

SORRELL V. IMS HEALTH AND THE END OF THE CONSTITUTIONAL DOUBLE STANDARD

Ernest A. Young*

INTRODUCTION

In the middle of the twentieth century, the Supreme Court retreated from an assertive role of enforcing economic rights, in which it had reviewed the reasonableness of economic regulation at both the state and national levels. At the same time, it largely swore off enforcing the limits of Congress's enumerated powers. Not long thereafter, the Court began developing a new role as the primary protector of "personal" rights, including racial equality, personal privacy, and free speech. Some commentators dubbed this contrasting stance toward economic rights, on the one hand, and personal rights, on the other, a "double standard,"¹ but that faintly pejorative label has not stopped this basic dichotomy from becoming the organizing principle of modern, post-New Deal constitutional law.

The double standard reflected changes in the social and political context in which the Constitution must operate, as well as the evolving experience of the Court itself as it strove to enforce constitutional principles. What has changed once, however, can generally change again. I suggest in this Essay that developments in the modern economy, as well as the continually evolving imperatives of constitutional doctrine, have been eroding the conceptual foundations of the double standard for some time. Last term's decision in *Sorrell v. IMS Health Inc.*,² however, laid bare just how far that erosion had progressed and how feeble the doctrinal structure is that remains. Simply put, *Sorrell* involved a quintessentially economic regulatory scheme covering activity that happened to be protected speech. The problem was not so much that the case fell at some fuzzy borderline between economic and personal rights; rather, Vermont's effort to regulate the sale of information within the health care market fell solidly within *both* the supposedly separate categories of post-New Deal constitutionalism. As

* Alston & Bird Professor, Duke Law School. This Essay has been prepared for a Symposium on "Constitutional Constraints on State Health Care & Privacy Regulation After *Sorrell v. IMS Health*," jointly sponsored by the University of New Hampshire School of Law and Vermont Law School. I am grateful to those institutions, and especially to my friend John Greabe, for the opportunity to participate, to Marin Levy for helpful comments on the manuscript, and to loyal Vermonter Christine Paquin for invaluable research assistance.

1. HENRY J. ABRAHAM & BARBARA A. PERRY, FREEDOM AND THE COURT: CIVIL RIGHTS AND LIBERTIES IN THE UNITED STATES 11 (8th ed. 2003).

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

such, it challenged the viability of the fundamental distinction upon which much of our constitutional law presently rests.

Sorrell was no sport. Many of the most productive and innovative industries in our modern economy center around communication—consider telecommunications and intellectual property, for example. It is thus no longer possible to classify “free speech” as a personal right separate from the concerns of “economic regulation.” Nor is this the only area of overlap. Many of the “personal” rights at the forefront of contemporary constitutional doctrine, including but hardly limited to the right of abortion, are exercised in areas characterized by extensive and traditional health and safety regulation. In other words, I submit that even if a strong dichotomy between the “economic” and the “personal” may have made sense at some point in our constitutional evolution, this will no longer be a workable distinction in many contemporary cases. That reality, in turn, poses some hard questions concerning the role of courts in contemporary society.

This Essay proceeds in four Parts. Part I compares two prominent areas of litigation concerning the health care system: challenges to state anti-detailing statutes in *Sorrell* and similar cases and the Commerce Clause-based challenges to the national Patient Protection and Affordable Care Act (PPACA). While the first set of challenges succeeded in *Sorrell*, current conventional wisdom holds that the PPACA challenges will fail.³ If that is how it plays out, the reason will have everything to do with the post-New Deal “double standard” that prefers free speech claims to claims involving economic rights or our federal structure. I flesh out that double standard in Part II, developing the dichotomy between economic and structural principles, on the one hand, and personal rights, on the other, as instances of the under- and over-enforcement of constitutional principles. Both over- and under-enforcement, I submit, involve judicial responses to line-drawing difficulties, but obviously the choice between these two decisional tracks has major consequences for outcomes.

Part III returns to the *Sorrell* opinions. Finding the data mining activities of the plaintiffs to involve protected speech, Justice Kennedy’s majority opinion applied heightened scrutiny to the Vermont law and found

3. As this Essay goes to press, the Supreme Court has just heard argument in the PPACA cases. By the time the Essay appears, the gentle reader will likely know how it all came out. But whether or not the predictions ventured here are accurate, the important point is that the *current* structure of constitutional doctrine offers grounds for learned commentators to say that the PPACA is an easy case. See, e.g., Laurence H. Tribe, *On Health Care, Justice Will Prevail*, N.Y. TIMES, Feb. 7, 2011, <http://www.nytimes.com/2011/02/08/opinion/08tribe.html>.

it wanting.⁴ In dissent, Justice Breyer charged the majority with returning, in essence, to the bad old days of *Lochner v. New York*, when the Court reviewed the reasonableness of economic legislation under a fairly nondeferential standard.⁵ Unfortunately, Breyer's dissent was better at showing the commonalities between the majority opinion and *Lochner* than it was at explaining why the prohibited activity did *not* involve protected expression. The upshot was thus to suggest not so much that the majority had chosen the wrong category, but rather that the whole distinction between economic and noneconomic liberty was untenable. Part IV offers some tentative ideas as to what might replace the double standard if it is indeed coming to the end of its usefulness as an organizing principle.

I. A TALE OF TWO HEALTH CARE CHALLENGES

Health care has come to occupy a central place in our political and constitutional debates. The signature legislative accomplishment of the first Obama Administration—the Patient Protection and Affordable Care Act⁶—has engaged public debate like few other issues, and the Supreme Court will decide this term whether the PPACA is consistent with our Constitution's limits on national power.⁷ Federal and state efforts to regulate health care have likewise engendered a broad array of individual-rights claims. These include arguments that the PPACA's "individual mandate" to buy health insurance violates individual economic liberty,⁸ that requiring religious organizations to provide their employees with health insurance coverage for contraception violates the Free Exercise Clause,⁹ and—in *Sorrell*—that efforts to reduce costs by regulating marketing activities of drug companies violates the Free Speech Clause of the First Amendment.¹⁰

4. *Sorrell*, 131 S. Ct. at 2659.

5. *Id.* at 2679 (Breyer, J., dissenting); *Lochner v. New York*, 198 U.S. 45, 56–57 (1905).

6. Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148, 124 Stat. 119 (2010) (to be codified in scattered sections of 26, 29, & 42 U.S.C.).

7. See *Florida ex rel. Attorney General v. U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235, 1311 (11th Cir. 2011), *cert. granted*, 132 S. Ct. 604 (2011).

8. See, e.g., Amended Complaint at 24, *Florida ex rel. Bondi v. U.S. Dep't of Health & Human Servs.*, 780 F. Supp. 2d 1256 (N.D. Fla. 2011) (No. 3:10-cv-91-RV/EMT) ("By requiring and coercing [individuals] to obtain and maintain such healthcare coverage, the Act deprives them of their right to be free of unwarranted and unlawful federal government compulsion in violation of the Due Process Clause of the Fifth Amendment to the Constitution of the United States.").

9. See, e.g., Michelle Bauman, *Wide Range of Religious Leaders Testify Against Contraception Mandate*, CATH. NEWS AGENCY (Feb. 16, 2012, 4:12 PM), <http://www.catholicnewsagency.com/news/wide-range-of-religious-leaders-testify-against-contraception-mandate/>.

10. *Sorrell*, 131 S. Ct. at 2659.

The conventional wisdom is that the constitutional challenge to the PPACA will fare rather more poorly than did the First Amendment challenge in *Sorrell*.¹¹ I am less interested in whether that wisdom is correct—like much conventional wisdom, it probably is—than in what the contrast between these two health care challenges can tell us about the contemporary structure of American constitutional law. I begin with the PPACA, then turn to *Sorrell*.

