *Sorrell*, 131 S. Ct. at 2660.

13. See *Sorrell*, 131 S. Ct. at 2661.

14. See *id.* at 2661–67. The majority opinion highlighted the discriminatory nature of the law in question by emphasizing that its limitations did not limit the ability of other speakers to acquire

In so ruling, the majority rejected Vermont's attempts to justify the statute in terms of its interests in medical privacy, physician confidentiality, avoidance of harassment, the integrity of the doctor–patient relationship, improving public health, or reducing health care costs.<sup>15</sup> And it brushed aside Vermont's arguments, embraced by Justice Breyer in dissent (joined by Justices Ginsburg and Kagan), that the statute was a permissible commercial regulation of a sort that had never previously been subjected to heightened First Amendment scrutiny at all or, alternatively, had only been subjected to the rather forgiving “intermediate” scrutiny applied to commercial speech.<sup>16</sup> To the majority, the content- and speaker-based burdens imposed by the Vermont statute made it obvious, *ex ante*, that a heightened form of First Amendment scrutiny should apply.<sup>17</sup> But to the dissent, the fact that the Vermont statute was a regulation of commerce similar to a number of other modern commercial measures regulating the transfer, sale, or use of information and data—and that it “adversely affect[ed] expression in one, and only one, way”—made it just as obvious, *ex ante*, that the measure did not warrant the careful scrutiny employed by the majority.<sup>18</sup>

The *Sorrell* decision is extremely involved and topically rich. As the excellent papers in this book demonstrate, the decision exposes emergent fault lines in the Supreme Court's relaxed approach towards legislative infringements of economic interests but assertive enforcement of individual rights—a phenomenon that has been dubbed the “constitutional double standard.”<sup>19</sup> The decision also could have very significant implications for federal and state health care regulation,<sup>20</sup> federal and state privacy regulation,<sup>21</sup> and federal and state laws that burden commercial speech,

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prescriber-identifying information for speech-related purposes other than the marketing of brand-name drugs. *See id.* at 2663.

15. *See id.* at 2667–72.

16. *See id.* at 2664–67.

17. *See id.* at 2661–67.

18. *Id.* at 2673 (Breyer, J., dissenting).

19. *See infra* Ernest A. Young, *Sorrell v. IMS Health and the End of the Constitutional Double Standard*, 36 VT. L. REV. 903 (2012) (crediting Henry J. Abraham & Barbara A. Perry, *Freedom and the Court: Civil Rights and Liberties in the United States* (8th ed. 2003), for the phrase “constitutional double standard”).

20. *See id.*

21. *See infra* Ashutosh Bhagwat, *Sorrell v. IMS Health: Details, Detailing, and the Death of Privacy*, 36 VT. L. REV. 855 (2012); Thomas R. Julin, Jamie Z. Isani & Patricia Acosta, *The Dog That Did Bark: First Amendment Protection of Data Mining*, 36 VT. L. REV. 881 (2012) (responding to Professor Bhagwat); and Christopher R. Smith, *Somebody's Watching Me: Protecting Patient Privacy in Prescription Health Information*, 36 VT. L. REV. 931 (2012).

expressive conduct, and the transmission of information.<sup>22</sup> Readers should constantly bear in mind, however, that *all* of these issues sit on top of, and trace back to, a “domestic” choice-of-law problem of the sort described above: a fundamental disagreement about the constitutional default rule that should apply to regulations which limit the sale, transfer, or use of data and commercial information.

The specific issue is this: Should the default rule that the Supreme Court has applied to commercial regulation since 1937—i.e., that such laws enjoy a presumption of constitutionality and are to be reviewed only for rationality<sup>23</sup>—also apply to the many regulatory provisions that might be seen to limit the freedom of economic actors to engage in conduct that involves the sale, transfer, or use of data or information?<sup>24</sup> Or should there be a “narrower scope for operation of the presumption of constitutionality” for such provisions precisely because, one plausibly can contend, they engage in content discrimination and therefore “appear[] on their face to be within a specific prohibition of the Constitution?”<sup>25</sup> And more generally, do widely shared assumptions about the folly of the Supreme Court’s conduct during the *Lochner* era helpfully illuminate this modern constitutional and regulatory dispute?<sup>26</sup> Or do charged invocations of *Lochner* serve in this context only to generate more heat than light?

These are questions of fundamental importance that deserve a more extended airing than the majority and dissenting opinions in the *Sorrell*

22. See *infra* Calvin Massey, *Uncensored Discourse Is Not Just for Politics*, 36 VT. L. REV. 845 (2012).

23. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938).

24. Justice Breyer provides a number of examples of regulation that he describes as similar to Vermont’s law (in terms of regulating on the basis of content and regulating particular speakers) but that never before have been subjected to heightened scrutiny of the sort employed by the majority:

Electricity regulators, for example, oversee company statements, pronouncements and proposals, but only about electricity. The Federal Reserve Board regulates the content of statements, advertising, loan proposals, and interest rate disclosures, but only when made by financial institutions. And the [Food and Drug Administration] oversees the form and content of labeling, advertising, and sales proposals of drugs, but not furniture.

*Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2677 (2011) (Breyer, J., dissenting) (citations omitted).

25. *Carolene Products*, 304 U.S. at 152 n.4.

26. *Compare Sorrell*, 131 S. Ct. at 2679 (Breyer, J., dissenting) (suggesting that the majority’s application of heightened First Amendment scrutiny to a regulation of commercial activities of the sort worked by the Vermont statute recalls “a happily bygone era when judges scrutinized legislation for its interference with economic liberty” when the power of judicial review “was much abused and resulted in the constitutionalization of economic theories preferred by individual jurists” (citing *Lochner v. New York*, 198 U.S. 45, 75–76 (1905) (Holmes, J., dissenting))), *with Sorrell*, 131 S. Ct. at 2665 (majority opinion) (responding to Justice Breyer by observing that while the “Constitution ‘does not enact Mr. Herbert Spencer’s Social Statics[.]’ [i]t does enact the First Amendment” (quoting *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting) (citations omitted))).

decision provide. Indeed, these questions merit careful consideration as part of the broader discussion of corporate constitutional rights that has been taking place ever since the Supreme Court decided, in the context of campaign-finance reform, that corporations enjoy full First Amendment protections.<sup>27</sup> I am certain that readers will find the papers and remarks that follow to be extremely valuable contributions as we consider these questions and press to new frontiers the ongoing national conversations about whether and how the Constitution limits federal and state regulatory power and the role that the Supreme Court should play in enforcing constitutional limits.

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27. See *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010) (holding in the course of evaluating the constitutionality of campaign-finance regulation that a corporate speaker is entitled to the same protections under the First Amendment as an individual speaker). Even though the *Sorrell* decision did not discuss, or even cite, *Citizens United*, a number of commentators have seen important points of intersection between the two cases. See, e.g., David Gans, *Sorrell v. IMS Health: Corporate Commercial Speech in the Age of Citizens United*, BALKINIZATION (June 23, 2011, 6:33 PM), <http://balkin.blogspot.com/2011/06/sorrell-v-ims-health-corporate.html>; Katie Booth, *The All-or-Nothing Approach to Data Privacy: Sorrell v. IMS Health, Citizens United, and the Future of Online Data Privacy Legislation*, JOLT DIGEST (Aug. 17, 2011), <http://jolt.law.harvard.edu/digest/privacy/the-all-or-nothing-approach-to-data-privacy-sorrell-v-ims-health-citizens-united-and-the-future-of-online-data-privacy-legislation>.