



# Protecting Commercial Speech and Personal Privacy in the Internet Age: Is the Court *Lochnerizing* the First Amendment?

*The Constitution at a Crossroads*

## Introduction

[I]n a democracy, the economic is subordinate to the political, a lesson that our ancestors learned long ago, and that our descendants will undoubtedly have to relearn many years hence.

Justice William Rehnquist<sup>1</sup>

In an earlier chapter of *Crossroads*, we considered the sharp divide on the Supreme Court concerning the First Amendment rights of corporations to spend unlimited amounts of money to influence elections and the explosive impact the Court's 2010 ruling in *Citizens United v. Federal Election Commission*<sup>2</sup> is having on campaign finance laws. This chapter examines recent developments in the law of commercial speech, in particular, the Court's 2011 decision *Sorrell v. IMS Health, Inc.*,<sup>3</sup> which announced a substantial expansion in the protections that the First Amendment affords to the commercial speech of corporations. In bitter dissents in *Citizens United* and *Sorrell*, Justice John Paul Stevens and Justice Stephen Breyer argued that the Court was perverting the First Amendment by giving corporate speakers the same rights as individuals (in *Citizens United*), and by moving to provide commercial speech with the same protection as political speech (in *Sorrell*). Both of these dissents warn that the Court may be moving the country back to the *Lochner* era,<sup>4</sup> a time when conservative majorities used trumped up constitutional arguments to impose constitutional obstacles to economic regulation by federal, state, and local governments.

The Court's treatment of commercial speech has followed a remarkable trajectory over the past 70 years. In 1942, the Court unanimously ruled that commercial speech was not protected at all under the First Amendment. Since then, the Court has expanded the protection given to commercial speech, while recognizing that governments have substantial latitude to regulate commercial advertising and that commercial speakers may be subject to numerous forms of government regulation that would be unconstitutional as applied to political speech. This expansion has been supported by both liberal and conservative Justices, who have united around the view that commercial speech is entitled to the

<sup>1</sup> *Central Hudson Gas and Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 599 (1980) (Rehnquist, J., dissenting).

<sup>2</sup> 130 S.Ct. 876 (2010).

<sup>3</sup> 131 S.Ct. 2653 (2011).

<sup>4</sup> See *Lochner v. New York*, 198 U.S. 45 (1905).

protection of intermediate scrutiny, a standard that has led the Court to strike down some state regulations while upholding others.

But in *Sorrell*, the Court's 6-3 opinion substantially expanded the protection due to commercial speech, broadening the scope of what is considered "speech" in the commercial area and increasing the appropriate level of scrutiny for laws that burden such speech. In *Sorrell*, the Court's five conservative Justices, joined by Justice Sonia Sotomayor, held that forms of marketing research such as data mining are "speech" protected by the First Amendment and moved toward providing commercial speech the same level of heightened protection long accorded to political speech. In dissent, Justice Breyer, joined by Justices Elena Kagan and Ruth Bader Ginsburg, warned that the majority was pushing the nation back toward *Lochner*. The *Sorrell* ruling imposes a heavy burden on the government to justify protections for personal privacy in an internet age, when companies such as Amazon and Google possess enormously valuable and enormously sensitive information about every one of us.

With a majority on the Supreme Court appearing to move toward applying strict scrutiny to regulation of commercial speech, a wide variety of regulatory actions that affect speech within the Court's ambit, and important constitutional challenges to federal regulation of tobacco advertising moving through the lower federal courts, the First Amendment's protection of commercial speech is at a crossroads.

## **Commercial Speech and the First Amendment from *Valentine* to the Roberts Court**

More than two centuries ago, the Framers of the Constitution wrote broad protection for freedom of speech into our founding document, providing that "Congress shall make no law abridging the freedom of speech." For most of our history, the notion that the First Amendment gave special protection to corporations to advertise their wares in the manner they chose was a nonstarter, a reflection of the "pervasive legal regulation of business advertising"<sup>5</sup> and the undoubted and substantial power of state and federal governments to regulate the sale of commercial goods and services.