A. The Affordable Care Act Cases Under the Commerce Clause

The Patient Protection and Affordable Care Act, enacted by the 111th Congress in 2010, does a lot of different things. Legal controversy has centered primarily on the Act's "individual mandate," which requires virtually every American to purchase and maintain a minimum level of health insurance coverage.¹² Plaintiffs, including both state governments and individuals, have asserted that this mandate exceeds Congress's power under the Commerce Clause and infringes individual economic liberty under the Due Process Clause.¹³ Some state governments have also challenged the Act's provisions inducing them to participate in the administration of the Act in exchange for certain grants of federal funding, arguing that these provisions are "coercive" under the Spending Clause.¹⁴

The challenges have thus far met with mixed results. The U.S. Courts of Appeal for the Sixth and District of Columbia Circuits have upheld the law,¹⁵ while a divided panel of the Eleventh Circuit struck down the individual mandate on Commerce Clause grounds.¹⁶ As many observers expected all along, the controversy has now reached the Supreme Court, which granted certiorari last fall and has just heard arguments as this Essay goes to press.

Notwithstanding the challengers' ability to persuade a bipartisan majority of the Eleventh Circuit, the leading lights of American

11. See sources cited *infra* notes 18–20.

12. PPACA § 5000A(a)–(b)(1), 124 Stat. at 244.

13. See, e.g., Amended Complaint, *supra* note 8, at 21–24.

14. See, e.g., *Florida ex rel. McCollum v. U.S. Dep't of Health & Human Servs.*, 716 F. Supp. 2d 1120, 1129 (N.D. Fla. 2010) ("The plaintiffs allege that these several provisions violate the Constitution and state sovereignty by coercing and commandeering the states and depriving them of their 'historic flexibility' to run their state government, healthcare, and Medicaid programs.")

15. *Seven-Sky v. Holder*, 661 F.3d 1, 20 (D.C. Cir. 2011); *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 545 (6th Cir. 2011). The Fourth Circuit dismissed similar challenges on justiciability grounds. *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 269 (4th Cir. 2011).

16. *Florida ex rel. Attorney General v. U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235, 1311 (11th Cir. 2011), *cert. granted*, 132 S. Ct. 604 (2011).

constitutional law have dismissed the PPACA challenges as borderline frivolous. Laurence Tribe has said that “this law’s constitutionality is open and shut.”¹⁷ Similarly, Erwin Chemerinsky has insisted that “the federal health care law is constitutional. It is not even a close question.”¹⁸ Both men, of course, are leading liberals and partisan Democrats in addition to being eminent scholars of the Constitution. But a number of conservatives and moderates have likewise expressed skepticism that the Supreme Court will, in fact, strike down the PPACA. Charles Fried, for instance, has asserted that “I have not met any scholars who teach constitutional law and are members of The Federalist Society who think it’s unconstitutional.”¹⁹ That may be an overstatement, as leading conservative scholars like Randy Barnett and Gary Lawson have, in fact, argued that the PPACA is unconstitutional.²⁰ But it seems fair to say that the academic right’s support for the anti-PPACA suits has been muted, at best. My own view, for whatever it’s worth, is that the challenges have a little better shot than Professor Tribe and Dean Chemerinsky would like to admit, but no prudent lawyer would bet his 401(k) on their success.²¹

One might fairly ask, however, why so many informed observers doubt that the challenges will succeed. After all, it seems highly unlikely that the

17. See Tribe, *supra* note 3. Much of the present author’s knowledge of constitutional law, such as it is, consists in what he learned from Professor Tribe in law school.

18. Erwin Chemerinsky, *Political Ideology and Constitutional Decision-Making: The Coming Example of the Affordable Care Act*, LAW & CONTEMP. PROBS. (forthcoming 2012) (manuscript at 6), available at <http://ssrn.com/abstract=1952028>. Similarly, Andrew Koppelman has pronounced that “[t]he constitutional objections [to the PPACA] are silly,” and that any adverse ruling on the PPACA by the Court could only be an illegitimately political effort by “the conservative majority on the Court . . . to crush the most important progressive legislation in decades.” Andrew Koppelman, *Bad News for Mail Robbers: The Obvious Unconstitutionality of Health Care Reform*, 121 YALE L.J. ONLINE 1, 2 (2011), <http://yalelawjournal.org/2011/04/26/koppelman.html>.

19. Steve Chapman, *Conservative Scholar Says Obamacare Constitutional*, ORANGE COUNTY REG., Apr. 19, 2011, <http://www.ocregister.com/articles/-296962--.html>.

20. See generally Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate Is Unconstitutional*, 5 N.Y.U. J.L. & LIBERTY 581 (2010); Gary Lawson & David B. Kopel, *Bad News for Professor Koppelman: The Incidental Unconstitutionality of the Individual Mandate*, 121 YALE L. J. ONLINE 267 (2011), <http://yalelawjournal.org/2011/11/08/lawson&kopel.html>. Professor Fried acknowledged that he had, in fact, not only met but *taught* Randy Barnett—but claimed to have taught him *torts*, not constitutional law. See Chapman, *supra* note 19.

21. Initial reports from the arguments suggest that the conventional wisdom may have been a bit overconfident. Five Justices expressed considerable skepticism about the Act, see, e.g., Lyle Denniston, *Argument Recap: It Is Kennedy’s Call*, SCOTUSBLOG (Mar. 27, 2012, 5:41 PM), <http://www.scotusblog.com/2012/03/argument-recap-it-is-kennedys-call/>, and that alone ought to put to rest any suggestion that arguments against the individual mandate are “silly,” see *supra* note 18. It is always risky to predict outcomes based on appearances at oral argument, however, and the PPACA may well be upheld. Nonetheless, the arguments suggest that constitutional law may be more in flux than we sometimes think.

Framers would have envisioned such a broad and intrusive government program, or that they would have seen health care regulation as the province of the federal government rather than of the states. It is hard to find many examples in which the government has required individuals to participate in a market transaction against their will. And polling data suggests that the intuitive judgment of the American people is that the PPACA is unconstitutional.²²

The problem with the PPACA challenges, I submit, is *not* that those challenges lack merit as a matter of pure constitutional meaning. Rather, as I have argued at greater length elsewhere, the problem is that the relevant constitutional principles are “underenforced.”²³ As Larry Sager argued in a seminal article three decades ago, courts do not always enforce constitutional principles to their full conceptual limits; rather, they often craft doctrinal tests that stop short of full enforcement for institutional reasons.²⁴ This has surely occurred with respect to both the federalism and individual economic liberty challenges to the PPACA. Ever since the New Deal, courts have doubted their institutional capacity to define the outer limits of national power or the contours of freedom of contract and other economic rights. This hardly means that the Constitution does not speak to these issues or meaningfully limit government power in these areas. But courts have been extremely unlikely to enforce those limits, instead deferring to legislative judgments and occasionally suggesting that the Constitution commits these issues to politics entirely.²⁵

22. A recent USA Today/Gallup poll found that “Americans overwhelmingly believe the ‘individual mandate’ . . . is unconstitutional, by a margin of 72% to 20%. Even a majority of Democrats, and a majority of those who think the healthcare law is a good thing, believe that provision is unconstitutional.” Jeffrey M. Jones, *Americans Divided on Repeal of 2010 Healthcare Law*, GALLUP POLS., Feb. 27, 2012, <http://www.gallup.com/poll/152969/Americans-Divided-Repeal-2010-Healthcare-Law.aspx>. The poll was “based on telephone interviews conducted Feb. 20–21, 2012, on the Gallup Daily tracking survey, with a random sample of 1,040 adults, aged 18 and older, living in all 50 U.S. states and the District of Columbia.” *Id.*

23. See generally Ernest A. Young, *Popular Constitutionalism and the Underenforcement Problem: The Case of the National Healthcare Law*, 75 L. & CONTEMP. PROBS. 157 (2012).

24. Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213 (1978).

25. See, e.g., *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976).

It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.

Id. (citing *Ferguson v. Skrupa*, 372 U.S. 726 (1963); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955) (“The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.”)).

