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## NO REGRETS (ALMOST): AFTER *VIRGINIA BOARD OF PHARMACY*

Alan B. Morrison\*

### INTRODUCTION

My basic idea behind the case that became *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*<sup>1</sup> (*Virginia Pharmacy*) was that the emphasis under the First Amendment should be on the impact of denying consumers access to useful information, rather than on the restrictions on the seller or would-be speaker.<sup>2</sup> *Virginia Pharmacy* involved a total ban on the advertising of the price of prescription drugs by pharmacists.<sup>3</sup> Pharmacists could advertise, and they could compete on price for prescription drugs, but they could not tell anyone what they were charging for a drug, unless the customer came into the store or called on the phone.<sup>4</sup> Many consumers were living on low or fixed incomes, and drug prices were a significant part of their expenses, yet they were being denied access to the information needed to find the most affordable drug that met their needs.<sup>5</sup>

At the time the case was filed, I had just begun to serve as the director of the newly formed Public Citizen Litigation Group, with Ralph Nader as my boss. One of our goals was to increase the availability and affordability of legal services for ordinary people, and I had identified the total ban on all lawyer advertising as a promising area to challenge. The prescription drug ban on price advertising was chosen as our first advertising case because, while false advertising can be banned, the Virginia law applied to useful information whose truth (accuracy) could easily be verified. With a win here, we planned to move on to the lawyer advertising ban, with an intermediate stop in a case in which the local medical society threatened to discipline doctors if they provided factual information, such as where they went to

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\* Lerner Family Associate Dean for Public Interest & Public Service Law, George Washington University Law School. Thanks to my former Public Citizen Litigation Group colleagues, William Schultz and David Vladeck, for commenting on a draft of this Essay and for their wise insights gathered from many years of experience in commercial speech cases in a variety of contexts. My current colleague, Catherine Ross, also had a number of valuable insights.

<sup>1</sup> 425 U.S. 748 (1976).

<sup>2</sup> Alan B. Morrison, *How We Got the Commercial Speech Doctrine: An Originalist's Recollections*, 54 CASE W. RES. L. REV. 1189, 1192 (2004).

<sup>3</sup> 425 U.S. at 749–50.

<sup>4</sup> *See id.* at 752.

<sup>5</sup> *Id.* at 763.

medical school, whether they were board certified in a specialty, whether they spoke a foreign language, and whether they accepted Medicare and Medicaid. Thus, the application of *Virginia Pharmacy* to lawyer advertising was not simply a side effect, but where we hoped to end. And I was prepared for a question at oral argument on that very subject, which came out in a somewhat different form than I had expected.<sup>6</sup>

In the years since then, people who knew of my connection to *Virginia Pharmacy* would ask whether I was pleased with how the case had played out, especially regarding lawyer advertising, which I took to mean the kind featured on late night television. My answer was generally along the lines of not liking some aspects, but that the ability of consumers to obtain important information from lawyer advertising far outweighed the sometimes outlandish ways in which the information was conveyed. When the invitation to participate in this symposium arrived, I decided to take the opportunity to look over the cases in the Supreme Court and the circuit courts of appeals to see where they had taken the *Virginia Pharmacy* case and see whether my answer was still, “No regrets.”

Before looking at those cases, I need to explain my criteria for regrets. Until *Virginia Pharmacy*, commercial speech had no First Amendment protection, and afterwards, particularly after *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*,<sup>7</sup> it received substantial protection, although less than political or ideological speech. Our argument in *Virginia Pharmacy* did not urge the Court to create a lower category of speech, but that is how it ended up.<sup>8</sup> When I was asked about how the case had played out, the questions were not directed toward whether the Court had given too little protection for commercial speech, but too much. Therefore, in this Essay, I will not discuss cases in which I think the Court restricted too much speech (often as applied to lawyers), but only the most significant ones where it gave what I consider too much protection, i.e., the Court failed to consider other important interests besides that of the speaker.

There is a second area that I have chosen to omit from any extended discussion. This area involves cases in which a government agency has directed a person (generally a business) to include additional information in an advertisement or other statement that the business is required or has chosen to disseminate, referred to in some contexts as compelled speech.<sup>9</sup> The information usually relates to a commercial activity

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<sup>6</sup> Justice Byron White asked me, “Well, I suppose Mr. Morrison, that your next case is lawyer advertising?” When the laughter died down, the Justice, quite uncharacteristically, said, “You don’t have to answer that question,” presumably because he thought he knew what I was going to say. But he would have been wrong because my answer would have been, “No, our next case is against doctors.” I also had a more substantive answer: “The principles in this case would apply to rules on lawyer advertising, but the outcome would depend on the specifics of the rule, the advertisement at issue, and the rationales for the ban or restriction.”

<sup>7</sup> 447 U.S. 557 (1980).

<sup>8</sup> See *id.* at 562–63; see also *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 637 (1985).