The Supreme Court first tackled the First Amendment's application to commercial speech in 1942, shortly after the New Deal Court ended the *Lochner* era and the Court opined that it had no constitutional warrant to overturn legislative judgments that regulation of corporations and other businesses was necessary to serve the public welfare. In *Valentine v. Chrestensen*, a unanimous Court upheld a New York law prohibiting the distribution of commercial or business related handbills, holding that:

the Constitution imposes no . . . restraint on government as respects purely commercial advertising. Whether, and to what extent, one may promote or pursue a gainful

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<sup>5</sup> See Thomas H. Jackson & John Calvin Jeffries, Jr., *Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 4 (1979).

occupation in the streets, to what extent such activity shall be adjudged a derogation of the public right of user, are matters for legislative judgment.<sup>6</sup>

In 1976, after three decades of rulings that expansively interpreted the reach of the First Amendment in other contexts, the Supreme Court reconsidered *Valentine's* highly deferential approach to the regulation of commercial speech. Asking pointedly "whether there is a First Amendment exception for 'commercial speech,'" the Court rejected such an exception in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*.<sup>7</sup> Striking down a Virginia law prohibiting pharmacists from advertising the price of prescription drugs, the Court held that "commercial speech, like other varieties, is protected" by the First Amendment.<sup>8</sup> Nonetheless, the Court recognized that "[i]n concluding that commercial speech enjoys First Amendment protection, we have not held that it is wholly undifferentiable from other forms. There are commonsense differences between speech that does 'no more than propose a commercial transaction,' and other varieties."<sup>9</sup> As a result, when it comes to commercial speech, "a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired."<sup>10</sup>

The sole remaining defender of *Valentine's* approach to commercial speech was then-Justice William Rehnquist. Consistent with his views on the regulation of corporate political speech,<sup>11</sup> Rehnquist's dissent criticized the majority for "elevat[ing] commercial intercourse between a seller hawking his wares and a buyer seeking to strike a bargain to the same plane as has been previously reserved for the free marketplace of ideas."<sup>12</sup> In Justice Rehnquist's view, "nothing in the United States Constitution . . . requires the Virginia Legislature to hew to the teachings of Adam Smith in its legislative decisions regulating the pharmacy profession."<sup>13</sup>

Four years later, in 1980, the Court gave substance to *Virginia Pharmacy's* protection of commercial speech by developing an intermediate standard of review applicable to laws regulating commercial speech. In *Central Hudson Gas and Electric Corp. v. Public Service Commission of New York*,<sup>14</sup> the Court announced a new four-step analysis and applied it to strike down a regulation of the New York Public Service Commission banning advertising to promote the use of electricity. At the outset, the Court recognized that not all commercial speech is protected by the First Amendment. Because the "First Amendment's concern for commercial speech is based on the informational function of advertising . . . , there 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

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<sup>6</sup> *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942).

<sup>7</sup> 425 U.S. 748 (1976).

<sup>8</sup> *Id.* at 770.

<sup>9</sup> *Id.* at 772 n.24 (quoting *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 385 (1973)).

<sup>10</sup> *Id.*

<sup>11</sup> See, e.g., *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 822-28 (1978) (Rehnquist, J., dissenting); *Federal Election Commission v. National Right to Work Committee*, 459 U.S. 197 (1982).

<sup>12</sup> *Id.* at 781 (Rehnquist, J., dissenting).

<sup>13</sup> *Id.* at 784.