Current doctrine thus allows far broader scope to national regulatory authority than it once did, and it also permits a far greater degree of intrusion on individual economic choices than did the pre-New Deal law. The Court's decisions upholding Congress's authority to regulate homegrown medicinal marijuana consumption nicely illustrates the first point,²⁶ and a host of decisions applying "rational basis review" to due process and equal protection challenges to economic regulation demonstrate the second.²⁷ As a matter of current federalism doctrine, the Court will likely find that there is an interstate market for health care insurance, and that individual decisions to purchase or refrain from purchasing insurance—considered in the aggregate under *Wickard*²⁸—have a substantial effect on that market. Likewise, whether or not a decision *not* to purchase health insurance represents commercial "activity," a mandate to purchase such insurance seems rationally related—and thus "necessary and proper" under current doctrine—to the broader scheme of health insurance regulation in the PPACA. That is probably enough under the Court's recent Commerce Clause precedents.

The individual rights argument has similar troubles. The interesting thing about the health care challenges is that, while typically presented as federalism arguments about the scope of the Commerce Clause, the intuitive heart of the objection to the individual mandate sounds in economic substantive due process.²⁹ What riles people up, in other words, is being required to purchase a good they don't want—a requirement that would rankle whether Congress *or* a state legislature imposed it. The objection thus rests on principles of due process—a freedom *not* to contract, if you will. Moreover, the purpose of the individual mandate is to force healthy persons who might rationally choose to forego insurance altogether into the risk pool in order to balance out persons with preexisting conditions, whom the PPACA requires health insurers to cover at regular

26. *Gonzales v. Raich*, 545 U.S. 1, 22 (2005).

27. *See, e.g., FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313–17 (1993) (rejecting, under an extremely deferential standard, an equal protection challenge to a provision of the Cable Communications Policy Act of 1984).

28. *Wickard v. Filburn*, 317 U.S. 111, 127–28 (1942).

29. I have argued elsewhere that there is absolutely nothing wrong with using a federalism argument to "stand in" for concerns about individual liberties that might not prevail as an independent claim. *See Young, Popular Constitutionalism, supra* note 23, at 170–72. Part of the point of federalism is to provide breathing space in which communities with divergent views on the nature and scope of individual liberty can flourish, subject to a federal floor of basic human rights. *See Ann Althouse, The Vigor of Anti-Commandeering Doctrine in Times of Terror*, 69 BROOK. L. REV. 1231 (2004) (arguing that the anti-commandeering doctrine provides space for individual states and localities to implement different visions of the balance between security and personal privacy).

rates.³⁰ This is precisely the sort of forced wealth transfer from A to B that the Court once struck down under the Due Process Clause.³¹ The current Court, however, is unlikely to bring back *Lochner v. New York*, notwithstanding occasional indications that economic substantive due process is not entirely dead.³² Under the “rational basis” test that dominates modern jurisprudence dealing with economic liberty claims, the Court should have little trouble concluding that Congress has a legitimate interest in expanding coverage without imposing crippling costs on insurers, or that the individual mandate is rationally related to that interest.

This is hardly to say that the Court would be *right* to reject the challenges to the PPACA. That question implicates difficult issues about the extent to which current doctrine, reflecting the felt necessities of the time, should be allowed to trump the original understandings of the Constitution’s text and structure. Nor is it even to say that the Court *will* reject the challenges. Current doctrine represents a significant revision of the Constitution’s original understanding—a revision that reflects both internal incoherences that developed as the Court sought to apply the original understanding over time, as well as external pressures arising from economic, social, and political changes in American society.³³ But what has changed once can change again. To the extent that the broad popular reaction against “Obamacare” and the associated Tea Party movement represent a form of popular constitutionalism “outside the courts,” those movements may in time influence the content of Supreme Court doctrine.³⁴

My point is simply that the challenges to the PPACA face a significantly uphill slog, and that this is because the structure of contemporary constitutional doctrine has come to disfavor constitutional

30. See, e.g., LAWRENCE R. JACOBS & THEDA SKOCPOL, *HEALTH CARE REFORM AND AMERICAN POLITICS: WHAT EVERYONE NEEDS TO KNOW* 90–91 (2010) (discussing the “adverse selection” problem).

31. BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* 47–48 (1998); *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798).

32. See, e.g., *E. Enters. v. Apfel*, 524 U.S. 498, 503–04 (1998) (striking down a federal statutory provision imposing retroactive costs on companies that had been in the coal business on a combination of Takings Clause and due process theories); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996) (striking down a state court punitive damages award as excessive on a substantive due process theory).

33. See Young, *Popular Constitutionalism*, *supra* note 23, at 181.

34. See generally BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 14 (2009) (“[O]ver time . . . Supreme Court decisions tend to converge with the considered judgment of the American people.”); see also Young, *Popular Constitutionalism*, *supra* note 23, at 181 (discussing how popular constitutionalism may impact the constitutionality of the PPACA).

arguments resting on the limits to national power vis-à-vis the states or on individual economic liberties. The constitutional battle in *Sorrell*, on the other hand, was fought on far different doctrinal terrain.

B. Sorrell and the First Amendment

The law of free speech is quite different from that concerning federalism and economic liberty. Although the text of the Constitution does not identify certain provisions as more important than others, the Supreme Court has long held that the “freedom of speech” is “in a preferred position.”³⁵ Judicial review of governmental action challenged as abridging the freedom of speech takes place under demanding doctrinal tests. Content-based regulation gets strict scrutiny.³⁶ Regulation that discriminates among viewpoints or speakers may be subject to even *stricter* review.³⁷ And even “lesser” forms of free speech review—for content-neutral regulations or restrictions on “low value” speech—are considerably more demanding than the “rational basis review” that governs most economic liberty claims and informs the Court’s construction of the Commerce Clause.³⁸

Not surprisingly, these speech doctrines spelled defeat for the Vermont regulation in *Sorrell*. That case, as the other contributions to this Symposium spell out in greater detail, involved a challenge to Vermont’s “Prescription Confidentiality Law” (also known as Act 80), which aimed to prevent the practice of “detailing” by pharmaceutical manufacturers.³⁹ “Detailing” involves highly targeted marketing of drugs to doctors by drug salesman, who rely heavily on “prescriber-identifying information” indicating the prescribing practices of the doctors they service.⁴⁰ Drug companies obtain this information from “data miners,” who in turn derive it from purchasing information obtained from pharmacies that sell prescription drugs.⁴¹ Detailing generally promotes “high-profit, brand-name drugs”; Vermont (and several other New England states) thus sought to

35. *Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943). *But see* Sanford Levinson & Ernest A. Young, *Who’s Afraid of the Twelfth Amendment?*, 29 FLA. ST. U. L. REV. 925, 943–44 (2001) (wondering why some constitutional provisions are “more equal than others”).

36. *United States v. Playboy Entm’t Grp.*, 529 U.S. 803, 813 (2000).

37. *See, e.g., R.A.V. v. City of St. Paul*, 505 U.S. 377, 391–96 (1992).

38. ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 264, 1017 (4th ed. 2011).

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

40. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2659–60 (2011).

41. *Id.* at 2660.

limit the practice as a means of containing health care costs.⁴² Act 80 thus barred pharmacies and other entities from selling prescriber-identifying information and prohibited drug companies from using such information for marketing without the consent of the prescribing doctor.⁴³ *Sorrell* involved two consolidated suits, one by data miners and the other by an association of pharmaceutical manufacturers, which both alleged that Act 80 violated their rights under the First and Fourteenth Amendments.⁴⁴

Justice Kennedy's majority opinion began its analysis by observing that "[o]n its face, Vermont's law enacts content- and speaker-based restrictions on the sale, disclosure, and use of prescriber-identifying information."⁴⁵ The measure "has the effect of preventing detailers—and only detailers—from communicating with physicians in an effective and informative manner."⁴⁶ Noting that "Act 80 is designed to impose a specific, content-based burden on protected expression," Kennedy concluded that "[i]t follows that heightened judicial scrutiny is warranted."⁴⁷ The Court rejected the First Circuit's conclusion, in a similar case arising in New Hampshire, that prescriber-identifying information was a commodity with no more First Amendment protection than "beef jerky,"⁴⁸ noting that "[t]his Court has held that the creation and dissemination of information are speech within the meaning of the First Amendment."⁴⁹

The majority equivocated, however, on the appropriate standard of review. Explaining that "[i]n the ordinary case it is all but dispositive to conclude that a law is content-based and, in practice, viewpoint-discriminatory,"⁵⁰ Justice Kennedy said that "the outcome is the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied."⁵¹ The Court thus avoided any need "to determine whether all speech hampered by § 4631(d) is commercial, as our cases have used that term."⁵² Applying an intermediate-scrutiny commercial-speech

42. *See id.* at 2659–60, 2670 (noting Vermont's contention that section 4631(d) "advances important public policy goals by lowering the costs of medical services and promoting public health").