<sup>9</sup> See *Zauderer*, 471 U.S. at 650–51.

of the business, and the argument is made that the commercial speech doctrine of *Virginia Pharmacy* protects the business from having to make the additional statement.<sup>10</sup> The relevance of commercial speech to compelled disclosure first arose in a case in which I was counsel for petitioner in the Supreme Court, *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*.<sup>11</sup> The main issue was whether Ohio could discipline a lawyer who advertised for women injured by a Dalkon Shield by including a drawing of the device, which enabled many women to connect their injuries to a particular device when they did not know its name because their doctor has simply inserted it in them.<sup>12</sup> The disciplinary authority also charged Mr. Zauderer with failure to disclose that, under the law then in effect in Ohio, his statement that there would be no cost to the plaintiff if she did not prevail, was incomplete.<sup>13</sup> That was because she might have been liable for the defendant's costs (even though as a practical matter in personal injury cases, defendants almost never made such a claim).<sup>14</sup> Zauderer prevailed on the drawing charge, but lost on the failure to disclose, even though there was no express requirement that he had not followed.<sup>15</sup>

In recent years, businesses have challenged agency disclosure requirements, arguing that they cannot apply it to at least some categories of commercial speech.<sup>16</sup> In my view, *Virginia Pharmacy* tells a government what it must allow businesses to say, but has little, if any, relevance on what they must say that they would prefer to omit. Thus, if commercial speech did not have First Amendment protection, and a state chose to allow limited lawyer advertising, the Court in *Zauderer* would still have upheld a rule requiring additional disclosures over a challenge that the First Amendment did not permit compelled speech, although in other commercial settings it might have been struck down.<sup>17</sup> To me, the *Central Hudson* analysis has no place in cases like that, and the main focus should be on the legitimacy of the basis on which the government is imposing a form of compelled speech. That question would be answered under the applicable statute, if an administrative action, or under other provisions of the Constitution, such as the Equal Protection Clause. To be sure, the same kind of inquiries as to the fit between ends and means found in *Central Hudson*<sup>18</sup> would likely be prominent in such a case, although not because it involved

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<sup>10</sup> *See id.*

<sup>11</sup> 471 U.S. 626 (1985).

<sup>12</sup> *Id.* at 630–32, 647.

<sup>13</sup> *Id.* at 633.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 647–49, 650–52; *see id.* at 632–33 n.4.

<sup>16</sup> *See, e.g., Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 20–21 (D.C. Cir. 2014) (en banc).

<sup>17</sup> *See, e.g., Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 4, 20–21 (1986) (overturning an order requiring utility to include ratepayer solicitation in regular billing envelope).

<sup>18</sup> 447 U.S. 557, 566 (1980).

commercial speech. But whatever the analysis, the commercial speech doctrine from *Virginia Pharmacy* should not, and normally does not, play a significant role in the outcome. For that reason, I do not include those cases in my calculation of regrets.

#### I. MISAPPLICATIONS OF THE DOCTRINE AND WHY THEY HAPPEN

My first regret category involves those cases in which the Court applied the four-part *Central Hudson* commercial speech doctrine<sup>19</sup> in a way that gave what I consider undue weight to the interest of the advertiser and too little weight to whether the information was useful to the listener. Of course, any time that a court establishes a multi-part test, its application in a given case is bound to provoke controversy. Although I did not propose such a test in *Virginia Pharmacy*, I must assume some responsibility for urging the adoption of a doctrine that has led to some unfortunate results, mainly as applied to the promotion of tobacco products. For example, in *Lorillard Tobacco Co. v. Reilly*,<sup>20</sup> Massachusetts adopted regulations prohibiting indoor, point-of-sale advertising of smokeless tobacco and cigars lower than five feet from the floor of retail establishments located within 1000 feet of a school or playground, as a means of limiting the impact of those ads on children.<sup>21</sup> The Court noted that the 1000-foot rule as applied to major cities had a very widespread impact,<sup>22</sup> and it doubted that the rule would have much of an impact on preventing underage use of tobacco products other than cigarettes (which were covered by federal law<sup>23</sup>).

But the nub of why the Court found that the regulations violated the First Amendment is summed up in these sentences:

We must consider that tobacco retailers and manufacturers have an interest in conveying truthful information about their products to adults, and adults have a corresponding interest in receiving truthful information about tobacco products.

....

In addition, a retailer in Massachusetts may have no means of communicating to passersby on the street that it sells tobacco products because alternative forms of advertisement, like newspapers, do not allow that retailer to propose an instant transaction in the way that onsite advertising does.<sup>24</sup>

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<sup>19</sup> *See id.*

<sup>20</sup> 533 U.S. 525 (2001).

<sup>21</sup> *Id.* at 533–36.

<sup>22</sup> *Id.* at 562–63.

<sup>23</sup> 15 U.S.C. §§ 1331–1341 (2012).

<sup>24</sup> *Lorillard*, 533 U.S. at 564–65.

What the Court never asked was whether the signs conveyed any information that was useful to consumers,<sup>25</sup> beyond the fact that a particular brand of tobacco products was for sale at a location where adults (the only legal buyers) almost certainly would know or assume that the products could be purchased there. And if they did not know, all they had to do was walk in the door or ask the person right in front of them. By contrast, in *Virginia Pharmacy*, we emphasized that consumers could not, as a practical matter, obtain the highly useful information about where lower-priced prescription drugs were sold so long as the advertisement ban was in place.<sup>26</sup> I had hoped that, as the commercial speech doctrine developed, the utility of the information to the consumer would be part of the balance, instead of simply asking whether the challenged statements were truthful. If there had been that balancing, some of the cases might have come out differently, especially where the only information provided was the name of the product being sold, without even a mention of its price.