<sup>14</sup> 447 U.S. 557 (1980).

forms of communication more likely to deceive the public than inform it.”<sup>15</sup> Reflecting the “lesser protection [due] to commercial speech than to other constitutionally guaranteed expression,”<sup>16</sup> the Court articulated a four-part test, considering “whether the expression . . . concern[s] lawful activity and [is not] misleading” and hence is “protected by the First Amendment,” and, if so, “whether the asserted governmental interest is substantial,” “whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than necessary to serve that interest.”<sup>17</sup>

Justice Rehnquist once again dissented, cautioning that the majority failed “to give due deference to th[e] subordinate position of commercial speech.”<sup>18</sup> “In so doing,” he explained, the Court “returns to the bygone era of *Lochner v. New York* in which it was common practice for this Court to strike down economic regulations adopted by a State based on the Court's own notions of the most appropriate means for the State to implement its considered policies.”<sup>19</sup> “[B]y labeling economic regulation of business conduct as a restraint on ‘free speech,’” Justice Rehnquist believed the majority had “gone far to resurrect the discredited doctrine of cases such as *Lochner*.”<sup>20</sup>

Over the last thirty-two years, *Central Hudson* has provided substantial protection for truthful, non-misleading commercial speech, even as the Court has continued to recognize the “subordinate position [of such speech] in the scale of First Amendment values.”<sup>21</sup> The Justices have held, time and again, that the government’s “burden is not satisfied by mere speculation or conjecture; rather, a government body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will alleviate them to a material degree.”<sup>22</sup> Relying on this principle, the Court has on many occasions invalidated regulations of commercial speech, finding that the government had failed to make the case that the particular government regulation of commercial speech was properly tailored to serve a substantial interest.<sup>23</sup> As these cases attest, both liberal and conservative Justices alike have recognized that the *Central Hudson* framework provides considerable protection for commercial speech, while still taking into account the substantial interests of the federal and state governments in regulating commercial transactions and providing “needed leeway in a field (commercial speech) ‘traditionally subject to government regulation.’”<sup>24</sup> While *Central Hudson* has been criticized both on and off the Court for offering inadequate protection of commercial

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<sup>15</sup> *Id.* at 563.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 566.

<sup>18</sup> *Id.* at 589 (Rehnquist, J., dissenting).

<sup>19</sup> *Id.* at 589 (Rehnquist, J., dissenting).

<sup>20</sup> *Id.* at 591 (Rehnquist, J., dissenting).

<sup>21</sup> *Board of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 477 (1989) (quoting *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978)).

<sup>22</sup> *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993).

<sup>23</sup> See, e.g., *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002); *Lorillard Tobacco Co v. Reilly*, 533 U.S. 525 (2001); *Greater New Orleans Broadcasting Ass’n v. United States*, 527 U.S. 173 (1999); *Rubin v. Coors Brewing*, 516 U.S. 476 (1995); *Edenfield*, *supra*.

<sup>24</sup> *Fox*, 492 U.S. at 481 (quoting *Ohralik*, 436 U.S. at 455-56).

speech, the Court has continued to apply *Central Hudson* to invalidate regulations of commercial speech.<sup>25</sup>

Further, in applying *Central Hudson*, the Justices have sharpened the First Amendment analysis applicable in commercial speech cases, explaining that “the mere fact that messages propose commercial transactions does not in and of itself dictate the constitutional analysis that should apply to decisions to suppress them.”<sup>26</sup> While the Court has continued to recognize that a State’s interests is greatest when “a State regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices, or requires the disclosure of beneficial consumer information,” its recent cases have expressed serious doubts about state regulation that “rest[s] solely on the offensive assumption that the public will respond ‘irrationally’ to the truth” since “[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.”<sup>27</sup> The Court has respected both sides of this balance, striking down some regulations as impermissibly paternalist while upholding others as necessary for consumer protection.<sup>28</sup>