43. tit. 18, § 4631(d).

44. *Sorrell*, 131 S. Ct. at 2661.

45. *Id.* at 2663.

46. *Id.*

47. *Id.* at 2664.

48. *See id.* at 2666 (quoting and discussing *IMS Health Inc. v. Ayotte*, 550 F.3d 42, 52–53 (1st Cir. 2008)).

49. *Id.* at 2667 (citing *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 481 (1995); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759 (1985)).

50. *Id.* (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382, 391–92 (1992)).

51. *Id.* (citing *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 184 (1999)).

52. *Id.* at 2667 (citing *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 474 (1989)).

test—“the State must show at least that the statute directly advances a substantial governmental interest and that the measure is drawn to achieve that interest”⁵³—the Court found Act 80 lacking. It rejected Vermont’s interest in physician privacy, noting that the state permitted the information to be used for purposes other than detailing.⁵⁴ And it found that Act 80 failed to advance Vermont’s interest in lowering health care costs “in a permissible way.”⁵⁵ That interest, after all, rested on the likelihood that speech by detailers would persuade its audience: “If pharmaceutical marketing affects treatment decisions, it does so because doctors find it persuasive. Absent circumstances far from those presented here, the fear that speech might persuade provides no lawful basis for quieting it.”⁵⁶

Justice Breyer dissented, arguing that the Vermont law’s effect on speech “is inextricably related to a lawful governmental effort to regulate a commercial enterprise.”⁵⁷ He, too, was somewhat ambiguous about the appropriate standard of review, arguing that “[t]he First Amendment does not require courts to apply a special ‘heightened’ standard of review when reviewing such an effort.”⁵⁸ But Breyer also seemed to accept existing commercial-speech doctrine that imposed on the government a burden considerably greater than traditional “rational basis” review.⁵⁹ Concluding that “[t]he statute threatens only modest harm to commercial speech” and that “[t]he legitimate state interests that the statute serves are ‘substantial,’”⁶⁰ Breyer argued that those interests—in protecting privacy and reducing costs—could not be furthered by less restrictive regulation.⁶¹ Moreover, the dissenters worried that “the Court opens a Pandora’s Box of First Amendment challenges to many ordinary regulatory practices that may only incidentally affect a commercial message.”⁶²

Certainly Justice Kennedy’s citation to *Board of Trustees of the State University of New York v. Fox*, 492 U.S. at 474, for the proposition that when “pure speech and commercial speech were inextricably intertwined, . . . the entirety must . . . be classified as noncommercial,” 131 S. Ct. at 2667 (internal quotation marks omitted), suggested that Kennedy thought the higher standard should most likely apply.

53. *Id.* at 2667–68 (citing *Fox*, 492 U.S. at 480–81; *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980)).

54. *Id.* at 2668.

55. *Id.* at 2670.

56. *Id.* at 2670 (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam)).

57. *Id.* at 2673 (Breyer, J., dissenting). Justices Ginsburg and Kagan joined Justice Breyer’s dissent. *Id.*

58. *Id.*

59. *See id.* at 2679–84 (applying the *Central Hudson* test).

60. *Id.* at 2680–81 (quoting *Central Hudson*, 447 U.S. 557, 564 (1980)).

61. *Id.* at 2683–84.

62. *Id.* at 2684. They were right. *See infra* note 111 and accompanying text.

The contrast with the PPACA litigation could hardly be more stark. Both Congress and the Vermont legislature enacted recent legislation seeking to address the high cost of health care in contemporary America. Congress's legislation, challenged under principles of federalism and economic liberty, seems highly likely to survive because it will be judged under lenient doctrinal tests that defer to judgments by the political branches. Vermont's measure, on the other hand, went down under far more demanding doctrines that protect free speech. This juxtaposition raises the question whether the distinction between federalism and economic liberty, on the one hand, and personal rights like free speech, on the other, can be justified or sustained.

II. THE "DOUBLE STANDARD" AND THE STRUCTURE OF MODERN AMERICAN CONSTITUTIONAL LAW

Henry Abraham famously described the structure of constitutional doctrine after the New Deal as embodying "a 'double standard' of judicial attitude, whereby governmental economic experimentation is accorded close to *carte blanche* by the courts, but alleged violations of individual civil rights and liberties are given meticulous judicial attention."⁶³ This "double standard" represents the enduring fallout from the backlash against *Lochner*-era judicial activism. Prior to the New Deal, the Supreme Court aggressively enforced federalism-based limits on national power as well as principles of individual economic liberty under the Due Process Clause.⁶⁴ As the national regulatory state expanded to meet the challenge of the Depression, the Court's stance put it on a collision course with the national political branches. Although President Roosevelt's plan to overturn *Lochner*-era resistance to national regulation by packing the Court failed, the Court largely capitulated by abandoning its constitutional opposition to the New Deal.⁶⁵ The post-New Deal Court found a new role, however, by enforcing various aspects of noneconomic individual liberty, such as racial equality, free speech and privacy, and the rights of criminal defendants.⁶⁶

63. ABRAHAM & PERRY, *supra* note 1, at 11.

64. *See* *Lochner v. New York*, 198 U.S. 45, 64 (1905) (holding a maximum-hour law unconstitutional); *see also* *Adkins v. Children's Hospital*, 261 U.S. 525 (1923); *Hammer v. Dagenhart*, 247 U.S. 251 (1918); *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895).

65. *See* *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937); *see also* FRIEDMAN, *supra* note 34, at 205–36; *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

66. *See, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479 (1965); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *see also* FRIEDMAN, *supra* note 34, at 237–79.

The Court prefigured this divide in *United States v. Carolene Products Co.*'s famous "Footnote Four," prescribing a deferential standard of review of economic regulation while reserving stricter scrutiny for textual rights provisions, regulation affecting the political process, and discrimination against "discrete and insular minorities."⁶⁷

There are complications to this canonical story. *Lochner*-era activism was not as categorical as is sometimes supposed; the Court upheld at least as many statutes as it struck down in both the Commerce Clause and freedom of contract contexts.⁶⁸ Its efforts to limit national power hardly redounded to the benefit of the states, because the Court's freedom of contract and *dormant* Commerce Clause jurisprudence sharply limited *state* regulatory experimentation as well.⁶⁹ The internal contradictions of the Court's Commerce Clause and freedom of contract jurisprudence may have been as important a cause of the Court's famous "switch in time" as the external threat posed by court-packing.⁷⁰ And scholars have questioned whether the post-New Deal revival of judicial review in civil liberties cases really tracks the lines laid out in *Carolene Products*.⁷¹ But none of these complications undermine the basic point, which is that the Supreme Court retreated from judicial activism in certain constitutional areas and diverted its energies into other constitutional fields, and that this redirection—undertaken largely for institutional reasons—fundamentally determines the structure of contemporary constitutional doctrine.

While most observers seem to agree that the double standard exists, it is considerably more difficult to define its content with any sort of precision. Lynn Baker and I have examined this problem in more detail elsewhere;⁷² for present purposes a sketch of the basic issues will suffice.

67. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938); see also JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 75–77 (1980) (explaining the Warren Court's jurisprudence in terms of Footnote Four).

68. See, e.g., CUSHMAN, *supra* note 31, at 33–34 (cataloguing a series of 1930s Supreme Court cases upholding various statutes).

69. See Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. CHI. L. REV. 483, 488–89 (1997) (explaining that, prior to 1938, the doctrine of substantive due process and the dormant Commerce Clause were "wielded extremely aggressively against the states").

70. Compare, e.g., ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* 117 (3d ed. 2000) (ascribing the switch in the Court's stance to a combination of FDR's sweeping 1936 electoral victory, the outbreak of a new wave of labor disputes, and the court-packing plan), with CUSHMAN, *supra* note 31, at 6 (arguing that the conventional account overlooks the critical role of doctrinal developments, internal to the law, that made the pre-1937 jurisprudence unsustainable).