A further illustration, also in the tobacco context, of the willingness of courts to find that the balance tips in favor of sellers, even when the disputed portions of the ad provide no useful information, is the final portion of *Discount Tobacco City & Lottery, Inc. v. United States*.<sup>27</sup> Although the court largely sided with the government in upholding the laws designed to prevent cigarette makers from influencing those under age eighteen to try their products, it nonetheless concluded that “the provision of the Act banning the use of color and graphics in tobacco advertising is vastly overbroad,” citing *Zauderer* with respect to graphics.<sup>28</sup> Had the court focused on the utility of the disputed aspect of the advertisement, it would have distinguished *Zauderer*, where the drawing of the IUD was found to be a significant factor in helping women identify the product as the one that caused their injuries, and then connected them with someone who was willing and able to represent them.<sup>29</sup> By contrast, the color and graphics here served no useful function to the consumer, although from the manufacturer’s perspective, it supposedly helped to sell cigarettes.<sup>30</sup>

## II. THE FIRST AMENDMENT SHOULD PERMIT DISCOURAGING OF LEGAL, BUT POTENTIALLY HARMFUL, ACTIVITIES

One approach that was followed for a brief time, but then was rejected, allowed a state to impose some restrictions on commercial speech if it had a legitimate

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<sup>25</sup> See *id.* at 554–56 (using *Central Hudson*’s four-part test, which does not include usefulness to consumer).

<sup>26</sup> *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 763–64 (1976).

<sup>27</sup> 674 F.3d 509 (6th Cir. 2012), *cert. denied*, 133 S. Ct. 1996 (2013).

<sup>28</sup> *Id.* at 547–48, 569 (citing *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 650–51 (1985)).

<sup>29</sup> See *Zauderer*, 471 U.S. at 631, 647.

<sup>30</sup> The plaintiffs in *Discount Tobacco City* argued the graphics served to “inform[ ] [consumers] about their products . . . , including how to use novel products[.]” 674 F.3d at 546.

interest in discouraging certain lawful activities. Thus, in *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*,<sup>31</sup> the Court, by a 5–4 vote with conservatives in the majority, upheld a law that prohibited casinos from advertising to locals as a means of discouraging their legal patronage at gaming places.<sup>32</sup> As then-Justice William Rehnquist put it for the majority, “the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling[.]”<sup>33</sup> The Court continued on that theme as follows:

It would surely be a Pyrrhic victory for casino owners such as appellant to gain recognition of a First Amendment right to advertise their casinos to the residents of Puerto Rico, only to thereby force the legislature into banning casino gambling by residents altogether. It would just as surely be a strange constitutional doctrine which would concede to the legislature the authority to totally ban a product or activity, but deny to the legislature the authority to forbid the stimulation of demand for the product or activity through advertising on behalf of those who would profit from such increased demand.<sup>34</sup>

However, that approach was specifically disavowed and rejected in *44 Liquormart, Inc. v. Rhode Island*.<sup>35</sup> As a result, the government is faced with the often-unpleasant choice of making a product unlawful or placing no limits on its truthful promotion. Thus, in *Educational Media Co. at Virginia Tech v. Insley*,<sup>36</sup> the court struck down a ban on advertising of alcoholic beverages in college newspapers where the majority of the students were legally able to purchase alcoholic beverages, and not encouraging its use was insufficient to override the sellers’ interest in getting out their message.<sup>37</sup> Similarly, in *Nordyke v. Santa Clara County*,<sup>38</sup> the court set aside a government restriction contained in a fairgrounds lease that forbade the offering of guns for sale on the premises, citing the language in *Virginia Pharmacy* that gave First Amendment protection to speech that does no more than propose a commercial transaction.<sup>39</sup> The county amended its law to forbid only the possession of firearms on the fairgrounds, and the court upheld that statute, even though it had the effect

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<sup>31</sup> 478 U.S. 328 (1986), *abrogated by* *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (plurality opinion).

<sup>32</sup> *Id.* at 330–33, 348.

<sup>33</sup> *Id.* at 345–46.

<sup>34</sup> *Id.* at 346.

<sup>35</sup> 517 U.S. 484, 508–14 (1996) (plurality opinion).

<sup>36</sup> 731 F.3d 291 (4th Cir. 2013).

<sup>37</sup> *Id.* at 294, 298, 301–02.

<sup>38</sup> 110 F.3d 707 (9th Cir. 1997).

<sup>39</sup> *Id.* at 708–10, 713 (citing *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976)).

(and perhaps the intent) of severely limiting the likelihood that anyone would actually make a purchase there.<sup>40</sup> Assuming that a state lessor can violate the First Amendment by including speech related restrictions in its leases, it is by no means clear why the state should not be allowed to impose non-discriminatory bans on the promotion of certain dangerous products, instead of having to take the further step of banning them entirely. No sensible person today would apply prohibition to cigarettes, but, especially for advertisements that convey no useful information, perhaps a state should be permitted to take the lesser step of limiting advertisements and promotional materials as an alternative.