On today’s Court, no one agrees with *Valentine* that the First Amendment does not protect commercial speech at all. All nine Justices agree that commercial speech is entitled to some constitutional protection, and a number of Justices have called for a substantial expansion of the protection the First Amendment affords to commercial speech. For example, Justice Clarence Thomas has long taken the position that truthful, non-misleading commercial speech should receive the same level of scrutiny as political speech, rejecting the notion that there is any “philosophical or historical basis for asserting that ‘commercial’ speech is of ‘lower value’ than ‘noncommercial speech.’”<sup>29</sup> Justice Thomas would reject the *Central Hudson* framework and apply strict scrutiny “when the government seeks to restrict truthful speech in order to suppress the idea it conveys . . . whether or not the speech in question may be labeled ‘commercial.’”<sup>30</sup> “Whatever the power of the state to regulate commercial speech,” Justice Thomas has argued, “it may not use that power to limit the content of commercial speech . . . ‘for reasons unrelated to the preservation of a fair bargaining process.’ Such content-discriminatory regulation – like all other content-based regulation of speech – must be subjected to strict scrutiny.”<sup>31</sup> Justice Kennedy and Justice Scalia, too, have expressed “continuing concerns that the

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<sup>25</sup> See *Thompson*, 535 U.S. at 367-68; *Lorillard*, 533 U.S. at 554-555; *Greater New Orleans*, 527 U.S. at 184.

<sup>26</sup> *44 Liquormart, Inc., v. Rhode Island*, 517 U.S. 484, 501 (1996) (plurality opinion).

<sup>27</sup> *Id.* at 501, 503 (plurality opinion); see also *id.* at 523-526 (Thomas, J., concurring).

<sup>28</sup> Compare *Thompson*, 535 U.S. at 374 (“We have previously rejected the notion that the Government has an interest in preventing dissemination of truthful commercial information in order to prevent members of the public from making bad decisions with that information.”) and *44 Liquor Mart, supra* (striking down ban on advertising the retail price of alcoholic beverages) with *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995) (upholding Bar rule prohibiting personal injury lawyers from sending targeted direct mail solicitations to victims within 30 days of an accident) and *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324 (2010) (rejecting First Amendment challenge by bankruptcy attorneys to rule requiring them to disclose that they are debt-relief agencies).

<sup>29</sup> *44 Liquormart*, 517 U.S. at 523 (Thomas, J., concurring).

<sup>30</sup> *Lorillard*, 533 U.S. at 572 (Thomas, J., concurring).

<sup>31</sup> *Id.* at 577 (Thomas, J., concurring).

[*Central Hudson*] test gives insufficient protection to truthful, nonmisleading commercial speech,<sup>32</sup> but they have yet to join Justice Thomas' call for strict scrutiny.

## ***Sorrell v. IMS Health Inc. -- Lochnerizing the Court's Commercial Speech Doctrine?***

For many years, *Central Hudson* remained settled law, even as Justice Thomas and others criticized it. But, under the leadership of Chief Justice John Roberts, who in 2005 succeeded Chief Justice Rehnquist, the original dissenter from the Court's commercial speech cases, the Supreme Court has begun to break from *Central Hudson*. In *Sorrell v. IMS Health Inc.*,<sup>33</sup> the Court struck down a Vermont statute limiting the ability of pharmaceutical manufacturers to purchase and use for marketing purposes government-collected data regarding the prescribing practices of individual doctors as a violation of the First Amendment and called for a new standard of review – heightened scrutiny – to judge the validity of content-based regulations of commercial speech.

In an opinion authored by Justice Anthony Kennedy, and joined by the Court's other conservatives and by Justice Sotomayor, *Sorrell* changed the law in two important ways. First, the Court expanded the scope of protected commercial speech, finding a violation of the First Amendment even though the Vermont law only regulated the *use* of data collected under a government mandate and did not impose any limits on the speech of pharmaceutical companies. Second, and perhaps even more important, the Court held that the Vermont law was subject to heightened scrutiny because it was a content-based and speaker-based regulation of commercial speech, making a break from *Central Hudson's* intermediate level of scrutiny toward a new, more demanding test. Justice Breyer, joined by Justices Ginsburg and Kagan, authored a bitter dissent, arguing that the Court had distorted the meaning of the First Amendment by striking down an effort "inextricably related to a lawful governmental effort to regulate a commercial enterprise," and had "reawaken[ed] *Lochner's* pre-New Deal threat of substituting judicial for democratic decisionmaking where ordinary economic regulations is at issue."<sup>34</sup>