71. See, e.g., LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 487–89 (2000).

72. Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 80–85 (2001).

Here are the constitutional principles that the Court largely stopped enforcing after 1937:

- freedom of contract and other economic liberties under the Due Process Clause;⁷³
- the Contracts Clause, especially as it bears on state action impairing contracts between private parties;⁷⁴
- dormant Commerce Clause review of state laws that burden interstate commerce but do not discriminate between in-staters and out-of-staters;⁷⁵
- federalism-based limits on Congress's commerce and spending power;⁷⁶ and
- the nondelegation doctrine, which once prohibited Congress from delegating lawmaking powers to federal agencies.⁷⁷

On the other hand, after an initial retreat from activism altogether, the post-New Deal Court gradually regained its confidence and considerably expanded judicial review in other constitutional areas. These include:

- racial equality under the Equal Protection Clause, as well as protection for other "discrete and insular minorities" and for women;⁷⁸

73. See *Williams v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487–88 (1955) (rejecting a freedom of contract challenge to an Oklahoma law); see also *Ferguson v. Skrupa*, 372 U.S. 726 (1963).

74. See *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 447 (1934).

75. See David S. Day, *Revisiting Pike: The Origins of the Nondiscrimination Tier of the Dormant Commerce Clause Doctrine*, 27 *HAMLIN L. REV.* 45, 49 (2004) (observing that "no Supreme Court decision has been based upon the undue burden standard since the Court's 1988 Term" and concluding that "the nondiscrimination standard has fallen into some disuse").

76. See *Perez v. United States*, 402 U.S. 146, 154 (1971) (upholding Congress's power to regulate "purely intrastate" extortion, an activity traditionally within state police powers, because it affects "interstate commerce"); see also *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Baker & Young*, *supra* note 72, at 87 (discussing the Court's justification for refusing to narrow Congress's commerce power "in terms of institutional concerns about judicial competence").

77. See *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 475–76 (2001) (holding that the EPA's duty to establish ambient air quality criteria under the Clean Air Act did not violate the non-delegation doctrine); see also *Touby v. United States*, 500 U.S. 160 (1991).

78. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (race); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 729–30 (1982) (gender); *Mills v. Habluetzel*, 456 U.S. 91, 99–101 (1982) (illegitimacy).

- unenumerated rights to privacy, especially in the area of family and reproductive rights;⁷⁹
- free speech, expanded to include a wide range of expressive conduct and to eliminate most previously unprotected forms of “low value” speech;⁸⁰
- rights to religious liberty, especially against government subsidies to and endorsement of religious belief and practice;⁸¹
- the criminal procedure rights of the accused and limits on sentences imposed on those convicted;⁸²
- extensive intervention in the political process under the Equal Protection Clause and the First Amendment;⁸³
- separation-of-powers limits on executive authority and congressional efforts to alter the legislative process;⁸⁴ and

79. See *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965); see also *Lawrence v. Texas*, 539 U.S. 558 (2003); *Roe v. Wade*, 410 U.S. 113 (1973).

80. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 396 (1992) (holding that an ordinance prohibiting bias-motivated disorderly conduct was impermissible content-based discrimination because it targeted a limited group); see also *Texas v. Johnson*, 491 U.S. 397 (1989); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam).

81. Compare *Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 690 (1994), and *Lee v. Weisman*, 505 U.S. 577 (1992), and *Engel v. Vitale*, 370 U.S. 421 (1962), with *Emp’t Div. v. Smith*, 494 U.S. 872, 882 (1990) (relegating many, if not most, Free Exercise Clause challenges to rational basis review).

82. See *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (holding unconstitutional the imposition of the death penalty on offenders who were under the age of eighteen when their crimes were committed); see also *Miranda v. Arizona*, 384 U.S. 436 (1966); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

83. See generally Richard H. Pildes, *The Supreme Court, 2003 Term—Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28 (2004). See also *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000); *Shaw v. Reno*, 509 U.S. 630 (1993); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Baker v. Carr*, 369 U.S. 186 (1962).

84. See, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557, 594–95, 612 (2006) (holding that the President’s power to establish military commissions is bounded by “congressional authorization”); *Clinton v. City of New York*, 524 U.S. 417, 421 (1998) (holding that the Line Item Veto violated the Presentment Clause); *INS v. Chadha*, 462 U.S. 919, 959 (1983) (holding that the legislative veto violated the separation of powers); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588–89 (1952) (holding the President’s seizure of privately owned factories unconstitutional); see also *United States v. Nixon*, 418 U.S. 683 (1974).

- rigorous dormant Commerce Clause review of state legislation that discriminates against out-of-staters.⁸⁵

This list should help to clarify what the dividing line is *not*: For example, the distinction is not between individual liberties and structural principles, because the Court has largely abandoned individual freedom of contract as an individual liberty while continuing to enforce the structural principle of separation of powers. The Court does not draw a line between unenumerated and enumerated constitutional principles, because it generally does not enforce the Contracts Clause while recognizing unenumerated rights to privacy. And the Court does not restrict its interventions to those necessary to protect politically powerless minorities—after all, large majorities favor contraception and corporations are extremely powerful speakers,⁸⁶ while religious minorities retain little protection and aspects of Establishment Clause doctrine actually work to their detriment.⁸⁷

The most likely account is simply that the Court stopped doing what it was doing when it got in trouble back in the 1930s. No organizing *principle* will perfectly reflect that reality, but the best candidate is probably some basic distinction between “economic” and “social or personal” rights. As Robert McCloskey has written, the double standard “was never really thought through. It seems to have been a kind of reflex, arising out of indignation against the excesses of the Old Court, and resting on the vague, uncritical idea that ‘personal rights’ are ‘O.K.’ but economic rights are ‘Not O.K.’”⁸⁸ This way of defining the double standard has several weaknesses. First, economic choices are often deeply personal. The choice of an occupation, for example, is an economic choice, but it is also one of the most basic efforts at self-definition that individuals undertake. Second, the Court has not uniformly deferred to government regulation of the economy;

85. See *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 572 (1997) (striking a real-estate tax scheme under the dormant Commerce Clause); see also *Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996); *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994); *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

86. See *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (striking down Connecticut’s ban on contraceptives); *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 767 (1978) (striking down a Massachusetts restriction on the free speech of corporations).

87. See *Emp’t Div. v. Smith*, 494 U.S. 872, 882 (1990) (holding that minority religious practices may generally be restricted so long as those restrictions are generally applicable); *Bd. of Educ. v. Grumet*, 512 U.S. 687, 690 (1994) (striking down a state legislature’s effort to accommodate a religious minority under the Establishment Clause).

88. Robert G. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34, 54.

for example, it continues to rigorously review state economic legislation under the dormant Commerce and Supremacy Clauses.⁸⁹ And, finally, the economic/personal divide does not really capture the distinctions drawn on the structural side, such as the current underenforcement of federalism and the Court's comparatively greater vigilance in separation of powers.⁹⁰

Nonetheless, the economic/personal distinction has both a great deal of descriptive power and, perhaps more important, a ready grounding in the New Deal battles from which the double standard arose. The test of wills between the Court and FDR had to do with economic regulation, and it is not surprising that the Court's retreat has been most dramatic in this area. The Court's enthusiasm for personal rights, moreover, has been deployed primarily at the expense of the states, allowing the Court largely to avoid further confrontations with the President or Congress.⁹¹ When the Court *has* confronted the national political branches in separation-of-powers cases, it has tended to be in contexts that are relatively low visibility,⁹² that enable the Court to play one branch off against the other,⁹³ or that allow the Court to make a stand for constitutional principle while still allowing the political branches to get much of what they want as a practical matter.⁹⁴

89. On the dormant Commerce Clause, see cases cited *supra* note 85. On preemption, see, e.g., *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2572 (2011) (holding that manufacturers of generic drugs cannot be sued for failure to warn because such claims are preempted by federal law); *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1 (2007). See generally Ernest A. Young, "The Ordinary Diet of the Law": The Presumption Against Preemption in the Roberts Court, 2011 SUP. CT. REV. 1.