Consider two examples. In *Passions Video, Inc., v. Nixon*,<sup>41</sup> the court sided with the owners of adult cabarets and sexually oriented businesses that were barred from having any form of advertising, with the exception of being allowed two exterior on-premises signs if within one mile of a state highway.<sup>42</sup> For a legal business not to be able to tell the public its name and location was found to be excessive and not outweighed by the alleged secondary effects of “[improving] traffic safety, [limiting] harm to minors, and [reducing] prostitution, crime, juvenile delinquency, deterioration in property values, and lethargy in neighborhood improvement projects.”<sup>43</sup> But the same deprivation of basic information in the form of a law banning all advertising of brothels in Nevada, including its name, location, or phone number, even in the counties where prostitution was legal, was upheld in *Coyote Publishing, Inc. v. Miller*.<sup>44</sup> The court purported to accept that *Posadas* was not good law, but it nonetheless upheld the law with very much *Posadas*-like language: “Nevada also argues for an exception specific to prostitution. We agree that there are strong reasons why the sale of sexual services, in particular, ought to be treated differently than other advertising bans on ‘vice’ activities.”<sup>45</sup> It is perhaps understandable why the U.S. Supreme Court declined to hear the case, but it is hard to argue with the newspaper plaintiffs that they only sought to convey factually correct information that was useful to those adults who were legally entitled to act on it.

There is one case which may illustrate the proposition that allowing commercial speech to be given does not mean the public will accept the proposed commercial transaction. In Ann Arbor, Michigan, as in most cities, a permit is required to operate a restaurant.<sup>46</sup> As a condition of getting the permit, the owner was forbidden from using the name of its chain—“Sambo’s”—because it was seen as demeaning to blacks.<sup>47</sup> The Court of Appeals overturned that condition, even though it agreed that

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<sup>40</sup> Nordyke v. King, 319 F.3d 1185, 1190–92 (9th Cir. 2003).

<sup>41</sup> 458 F.3d 837 (8th Cir. 2006).

<sup>42</sup> *Id.* at 839.

<sup>43</sup> *Id.* at 842–44 (alterations in original) (quoting MO. REV. STAT. § 226.531.5 (West 2004)).

<sup>44</sup> 598 F.3d 592, 596–97 (9th Cir. 2010), *cert. denied*, 562 U.S. 1217 (2011).

<sup>45</sup> *Id.* at 600.

<sup>46</sup> *See Sambo’s Rests., Inc. v. City of Ann Arbor*, 663 F.2d 686, 687 (6th Cir. 1981).

<sup>47</sup> *Id.* at 687–88.



the name was tasteless and offensive.<sup>48</sup> The victory was for naught, as less than a month after issued, Sambo's filed for bankruptcy, and now all but one of its 1,117 outlets is no longer in operation.<sup>49</sup>

### III. CORPORATE SPEECH, SEEN BROADLY

Depending on how *Virginia Pharmacy* is read, it can be made to seem responsible at least in part for the Court's decision in *Citizens United v. FEC*,<sup>50</sup> which upheld the right of for-profit corporations under the First Amendment to make unlimited independent political expenditures in connection with an election.<sup>51</sup> Many of the obvious beneficiaries of *Virginia Pharmacy* were pharmacies operating in corporate form, and so the decision does at least hold that some forms of corporate speech have constitutional protection. But even before *Virginia Pharmacy*, corporations had some First Amendment rights. The New York Times is a corporation, and it was the defendant in the most important libel case under the First Amendment, *New York Times Co. v. Sullivan*,<sup>52</sup> in which the allegedly libelous speech was contained in a paid advertisement.<sup>53</sup> Moreover, the conduct at issue in *Citizens United* was not a commercial transaction, but the payment to create a political movie attacking a candidate for president, which presumably supplied information that was useful to some voters.<sup>54</sup> Seen from that perspective, *Virginia Pharmacy* is not to blame, but that is not the end of the story.

Two years after *Virginia Pharmacy*, the Court heard *First National Bank of Boston v. Bellotti*,<sup>55</sup> a challenge to the Massachusetts statute that forbade corporations from making expenditures to support or oppose a ballot initiative, except where the initiative would directly affect them.<sup>56</sup> In setting aside the ban, the Court noted that *Virginia Pharmacy* had held that the First Amendment did not permit the banning of all commercial speech by corporations.<sup>57</sup> *Citizens United*, in turn, cited *Bellotti* for the proposition "that First Amendment protection extends to corporations."<sup>58</sup> From there the end was not much in doubt, but that was mainly because the *Citizens United* majority saw no difference between making a speech and spending

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<sup>48</sup> *Id.* at 694–95.

<sup>49</sup> *Chapter 11 Petition Filed by Sambo's*, N.Y. TIMES (Nov. 29, 1981), <http://www.nytimes.com/1981/11/28/business/chapter-11-petition-is-filed-by-sambo-s.html> [<https://perma.cc/NQK4-EK9E>]; SAMBO'S, <http://sambosrestaurant.com/#home> [<https://perma.cc/9AHP-PPTH>].

<sup>50</sup> 558 U.S. 310 (2010).

<sup>51</sup> *Id.* at 365, 372.

<sup>52</sup> 376 U.S. 254 (1964).

<sup>53</sup> *Id.* at 256–57.

<sup>54</sup> 558 U.S. at 319–20.

<sup>55</sup> 435 U.S. 765 (1978).

<sup>56</sup> *Id.* at 767–68.

<sup>57</sup> *Id.* at 783.