Justice Kennedy's opinion for the Court began its analysis not with the familiar *Central Hudson* framework, but instead with the premise that the Vermont law "enacts content- and speaker-based restrictions on the sale, disclosure and use of prescriber-identifying information" and hence "burdens disfavored speech by disfavored speakers."<sup>35</sup> Justice Kennedy dismissed the argument that the Vermont statute did not burden speech, but only regulated access to data, by making the point that "Vermont's statute could be compared with a law prohibiting trade magazines from purchasing or using ink."<sup>36</sup> In the majority's view, "even assuming . . . that prescriber-identifying information is a mere commodity," the statute's restriction on access to that commodity was a "content- and speaker-based burden on protected expression" that was designed to stifle the effectiveness of marketing by pharmaceutical

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<sup>32</sup> *Id.* at 571-72 (Kennedy, J., concurring).

<sup>33</sup> 131 S.Ct. 2653 (2011).

<sup>34</sup> *Id.* at 2673, 2685 (Breyer, J., dissenting).

<sup>35</sup> *Id.* at 2663.

<sup>36</sup> *Id.* at 2667.

companies and, hence, required heightened judicial scrutiny.<sup>37</sup> Thus, as Duke Law Professor Jedediah Purdy observed, “most of what the Vermont decision protects is not verbal expression . . . but simply the sale of data. *Sorrell* moves towards constitutionalizing an open market in information, at least where the data will inform marketing decisions . . . .”<sup>38</sup>

In dissent, Justice Breyer criticized the majority’s opinion precisely along these lines, arguing that the majority had distorted the meaning of the First Amendment in expanding the scope of protection from commercial speech to data. Justice Breyer reasoned that “Vermont’s statute neither forbids nor requires anyone to say anything, to engage in any form of symbolic speech, or to endorse any particular point of view, whether ideological or related to the sale of a product,” but instead simply “deprives pharmaceutical and data-mining companies of data, collected pursuant to the government’s regulatory mandate, that could help pharmaceutical companies create better sales messages.”<sup>39</sup> In Justice Breyer’s view, the majority’s finding of a constitutional violation was out of line with the First Amendment and the entire body of Supreme Court precedent interpreting it. “[T]his Court has *never* found that the *First Amendment* prohibits the government from restricting the use of information gathered pursuant to a regulatory mandate.”<sup>40</sup>

Justice Kennedy and Justice Breyer also bitterly divided on the standard of review applicable to the Vermont regulation. Echoing the language of his opinion in *Citizens United*, Justice Kennedy’s opinion for the Court held that “heightened judicial scrutiny is warranted” because Vermont’s law “on its face burdens disfavored speech by disfavored speakers,” portraying the law as an attempt “to tilt public debate in a preferred direction.”<sup>41</sup> Justice Kennedy found that “Vermont’s law enacts content- and speaker-based restrictions on the sale, disclosure, and use of prescriber-identifying information,” by limiting the ability of pharmaceutical companies to use this data for marketing purposes, even as it allowed others to make use of the information.<sup>42</sup> As noted above, rather than turning to the established *Central Hudson* commercial speech framework, Justice Kennedy’s opinion applied the Court’s First Amendment precedents requiring heightened scrutiny for laws that discriminate on the basis of content. While Justice Kennedy’s opinion argued that the Vermont statute was invalid either under *Central Hudson*’s “special commercial speech inquiry or a stricter form of judicial scrutiny,”<sup>43</sup> there is little doubt that *Sorrell* took a big step away from *Central Hudson* by demanding that content- and speaker-based regulations of commercial speech be subject to “heightened scrutiny.”