90. On the underenforcement of federalism, see, e.g., *Gonzales v. Raich*, 545 U.S. 1, 9 (2005) (holding that, under the Commerce Clause, Congress can criminalize medicinal marijuana use despite a legal classification under state law); Young, *Popular Constitutionalism*, *supra* note 23, at 159. On separation of powers, see cases cited *supra* note 84, as well as *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 130 S. Ct. 3138 (2010), *Boumediene v. Bush*, 553 U.S. 723 (2008), and *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995).

91. See, e.g., *Kennedy v. Louisiana*, 554 U.S. 407, 413 (2008) (striking down a state law imposing the death penalty for a non-homicide offense and ignoring a similar provision in federal law), *modified on denial of reh'g*, 129 S. Ct. 1 (2008); *Romer v. Evans*, 517 U.S. 620, 623 (1996) (striking down a Colorado constitutional amendment forbidding localities from providing antidiscrimination protection for homosexuals); *Roe v. Wade*, 410 U.S. 113, 164–66 (1973) (striking down Texas and Georgia abortion laws). See generally POWE, *supra* note 71, at 486–87 (arguing that the Warren Court's decisions were primarily directed toward imposing national norms on recalcitrant states in the South).

92. See, e.g., *Free Enterprise Fund*, 130 S. Ct. at 3151–52 (striking down provisions protecting members of the Public Company Accounting Oversight Board from presidential removal); *Clinton v. City of New York*, 524 U.S. 417, 421 (1998) (striking down the line-item veto); *Plaut*, 514 U.S. at 240 (striking down a federal statute reopening final federal judgments as a violation of Article III).

93. See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588–89 (1952) (holding that President Truman lacked constitutional authority to seize the steel mills without authorization by Congress); *INS v. Chadha*, 462 U.S. 919, 959 (1983) (striking down the legislative veto).

94. See, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557, 594–95, 612 (2006) (holding that the President could not establish military commissions to try suspected terrorists without congressional

It is important to underscore, however, that the double standard is a creature of Supreme Court doctrine, not an inherent quality of the Constitution. For much of our history, the Court vigorously enforced economic rights and federalism while doing little to protect “personal” rights like free speech, religious liberty, or the rights of the accused.⁹⁵ The vigor with which judge-made doctrine enforces particular constitutional principles is thus historically contingent, and it changes over time. The question is whether it is about to change again.

III. *SORRELL*'S ASSAULT ON THE DOUBLE STANDARD

Justice Breyer's dissent in *Sorrell* explicitly invoked the post-New Deal double standard and the danger of returning to an older jurisprudence that would more closely scrutinize economic regulations.⁹⁶ For him, Vermont's Act 80 was an ordinary regulatory statute, addressing one of the principal economic problems of our age, with a merely “incidental” impact on free speech.⁹⁷ For “ordinary commercial or regulatory legislation that affects speech in less direct ways,” he wrote, “the Court has taken account of the need . . . to defer significantly to legislative judgment—as the Court has done in cases involving the Commerce Clause or the Due Process Clause.”⁹⁸ He cited two of the classic cases abandoning vigorous review of economic regulation and articulating a “rational basis review” involving virtually complete deference to the political branches—*Williamson v. Lee Optical*⁹⁹ and *United States v. Carolene Products Co.*¹⁰⁰—and strongly suggested that this was the appropriate standard of review in *Sorrell*.¹⁰¹ And he warned that “given the sheer quantity of regulatory initiatives that touch upon commercial messages, the Court's vision of its reviewing task threatens to return us to a happily bygone era when judges scrutinized

authorization, but leaving open the possibility that Congress could enact a new statute authorizing such commissions); *Stern v. Marshall*, 131 S. Ct. 2594, 2611 (2011) (holding that Article III prohibited allowing bankruptcy judges from entering final judgments on state law counterclaims but leaving open various possibilities by which Article III might be satisfied with relatively minor changes to the bankruptcy system); *see also* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803) (striking down a provision of the 1789 Judiciary Act but avoiding issuing an order that the political branches might defy).

95. *See* Young, *Popular Constitutionalism*, *supra* note 23, at 183, 186.

96. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2679 (2011) (Breyer, J., dissenting).

97. *Id.* at 2681–85.

98. *Id.* at 2674–75 (citing *Glickman v. Wileman Bros. & Elliot, Inc.*, 521 U.S. 457, 475–76 (1997)).

99. *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955).

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

101. *Sorrell*, 131 S. Ct. at 2675 (Breyer, J., dissenting).

legislation for its interference with economic liberty.”¹⁰² Noting that “[h]istory shows that the power was much abused and resulted in the constitutionalization of economic theories preferred by individual jurists,” he concluded that “today’s majority risks repeating the mistakes of the past.”¹⁰³ Justice Breyer, in other words, cried “*Lochner!*”

This is an important accusation, because speech is not a narrow category. Consider how many leading sectors of the economy are built around activities that, because they involve expression and the dissemination of information, would qualify for First Amendment protection—industries such as telecommunications, social networking, software development, both nonprofit and for-profit education, financial trading and advising, and legal services. A decade ago, Daniel Bell contrasted “industrial society . . . based on a labor theory of value” with “[a] post-industrial society [that] rests on a knowledge theory of value.”¹⁰⁴ It is simply no longer possible to imagine a sphere of economic activity in which the government has largely free regulatory rein and a more protected sphere of personal activity in which First Amendment activities take place. More and more, the critical economic industries that government must regulate will involve potentially protected expression and information flows.

From this perspective, the most striking thing about *Sorrell* is not simply the plausibility of Justice Breyer’s accusation that the Court was interfering with ordinary governmental regulatory policies, but also how such interference arose out of a perfectly straightforward application of traditional First Amendment principles. It is tempting to say, as the First Circuit did in *Ayotte*, that state restrictions on data-mining prescription information do not implicate speech at all. But the Court was surely right that the disclosure of raw information is a critical aspect of protected expression. Consider, for example, the famous Pentagon Papers case, which likewise involved the right to disclose information.¹⁰⁵ And Justice Kennedy

102. *Id.* at 2679.

103. *Id.*

104. DANIEL BELL, *THE COMING OF POST-INDUSTRIAL SOCIETY: A VENTURE IN SOCIAL FORECASTING*, at xvii (1999); *see also id.* (observing that while “[t]he infrastructure of industrial society was transportation . . . [t]he infrastructure of post-industrial society is communication”). Some argue that information flows will come to be critical even to traditional production industries. *See, e.g.*, Mary Adams, *The Post-Industrial Production Economy*, MANDEL ON INNOVATION AND GROWTH (Oct. 21, 2011), <http://innovationandgrowth.wordpress.com/2011/10/21/the-post-industrial-production-economy/> (“[W]e can expect that every corner of the economy, including the production sector, will be ‘knowledge-ized,’ that is, re-made using information technology and knowledge to drive efficiencies.”).

105. *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971).

was able to cite numerous more mundane cases recognizing that prosaic forms of information amount to protected speech.¹⁰⁶

Once the regulated activity is speech, then heightened scrutiny follows almost as night follows the day. As Justice Kennedy observed, Vermont's regulation "imposes more than an incidental burden on protected expression," in the way that "'an ordinance against outdoor fires' might forbid 'burning a flag.'"¹⁰⁷ Because the regulation turned on the content of the speech, and seemed indeed to be directed at some speakers but not others, strict scrutiny followed under well-established precedents. But it is also true, as Justice Breyer pointed out, that "[r]egulatory programs necessarily draw distinctions on the basis of content," and it is also commonplace for economic regulations "to be 'speaker-based,' affecting only a class of entities, namely, the regulated firms."¹⁰⁸ For example, federal law extensively regulates the content of drug labels, often requiring governmental approval of the content of those labels and forbidding reference to unapproved uses of the drug.¹⁰⁹ Many of those regulations, moreover, are speaker-based; generic-drug manufacturers have different obligations than brand-name manufacturers, for instance.¹¹⁰ Pharmaceutical companies have already filed First Amendment challenges to some of these requirements in *Sorrell's* wake.¹¹¹

One might instead say that the Court erred in treating the speech in *Sorrell* as ordinary noncommercial speech, rather than as commercial speech triggering a lesser degree of First Amendment scrutiny. This approach would attempt to replicate the post-1937 double standard *within* First Amendment doctrine, according the strictest scrutiny to restrictions on political or personal speech while treating commercial speech regulation more deferentially.¹¹² It is not obvious that this can or should be done, as

106. *Sorrell*, 131 S. Ct. at 2667 (citing *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 481 (1995) (recognizing that "information on beer labels" is speech); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759 (1985) (plurality opinion) (recognizing that a credit report is "speech")).