<sup>58</sup> 558 U.S. at 342 (citing *Bellotti*, 435 U.S. at 778 n.14).

millions on an advertising campaign.<sup>59</sup> However, the blame for that step must go to the Court's pre-*Virginia Pharmacy* decision in *Buckley v. Valeo*,<sup>60</sup> where the Court ruled that any limits on the amount of election-related independent expenditures by individuals violate the First Amendment.<sup>61</sup> I regret that the Court took the next step in *Citizens United*, but that step does not inevitably flow from *Virginia Pharmacy*, and so my regret is quite small and one for which I am willing to take a little, but not very much, responsibility.<sup>62</sup>

#### IV. THE SPEECH TAIL WAGGING THE CONDUCT DOG

To me, the single most regrettable misuse of the commercial speech doctrine has occurred in those cases, to which I now turn, in which a limitation on speech is a small part of a larger regulatory program, but the speech element enabled the business challenger to accomplish through the back door what would be seen as an improper substantive due process challenge if made directly. Because the right of pharmacists to reduce their prices as a form of competition was not at issue, there could be no claim that the speech ban at issue in *Virginia Pharmacy* was a disguised substantive due process challenge to an underlying ban on conduct.

The first of these regulatory speech cases is *Thompson v. Western States Medical Center*.<sup>63</sup> Under a 1997 amendment to the Federal Food, Drug, and Cosmetic Act, there is a specific exemption for "compounded drugs" from the Food and Drug Administration's (FDA) standard drug approval process.<sup>64</sup> It applies "as long as the providers of those drugs abide by several restrictions, including that they refrain from advertising or promoting particular compounded drugs."<sup>65</sup> As the Court described the practice, "[c]ompounding is typically used to prepare medications that are not commercially available, such as medication for a patient who is allergic to an ingredient in a mass-produced product."<sup>66</sup> The parties agreed that the reason for the advertising ban was to prevent businesses from making large quantities of the compounds, which then might be substituted—perhaps inappropriately—for the prescribed

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<sup>59</sup> See *id.* at 371–72.

<sup>60</sup> 424 U.S. 1, 44–51 (1976) (per curiam).

<sup>61</sup> *Id.* at 39, 51.

<sup>62</sup> The extension of *Buckley* from individuals to corporations has not been the major cause of the massive influx of millions of dollars into recent elections. Rather, most of that money is coming from individuals, not corporations, and that can only be reversed if that part of *Buckley* is narrowed. Alan B. Morrison, *McCutcheon v. FEC and Roberts v. Breyer: They're Both Right and They're Both Wrong*, AM. CONST. SOC'Y (Oct. 15, 2014), <http://www.acslaw.org/publications/issue-briefs/mccutcheon-v-fec-and-roberts-v-breyer-theyre-both-right-and-theyre-both> [<https://perma.cc/R6H8-V8HX>].

<sup>63</sup> 535 U.S. 357 (2002).

<sup>64</sup> *Id.* at 360 (citing 21 U.S.C. § 353a (2000)).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 361.

drug.<sup>67</sup> There was no effort to discourage the use of drugs compounded to meet the needs of an individual; indeed, the exemption shows that Congress's intent was quite the opposite.<sup>68</sup> Nonetheless, the Court struck down the ban on advertising, even though it was there only to assure that compounding of drugs was properly controlled.<sup>69</sup>

Despite the speech-based conclusion of the majority, Justice Breyer, in dissent for himself, the Chief Justice, and Justices Stevens and Ginsburg, saw the two parts as inextricably intertwined: "I do not believe that Congress could have achieved its safety objectives in significantly less restrictive ways."<sup>70</sup> Although the majority suggested that there were other means of achieving the safety goals of the law,<sup>71</sup> its suggestions involved difficult to enforce limits on drug production.<sup>72</sup> Moreover, the majority failed to suggest any non-safety related reason why Congress imposed the ban, or why the Court's judgment on how to protect the public should trump that of Congress.<sup>73</sup> To be sure, patients might learn that a particular compound was available, but they could not use that information unless they had a prescription for it, making any gain in useful information for the consumer quite marginal.

Perhaps the most far-reaching of the cases in which commercial speech was used to set aside a regulatory scheme is *Sorrell v. IMS Health, Inc.*<sup>74</sup> Vermont's Prescription Confidentiality Law,<sup>75</sup> which was enacted to protect the privacy of prescribing physicians from drug detailers (sales reps), provided that, absent the prescribing doctor's consent, prescriber-identifying information may not be sold by pharmacies and similar entities, or disclosed by those entities for marketing purposes, or used for marketing by pharmaceutical manufacturers.<sup>76</sup> The plaintiffs were data miners who bought data from pharmacies and sold it to drug manufacturers, some of whom joined as plaintiffs.<sup>77</sup> On one side, Vermont argued "that its prohibitions safeguard medical privacy and diminish the likelihood that marketing will lead to prescription decisions not in the best interests of patients or the State."<sup>78</sup> The plaintiffs countered that "[k]nowledge of a physician's prescription practices—called 'prescriber-identifying information'—enables a detailer better to ascertain which doctors are likely to be interested in a particular drug and how best to present a particular sales message."<sup>79</sup>

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<sup>67</sup> See *id.* at 362.

<sup>68</sup> See *id.* at 364–65.

<sup>69</sup> *Id.* at 371; see also *id.* at 360–65.

<sup>70</sup> *Id.* at 385 (Breyer, J., dissenting).

<sup>71</sup> *Id.* at 372 (majority opinion).

<sup>72</sup> *Id.* at 385–86 (Breyer, J., dissenting).

<sup>73</sup> See *id.* at 386.

<sup>74</sup> 564 U.S. 552 (2011).

<sup>75</sup> VT. STAT. ANN. tit. 18, § 4631 (2010); *Sorrell*, 564 U.S. at 558–59.

<sup>76</sup> *Sorrell*, 564 U.S. at 558–61.

<sup>77</sup> *Id.* at 561.