In dissent, Justice Breyer argued that the majority’s call for heightened scrutiny was inconsistent with binding precedent, which had never before required this sort of “greater scrutiny when regulatory activity affects commercial speech,” and would “open a Pandora’s Box of First Amendment challenges to many ordinary regulatory practices,” since much commercial speech regulation “necessarily draws

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<sup>37</sup> *Id.*

<sup>38</sup> Jedediah Purdy, *The Roberts Court v. America*, 23 DEMOCRACY J. 46, 51 (Winter 2012).

<sup>39</sup> *Sorrell*, 131 S. Ct. at 2673, 2675 (Breyer, J., dissenting).

<sup>40</sup> *Id.* at 2677 (Breyer, J., dissenting) (emphasis in original).

<sup>41</sup> *Id.* at 2663-64, 2671.

<sup>42</sup> *Id.* at 2663.

<sup>43</sup> *Id.* at 2667.

distinctions on the basis of content.”<sup>44</sup> In short, Justice Breyer argued, “to require ‘heightened scrutiny’ on this basis is to require its application early and often when the State seeks to regulate industry. . . . [G]iven the sheer quantity of regulatory initiatives that touch on commercial messages, the Court’s vision of its reviewing task threatens to return us to a happily bygone era when judges scrutinized legislation for its interference with economic liberty.”<sup>45</sup>

Justice Breyer firmly rejected that approach. “Since ordinary regulatory programs can affect speech, particularly commercial speech, in myriad ways,” Breyer explained, “to apply a ‘heightened’ First Amendment standard of review whenever such a program burdens speech would transfer from legislatures to judges the primary power to weigh ends and to choose means, threatening to distort or undermine legitimate legislative objectives.”<sup>46</sup> Rather than “risk . . . a ‘retur[n] to the bygone era of *Lochner v. New York*, in which it was common practice for this Court to strike down economic regulations adopted by a State based on the Court’s own notions of the most appropriate means for the State to implement its considered policies,”<sup>47</sup> the dissenters would have upheld Vermont’s regulation under *Central Hudson*, concluding that the limited burden imposed was amply justified by the government’s interest in the protection of public health and the privacy of records.

### **The Future of Commercial Speech After *Sorrell***

The opinions in *Sorrell* illustrate that we are on the cusp of possibly sweeping changes in the Supreme Court’s commercial speech doctrine. After decades in which commercial speech was recognized to have a subordinate status in the First Amendment pantheon, Justice Kennedy’s opinion in *Sorrell* suggests that a majority of the Court may well be ready to displace *Central Hudson*’s intermediate scrutiny standard and invoke the rigorous standards that the Court has applied, outside the context of commercial speech, in striking down content- and speaker-based regulations of speech. As one observer noted, in the wake of *Sorrell*, “[t]he prospect of enhanced judicial scrutiny casts a shadow over regulation of health information, including food, drugs, alcohol, and tobacco – almost all of which is speaker and viewpoint-based.”<sup>48</sup>

At this critical juncture, moving through the lower federal courts are a set of cases challenging the Family Smoking Prevention and Tobacco Control Act, a 2009 measure passed by Congress and signed into law by President Obama, designed to toughen federal regulation of tobacco advertising and promotion. The Act, among other things, requires tobacco manufacturers to reserve a significant portion of tobacco packaging for the display of health warnings (including graphic images designed to illustrate the dangers of smoking), limits tobacco print advertising to use of black text on a white background, and prohibits tobacco manufacturers from conveying the impression that tobacco products are approved or safer by virtue of being regulated by the FDA. So far, the lower federal courts have been split on the

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<sup>44</sup> *Id.* at 2677, 2685, 2677 (Breyer, J., dissenting).

<sup>45</sup> *Id.* at 2678, 2679 (Breyer, J., dissenting).

<sup>46</sup> *Id.* at 2675.