107. *Id.* at 2665 (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 385 (1992)).

108. *Id.* at 2677-78 (Breyer, J., dissenting) (citing *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976)).

109. See 21 U.S.C. §§ 352(f)(2), 355(b)(1), 355(d) (2006); see also *Sorrell*, 131 S. Ct. at 2676 (discussing these requirements).

110. See *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2574 (2011) (describing the generic drug labeling regime).

111. See Thomas Sullivan, *Par Pharmaceuticals vs. FDA Calling for Truthful Speech vs. FDA Approved*, POL'Y & MED. (Oct. 18, 2011), <http://www.policymed.com/2011/10/phar-pharmaceuticals-vs-fda-calling-for-truthful-speech-vs-fda-approved.html> (analyzing the legal merits of a recent challenge to the FDA's prohibition against "off-label promotion").

112. See, e.g., *Sorrell*, 131 S. Ct. at 2673-74 (Breyer, J., dissenting) ("[T]he First Amendment

many Justices and commentators have criticized the doctrinal distinction between commercial and noncommercial speech.¹¹³ Nor is it clear where such a divide would leave the large proportion of speech cases that do not involve outright political speech but have not been treated as commercial either, such as the Court's recent cases on broadcast indecency,¹¹⁴ animal "crush" videos,¹¹⁵ and violent video games.¹¹⁶ But even if we accept a sharp distinction between commercial and noncommercial speech, and put *Sorrell* on the commercial side of the line, that would not solve the more fundamental problem that the case presents.

Justice Kennedy seemed to prefer a more demanding level of scrutiny for content-based restrictions, even in commercial cases, and Justice Breyer argued for something closer to rational basis review, but both the majority and the dissent in *Sorrell* purported to apply *arguendo* the standard test for regulation of commercial speech established in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.¹¹⁷ That test inquires whether (1) the commercial speech at issue "is neither misleading nor related to unlawful activity"; (2) the government's interest is "substantial"; (3) "the restriction . . . directly advance[s] the state interest"; and (4) "the governmental interest could be served as well by a more limited restriction on commercial speech."¹¹⁸ Both majority and dissent treated this as a form of "intermediate" scrutiny.¹¹⁹ As such, it is already a far cry from the "rational basis" review that has characterized constitutional review on the deferential side of the modern double standard. *Lochner* itself applied a form of intermediate scrutiny, inquiring whether a law restricting freedom of contract was "a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary

imposes tight constraints upon government efforts to restrict, *e.g.*, 'core' political speech, while imposing looser constraints when the government seeks to restrict, *e.g.*, commercial speech, the speech of its own employees, or the regulation-related speech of a firm subject to a traditional regulatory program.").

113. See, *e.g.*, 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 520, 522 (1996) (Thomas, J., concurring in part and in the judgment) (noting "the near impossibility of severing 'commercial' speech from speech necessary to democratic decisionmaking" and concluding that "I do not see a philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than 'noncommercial' speech").

114. *FCC v. Fox Television Stations, Inc.*, 131 S. Ct. 3065, 3065–66 (2011) (granting certiorari to decide "[w]hether the Federal Communications Commission's current indecency-enforcement regime violates the First or Fifth Amendment to the United States Constitution").

115. *United States v. Stevens*, 130 S. Ct. 1577, 1592 (2010).

116. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2742 (2011).

117. *Sorrell*, 131 S. Ct. at 2667–68; *id.* at 2679 (Breyer, J., dissenting).

118. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 564 (1980).

119. See *Sorrell*, 131 S. Ct. at 2667–68; *id.* at 2679 (Breyer, J., dissenting).

interference with the right of the individual to his personal liberty or to enter into . . . contracts.”¹²⁰ As Barry Cushman has demonstrated, the *Lochner* freedom of contract jurisprudence upheld at least as many regulations as it struck down.¹²¹

Applying a different First Amendment standard, in other words, would hardly make a dent in the criticism that judicial review is likely to disrupt important governmental regulatory schemes. All forms of speech review—including the *Central Hudson* test—are far less deferential than the “rational basis” review of economic legislation that replaced *Lochner*’s reasonableness test. Perhaps the only solution, then, is to adopt Justice Breyer’s suggestion that cases like *Sorrell* should be judged under the same rational basis standard that now applies in economic due process litigation. But this is hardly satisfactory, because Breyer offered little explanation as to when rational basis review should supplant ordinary First Amendment doctrine. He suggested that “[t]he Court has also normally applied a yet more lenient approach to ordinary commercial or regulatory legislation that affects speech in less direct ways” than restrictions on advertising.¹²² That suggestion, however, brings back bad memories of the direct/indirect distinction that once organized the Court’s *Lochner*-era Commerce Clause jurisprudence.¹²³ Breyer’s other grounds for applying more deferential scrutiny—for example, that the federal government and other states undertake similar regulatory actions, that the Vermont law is part of a “comprehensive regulatory regime,” and that the regulated information “exists only by virtue of government regulation”¹²⁴—were so fact-intensive as to amount to a gestalt judgment with little constraining force in future cases.

More fundamentally, if expressive activity is really ubiquitous in the modern information economy, then there is no escaping the basic dilemma *Sorrell* poses. If much economic regulation is also speech regulation, then the Court must either fundamentally narrow First Amendment doctrine to allow application of traditional rational basis review to economic regulation of speech or reintroduce meaningful judicial scrutiny into a large swath of regulatory activity. It cannot honestly resolve cases like *Sorrell* by applying

120. *Lochner v. New York*, 198 U.S. 45, 56 (1905); see *id.* at 54 (noting that the Court’s freedom of contract jurisprudence had “been guided by rules of a very liberal nature, the application of which has resulted, in numerous instances, in upholding the validity of state statutes thus assailed”).

121. See CUSHMAN, *supra* note 31, at 33–34.

122. *Sorrell*, 131 S. Ct. at 2674 (Breyer, J., dissenting).

123. See, e.g., *United States v. E.C. Knight Co.*, 156 U.S. 1, 15–16 (1895) (distinguishing state laws that directly interfere with interstate commerce from those only indirectly affecting it).

124. *Sorrell*, 131 S. Ct. at 2676 (Breyer, J., dissenting).

the customary doctrinal double standard, because the regulations in such cases will fit comfortably on *both* sides of the line.

Nor can the dilemma be confined to the First Amendment. Recent years have seen increasingly frequent collision between other “personal” rights and traditional forms of economic regulation. Federal health care rules mandating that employers provide coverage for contraception and employment rules forbidding discrimination on grounds like disability, for example, have come into conflict with the rights of religious groups under the Free Exercise Clause.¹²⁵ Regulation of health care and medical ethics also collides with various aspects of privacy under the Due Process Clause.¹²⁶ Like other ill-fated judicial attempts to divide up the world into distinct “spheres” of activity, the effort to cabin heightened judicial scrutiny into a “personal” sphere while giving the government free play on “economic” matters is likely to fail across the board.

This problem is not altogether new. In *Turner Broadcasting System, Inc. v. FCC*, for example, the Court strained to find that the Federal Communications Commission’s “must carry” rules for cable service providers were subject only to intermediate scrutiny because they were content neutral, notwithstanding that they required cable providers to carry certain content.¹²⁷ The Court’s embrace of intermediate scrutiny might be more plausibly explained as a recognition that cable regulation is economic regulation, so that application of strict First Amendment scrutiny would disrupt precisely the sorts of government policies that the double standard was erected to protect. Of course, the solution is only partially satisfactory because intermediate scrutiny under *Turner*, like the *Central Hudson* test, is still far more intrusive than ordinary rational basis review. The important point is simply that the double standard has been eroding for some time in the First Amendment area, and that erosion is only going to get worse as expression and information become increasingly central to our economic life.