<sup>78</sup> *Id.* at 557.

<sup>79</sup> *Id.* at 558.

The two arguments sounded like a routine debate over the proper balance between privacy and patients' safety, on the one hand, versus the ability to market a useful and legal product on the other. But the trump card once again was commercial speech. The basis for invoking commercial speech is that the law "bars pharmaceutical manufacturers and pharmaceutical marketers from using prescriber-identifying information for marketing, again absent the prescriber's consent."<sup>80</sup> The data could be sold for other purposes, but it seems unlikely that anyone would pay for prescriber specific data, nor is it clear what use it would be outside of the drug detailer context. Reading the majority opinion, I sensed that the majority thought that the law did not serve a legitimate purpose—protecting doctors from being asked questions by detailers whom they could simply refuse to see—and was able to use the speech suppressing aspect as a basis for striking it down, without invoking substantive due process.

In dissent, Justice Breyer, joined by Justices Ginsburg and Kagan, saw the law differently: "In my view, this effect on expression is inextricably related to a lawful governmental effort to regulate a commercial enterprise. The First Amendment does not require courts to apply a special 'heightened' standard of review when reviewing such an effort."<sup>81</sup> His dissent further argued as follows:

To apply a strict First Amendment standard virtually as a matter of course when a court reviews ordinary economic regulatory programs (even if that program has a modest impact upon a firm's ability to shape a commercial message) would work at cross-purposes with this more basic constitutional approach. Since ordinary regulatory programs can affect speech, particularly commercial speech, in myriad ways, 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>82</sup>

If, as I argued and the Court held in *Virginia Pharmacy*, commercial speech should be judged based in part on whether the information being conveyed is useful to the listener, the majority's decision in *Sorrell* is mistaken. The supposed listeners are the doctors,<sup>83</sup> who know what they have been prescribing or could easily find out. It is mainly because they are not prescribing what the detailers are selling that they are being "provided" the information about their prescribing practices.<sup>84</sup> Whatever else underlies *Sorrell*, it is not a concern that the recipients of the information at

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<sup>80</sup> *Id.* at 559.

<sup>81</sup> *Id.* at 581 (Breyer, J., dissenting).

<sup>82</sup> *Id.* at 584–85.

<sup>83</sup> *See id.* at 557–58 (majority opinion).

<sup>84</sup> *See id.*

issue are kept in the dark against their will. Justice Breyer does not directly accuse the majority of bringing back substantive due process under a First Amendment veil,<sup>85</sup> but that is the import of his dissent.

Another example of the speech tail wagging the conduct dog is *U.S. West, Inc. v. FCC*.<sup>86</sup> The relevant statute forbade telecommunications companies from disseminating or using consumer privacy information without the consent of the customer.<sup>87</sup> The FCC decided that affirmative approval (opt in) by the consumer was needed, whereas the company wanted only opt out, which would have meant many more customers would have “consented.”<sup>88</sup> It argued that the failure to permit opt out was an unconstitutional infringement on its First Amendment rights to engage in commercial speech.<sup>89</sup> A divided Court of Appeals agreed with the challengers, citing *Virginia Pharmacy*.<sup>90</sup> Judge Brisco in dissent responded that the opt-out method would not meet the statutory goals of privacy protection because “unlike the opt-in method, [it] does not guarantee that a customer will make an informed decision about usage of his or her individually identifiable [customer proprietary network information].”<sup>91</sup> It is difficult to fathom the basis for concluding that the difference between an opt-in and an opt-out approval process, in order to protect customer privacy, can rise to the level of a First Amendment issue simply because the person that obtains any such approval will be disseminating the customer’s presumptively private information and is doing so for a commercial purpose.<sup>92</sup>

The most serious problem resulting from focusing on speech, when the main issue is regulation of conduct, may be the decision in *United States v. Caronia*.<sup>93</sup> The case can be read narrowly to turn on the definition of a misbranded drug and/or the choice of the United States to charge the defendant with promoting a drug for an unapproved use by statements that he made regarding the drug,<sup>94</sup> instead of charging him with the more difficult to prove intent to distribute a drug for an unapproved use.<sup>95</sup> But for purposes of this Essay, I want to assume the worst regarding the court’s expansion of the commercial speech doctrine.

Again, the speech at issue was inextricably intertwined with the substantive regulation here, by the FDA of new drugs.<sup>96</sup> Under the law, a manufacturer must submit

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<sup>85</sup> See *id.* at 602–03 (Breyer, J., dissenting).

<sup>86</sup> 182 F.3d 1224 (10th Cir. 1999), *cert. denied*, 530 U.S. 1213 (2000).

<sup>87</sup> 47 U.S.C. § 222 (1996); *U.S. West, Inc.*, 182 F.3d at 1228.

<sup>88</sup> *U.S. West, Inc.*, 182 F.3d at 1230.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 1232 (citing *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 760 (1976)).

<sup>91</sup> *Id.* at 1247 (Brisco, J., dissenting).

<sup>92</sup> See *id.* at 1246–47.

<sup>93</sup> 703 F.3d 149 (2d Cir. 2012).

<sup>94</sup> *Id.* at 152.

<sup>95</sup> See *id.* at 173 n.4 (Livingston, J., dissenting).