<sup>47</sup> *Id.* (quoting *Central Hudson*, 447 U.S. at 589 (Rehnquist, J., dissenting)).

<sup>48</sup> See Lawrence Gostin, *Marketing Pharmaceuticals: A Constitutional Right to Sell Prescriber-Identified Data*, 307 *JAMA* 787, 787 (Feb. 2012).

Act's constitutionality. In March of this year, in *Discount Tobacco City & Lottery, Inc. v. United States*,<sup>49</sup> a divided panel of the Sixth Circuit upheld the vast majority of the Act's provisions under *Central Hudson*, rejecting the plaintiff's argument that strict scrutiny should apply. Meanwhile, in *R.J. Reynolds v. United States Food & Drug Admin.*,<sup>50</sup> a district court in Washington D.C. invalidated the new graphic warnings, agreeing with the dissent in *Discount Tobacco*. Should the D.C. Circuit agree, the case will almost certainly prompt Supreme Court review and set the stage for an important new clash over the First Amendment's constraints on the power of the government to require tobacco manufacturers to disclose the undisputed risks that tobacco products pose to the American public.

The challenge to the federal government's effort to impose tougher standards on the tobacco industry may be just the tip of the iceberg. *Sorrell's* demand that courts apply heightened scrutiny to content- and speaker-based regulations of speech as well as data relevant to commercial speech might not only call into question federal tobacco regulation, but also federal drug labeling and federal securities laws that impose content-based restrictions on commercial speech.<sup>51</sup> For example, in enforcing the Federal Food, Drug and Cosmetic Act, the FDA prohibits drug manufacturers from advertising and promoting uses of their drugs not approved by the FDA, while federal securities law prohibits anyone from writing about a security in return for compensation, unless that compensation is fully disclosed.<sup>52</sup>

Even more important, *Sorrell's* expansive understanding of the reach of the First Amendment suggests that restrictions on the sale of data will also be subject to heightened scrutiny, imposing a heavy burden of justification on the government to protect the privacy of "personal medical information in the possession of health care providers, financial information in the possession of financial institutions, purchasing histories in the possession of retailers, including online retailers, such as Amazon.com, search information in the possession of search engines such as Google . . . and any number of other forms of personal data which individuals voluntarily share with private sector firms."<sup>53</sup> Indeed, Justice Kennedy is already on record expressing skepticism of federal regulation of credit report data, suggesting that federal regulation that prevents credit reporting agencies from selling the names and addresses of individuals to marketers runs afoul of the First Amendment.<sup>54</sup> In short, the Supreme Court's protection of commercial speech is on a collision course with government efforts to protect personal privacy in the internet age. There are few issues as resonant to the lives of 21<sup>st</sup> Century Americans as the Court's resolution of these legal challenges.

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<sup>49</sup> 674 F.3d 509 (6<sup>th</sup> Cir. 2012).

<sup>50</sup> 2012 WL 653828, No. 11-1482 (D.D.C. Feb., 29, 2012).

<sup>51</sup> *Sorrell*, 131 S. Ct. at 2677-78 (Breyer, J., dissenting) (discussing areas where federal and state laws impose content-based regulation of commercial speech); see also Richard Samp, *Sorrell v. IMS Health: Protecting Free Speech or Resurrecting Lochner?* 2011 Cato Sup. Ct. Rev. 129, 140-43 (2011) (discussing federal regulation of prescription drugs and securities as two areas where "*Sorrell* . . . calls into question the constitutionality of speech restrictions").

<sup>52</sup> See Samp, *supra*, at 140-43 (discussing these two examples).

<sup>53</sup> Asutosh Bhagwat, *Sorrell v. IMS Health: Details, Detailing, and the Death of Privacy* 16-17 (Feb. 2012) (available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1974611](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1974611)).

<sup>54</sup> *Trans Union LLC v. FTC*, 536 U.S. 915 (2002) (Kennedy, J., dissenting from denial of certiorari).