<sup>96</sup> *Id.* at 154–55 (majority opinion).

evidence that a new drug is both safe for use and that it is effective before it can be marketed.<sup>97</sup> Aside from Congress's desire that patients not spend money for drugs that do not work,<sup>98</sup> it is well-recognized that virtually all drugs have some adverse side effects. Therefore, Congress concluded, if the drug is not effective for the disease for which it is prescribed, the risks outweigh the benefits, which means that manufacturers may not promote the drug for that disease.<sup>99</sup> The proof required for FDA approval includes clinical testing on patients that is very time consuming and expensive, and so often manufacturers will obtain initial approval for only one use and one patient population, which may exclude the very young and the very old.<sup>100</sup> As a result, a manufacturer cannot promote the use of that drug for an unapproved (known as "off label") use.<sup>101</sup> If, however, a manufacturer could promote additional uses without doing the testing, it would have no incentive to spend the money to do so, other than a fear that it could be sued for harm caused by unapproved uses.<sup>102</sup>

One final significant fact is that the federal law does not preclude a doctor from prescribing a drug for off-label use because doctors are not subject to any aspect of the federal laws dealing with the drug approval process and are instead regulated by the states.<sup>103</sup> One of the main means by which doctors learn about unapproved uses of prescription drugs is by reading independent scientific or medical journals or by attending legitimate conferences at which those uses are discussed.<sup>104</sup> Statements made in those contexts are not considered by the FDA to be the improper promotion of a drug for an unapproved use, even if made by the drug's manufacturer.<sup>105</sup> But the FDA has drawn the line when the company's detailers—the people who visited the doctors in *Sorrell* and wanted to discuss the doctor's prescribing habits<sup>106</sup>—attempt to promote off-label uses by trying to persuade the doctors, who alone can prescribe a drug, to do so for those off-label uses.<sup>107</sup> That is what the record clearly shows Mr. Caronia did.<sup>108</sup>

In reversing Mr. Caronia's conviction based on his promotional statements for unapproved uses, the court relied heavily on *Sorrell*, noting that "off-label drug usage is not unlawful"<sup>109</sup> because doctors can legally write prescriptions for such

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<sup>97</sup> *Id.* at 153 (citing 21 U.S.C. § 355(d) (2012)).

<sup>98</sup> *See id.* at 180 (Livingston, J., dissenting).

<sup>99</sup> *See id.* at 154–55 (majority opinion).

<sup>100</sup> *See id.* at 153, 156–57.

<sup>101</sup> *Id.* at 152–53.

<sup>102</sup> *See id.* at 154–55.

<sup>103</sup> *See Chaney v. Heckler*, 718 F.2d 1174, 1179–81 (D.C. Cir. 1983), *rev'd on other grounds*, 470 U.S. 821 (1985).

<sup>104</sup> *See Caronia*, 703 F.3d at 166–67.

<sup>105</sup> *Id.* at 167.

<sup>106</sup> *See* 564 U.S. 552, 557–58 (2011).

<sup>107</sup> *See Caronia*, 703 F.3d at 152–53.

<sup>108</sup> *Id.* at 156–57; *see also id.* at 172–74 (Livingston, J., dissenting).

<sup>109</sup> *Id.* at 166 (majority opinion).

uses and patients may lawfully take the drug.<sup>110</sup> The court could also have noted that the manufacturer was permitted to sell as much of the drug as it was able to do. The problem with those claims is that they overlook the fact that the manufacturer for which the defendant worked could not lawfully promote that drug for that improper use,<sup>111</sup> which is what the law forbids and for which he was convicted.<sup>112</sup>

Second, the court relied on *Virginia Pharmacy* when it accused the Government of behaving paternalistically by denying patients “potentially *relevant* treatment information; such barriers to information about off-label use could inhibit, to the public’s detriment, *informed and intelligent* treatment decisions.”<sup>113</sup> That assertion contains an implicit assumption that the court may determine what information is “*relevant*” to a patient’s “*informed and intelligent*” treatment and to a doctor’s decision about what to prescribe, not Congress or the FDA. The court did not appear to challenge the legality of forbidding a manufacturer from promoting a drug for off-label use,<sup>114</sup> but never explained how else that unlawful promotion is to occur *except* through the written or spoken word.<sup>115</sup> Or perhaps this is another case in which the court is telling Congress, “You have a choice: you can forbid doctors from prescribing off-label uses, in which case the promotion ban is valid, or you can continue to allow doctors to prescribe off label, but also allow the manufacturer to promote off-label uses.” *Posadas* would not have required that Hobson’s choice, but would have allowed the government to discourage conduct of which it did not approve, by restricting advertising about it, without having to ban it entirely.<sup>116</sup> Perhaps that would have been a better option, especially where the advertising (here the detailer promotion to doctors) provided little or no information that was not readily available elsewhere and, in this case, from more reliable sources, such as medical journals and scientific conferences.<sup>117</sup>

Other plaintiffs have sought to apply the First Amendment very broadly to strike down the reach of some occupational licensing laws. As part of our efforts at Public Citizen to increase the availability and affordability of “legal” services, we represented a number of individuals who were not lawyers and were charged with the unauthorized practice of law. In some cases, they gave advice, and in others they filled in forms or used existing pleadings as models. Because they were speaking and writing, they could argue that they were exercising First Amendment rights. The speech might be commercial if the speaker was paid (much less than a lawyer), but

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<sup>110</sup> *Id.* at 165.

<sup>111</sup> *See id.* at 154.

<sup>112</sup> *Id.* at 161.

<sup>113</sup> *Id.* at 166 (emphasis added) (citing *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976)).

<sup>114</sup> *See id.* at 166–67.

<sup>115</sup> *Id.*

<sup>116</sup> *See generally* *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328 (1986), *abrogated by* *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (plurality opinion).

<sup>117</sup> *See Caronia*, 703 F.3d at 166–67.

not if the advice or papers were given without charge. My own conclusion was that the state had a right to regulate conduct, of which speech was a significant part, without stepping on the speaker's First Amendment rights, because I thought—perhaps wrongly in light of some of these cases—that a First Amendment claim would not stand up.

Of course, the fact that a state *can* constitutionally prohibit some kinds of advice giving, such as the unauthorized practice of law, does not mean that it should. The First Amendment argument is even more starkly presented in cases involving licensing of tour guides, but so far the courts have not accepted it, even when the speech is made for a commercial purpose.<sup>118</sup> However, in *Edwards v. District of Columbia*,<sup>119</sup> although the plaintiff conceded that the District of Columbia could constitutionally license tour guides who were paid for their services, they objected to the requirement that they had to pass a one hundred question exam on the sights of the Nation's Capital.<sup>120</sup> The court found that the examination rule violated the First Amendment,<sup>121</sup> and the case was ultimately dismissed as moot when the District repealed the offending examination requirement.<sup>122</sup> I do not oppose all occupational licensing schemes, but think that many, such as those involving the unauthorized practice of law, as well as some portions of those governing tour guides, are far too expansive.<sup>123</sup>

Finally, a recent appellate decision illustrates the manner in which incidental and probably inevitable speech made in a commercial transaction can enable those who disagree with a law regulating that transaction to obtain relief under the commercial speech doctrine. In *Dana's Railroad Supply v. Attorney General of Florida*,<sup>124</sup> several retailers challenged Florida's statute governing the manner in which a seller could charge a higher price for a customer who pays with a credit card instead of cash.<sup>125</sup> Florida insisted that merchants only give discounts for cash, instead of imposing surcharges for using credit cards,<sup>126</sup> presumably because the legislature concluded that it would be fairer and more transparent to the customer. The retailer alleged that controlling the statements made in such transactions infringed on his right to engage in commercial speech, and a 2–1 court agreed<sup>127</sup>: “The fate of Florida's no-surcharge law hinges on a single determination: whether the law regulates *speech*—triggering

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<sup>118</sup> *Kagan v. City of New Orleans*, 753 F.3d 560 (5th Cir. 2014), *cert. denied*, 135 S. Ct. 1403 (2015).

<sup>119</sup> 755 F.3d 996 (D.C. Cir. 2014).

<sup>120</sup> *Id.* at 999.

<sup>121</sup> *Id.* at 998.

<sup>122</sup> *Edwards v. Dist. of Columbia*, No. 14-7199, 2015 WL 5237417, at \*1 (D.C. Cir. Aug. 19, 2015).

<sup>123</sup> See Alan B. Morrison, *Defining the Unauthorized Practice of Law: Some New Ways of Looking at an Old Question*, 4 NOVA L.J. 363 (1980).

<sup>124</sup> 807 F.3d 1235 (11th Cir. 2015), *petition for cert. filed* (U.S. June 8, 2016) (No. 15-1482).

<sup>125</sup> *Id.* at 1239.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 1239–41.



First Amendment scrutiny—or whether it regulates *conduct*—subject only to rational-basis review as a mine-run economic regulation.”<sup>128</sup> The dissent disagreed: “Prescribing when a business can add an additional amount to its price controls the timing of conduct and not the speech describing that conduct. The Supreme Court has long held that the government can regulate economic conduct—including the prices charged by merchants—without violating the First Amendment.”<sup>129</sup> The State filed a petition for certiorari,<sup>130</sup> in which it pointed to two recent court of appeals decisions that reached the opposite result: *Expressions Hair Design v. Schneiderman*,<sup>131</sup> and *Rowell v. Pettijohn*.<sup>132</sup> On September 29, 2016, the Court granted certiorari in *Expressions Hair Design*,<sup>133</sup> which was the first petition filed. This will present the Justices with an opportunity to clarify the speech-versus-conduct conflict, and perhaps even cut back on an overly expansive use of the commercial speech doctrine—one that I surely could not have anticipated, but for which I have some regrets.

#### CONCLUSION

As I have tried to show, generally the courts have faithfully followed the commercial speech doctrine and not produced results for which I have regrets as its originator. But not in all cases, and so I must confess to having some regrets, with the hope that not all of them will remain good law.

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<sup>128</sup> *Id.* at 1241.

<sup>129</sup> *Id.* at 1257 (Carnes, J., dissenting) (citing 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 504–09 (1996) (plurality opinion)).

<sup>130</sup> Petition for Writ of Certiorari, *Bondi v. Dona’s R.R. Supply*, No. 15-1482 (U.S. June 6, 2016).

<sup>131</sup> 808 F.3d 118 (2d Cir. 2015), *petition for cert. filed* (U.S. May 16, 2016) (No. 15-1391). Judge Livingston, who was the dissenter in *Caronia*, wrote the opinion upholding the law in *Expressions Hair Design*. *Id.* at 121.

<sup>132</sup> 816 F.3d 73 (5th Cir. 2016), *petition for cert. filed* (U.S. June 3, 2016) (No. 15-1455).

<sup>133</sup> *Expressions Hair Design*, 808 F.3d 118, *cert. granted*, 137 S. Ct. 30 (2016).