I do not profess to have a solution to this dilemma. The doctrinal double standard came into being for good reasons—a desire to avoid repeating the excessive judicial intervention of the *Lochner* era, combined with a recognition that full judicial abdication would undermine our

125. See, e.g., Complaint at 1–2, *Priests for Life v. Sebelius*, No. 1:12-cv-00753 (E.D.N.Y. filed Feb. 15, 2012) (challenging the PPACA’s mandate that all employers must provide contraception in their health insurance plans); *Hosanna–Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 705–06 (2012) (holding that religious institutions enjoy a “ministerial exception” from the Americans with Disabilities Act).

126. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 705 (1997) (considering claims that the Due Process Clause protects a privacy right to physician-assisted suicide).

127. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 643–44 (1994).

national commitment to constitutionalism. It seems clear that the tension between those two imperatives can no longer be resolved simply by assigning them to different spheres of governmental activity. We need a set of doctrinal rules that are not tied to unsustainable distinctions—but also a set of rules that does not abandon judicial checks on arbitrary action by political actors.¹²⁸ But it is infinitely easier to say that than it is to articulate what those rules should be.

One possibility would be to build on the “undue burden” standard that the Court has adopted in abortion cases.¹²⁹ Strict scrutiny—the primary doctrinal standard for analyzing regulation of fundamental personal rights—proceeds on the assumption that most such regulation is pernicious and should be struck down, with only rare exceptions.¹³⁰ But some rights, such as rights to make meaningful choices about reproduction and medical care, *require* certain forms of regulation in order to further their exercise. The Court has thus been unwilling to adopt strict scrutiny as the standard for evaluating restrictions on physician-assisted suicide, for example;¹³¹ even those who favor making that choice available would generally concede that it requires extensive regulatory safeguards to ensure that choices are voluntary and methods are humane. Similarly, abortion is not a meaningful choice unless it is medically safe, and safety requires some degree of regulation.¹³² The Court has thus abandoned strict scrutiny of abortion regulations in favor of the undue burden standard, which is designed to distinguish between regulation that furthers the underlying right and

128. Professor Tribe has argued, for example, that while the *Lochner* Court erred by painting the wrong “picture of freedom in industrial society,” “there is no escape from the difficult task of painting a better . . . truer picture; to leave the canvas blank just hands the brushes over to other artists.” LAURENCE H. TRIBE, 1 *AMERICAN CONSTITUTIONAL LAW* §§ 8–9, at 1371 (3d ed. 2000). In other words, courts cannot entirely abdicate defining and enforcing principles of substantive liberty under the Due Process Clause.

129. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992) (plurality opinion) (“A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.”).

130. See generally Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 296 (1992) (“If strict scrutiny is applied, the challenged law is never supposed to survive . . . Hence Professor Gerald Gunther’s pithy aphorism: “‘strict’ in theory and fatal in fact.”) (quoting Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972)).

131. See *Glucksberg*, 521 U.S. at 705.

132. More controversially, some regulations also proceed on the principle that abortion is not a meaningful choice unless it is sufficiently *informed* by knowledge about its consequences.

regulation that, while perhaps disguised as helpful, is actually meant to discourage that right.¹³³

This sort of right—that is, one requiring a certain degree of regulation for its meaningful vindication—seems pervasive in contemporary society. The theory of modern campaign-finance regulation, for example, is that political speech cannot be truly “free” if wealthy interests are allowed to drown out other speakers in an untrammelled free market. The right to marry is, effectively, a right to governmental recognition of a personal relationship—a right that necessarily requires government to define the sorts of relationships it will recognize. And debates about the free exercise of religion are increasingly about rights to have the government take action to accommodate—not simply ignore—particular beliefs and practices. In each of these areas, we may not be able to afford a strong, strict-scrutiny-type standard that presumptively invalidates all governmental intrusion, but there is sufficient risk of governmental attempts to control protected choice that we also cannot afford to dispense with judicial review entirely.

One hesitates to advocate expanding undue-burden-type analyses to these other contexts, given how controversial the standard is even in its natural habitat.¹³⁴ My point is simply that the undue burden standard arguably has two characteristics that will become increasingly important in a post-double-standard world. First, it is *intermediate* between tests that strike almost everything down and tests that rubber-stamp whatever the government chooses to do. Second, because it holds this middle ground, it is *generalizable* to a wide range of circumstances, without needing to divide up the world into distinct categories triggering distinct analyses. Courts conceivably could apply this sort of analysis to the full range of government regulation, upholding those regulations designed to respect and facilitate individual rights while striking down those with the purpose or effect to interfere.

These advantages come at a cost, however, which is that the undue burden standard is far more *indeterminate* than either strict scrutiny or

133. See *Casey*, 505 U.S. at 877 (“A statute [creating an obstacle to securing an abortion] is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman’s free choice, not hinder it.”).

134. See, e.g., Gillian E. Metzger, Note, *Unburdening the Undue Burden Standard: Orienting Casey in Constitutional Jurisprudence*, 94 COLUM. L. REV. 2025, 2026 (1994) (“[T]he abortion undue burden standard is virtually unique in its lack of protection against unnecessary and unjustified burdens on a constitutionally protected right.”). For an earlier and much more extensive effort to think about the undue burden standard as responding to more universal problems in constitutional law, see generally Alan Brownstein, *How Rights Are Infringed: The Role of Undue Burden Analysis in Constitutional Doctrine*, 45 HASTINGS L. J. 867 (1994).

rational basis review.¹³⁵ Any form of intermediate scrutiny means that the initial categorization decision does not decide the case. Judges will have to actually make case-by-case judgments about which regulations to uphold and which to strike down, and this means that different judges will come out differently in ostensibly similar cases.¹³⁶ If nothing else, the Supreme Court's undue burden jurisprudence reminds us how difficult it is to apply such tests in a principled way. An influential school of thought holds that such indeterminacy—the inability of a doctrine to guide courts so that their decisions seem consistent and principled to outside observers—fatally undermined the *Lochner*-era Court's efforts to enforce both federalism and economic liberty. That, of course, is why we developed the double standard in the first place.¹³⁷

Not everyone is terrified of reviving *Lochner*. David Bernstein, for example, recently published a book-length project aimed at “Rehabilitating *Lochner*.”¹³⁸ Short of that, others have pressed for a somewhat more vigorous version of rationality review in economic cases. Citing recent cases like *Romer v. Evans* and *City of Cleburne v. Cleburne Living Center*, which both applied rational basis review under the Equal Protection Clause with a somewhat greater than usual “bite” to strike down state legislation,¹³⁹ Timothy Sandefur argues that “a realistic rationality review need not intrude upon the ability of legislatures to make legitimate policies. Rather, courts would do what they already do in cases involving other types of discrimination: ensure that the legislature is pursuing a genuine and

135. Compare, e.g., *Stenberg v. Carhart*, 530 U.S. 914, 921–22 (2000) (striking down Nebraska's partial-birth-abortion ban), with *Gonzales v. Carhart*, 550 U.S. 124, 132–33 (2007) (upholding the federal partial-birth-abortion ban without overruling *Stenberg*).

136. Sullivan, *supra* note 130, at 296 n.9. “If a case is steered at the outset onto a track of intermediate scrutiny, the result is not predetermined at the threshold. Intermediate scrutiny, as discussed below, is a balancing mode, whether adopted officially or de facto.” *Id.* (citation omitted).

137. See Kathleen M. Sullivan, *The Supreme Court 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 60 (1992).

Bipolar two-tier review did penance for the appearance of naked value choices that had brought the Court into disrepute in the *Lochner* era. Thus, in true categorical fashion, two-tier review generally decides cases through characterization at the outset, without the need for messy explicit balancing. The classification at the threshold cuts off further serious debate

Id.

138. DAVID E. BERNSTEIN, *REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM* (2011).

139. *Romer v. Evans*, 517 U.S. 620, 635 (1996) (striking down Colorado's state constitutional amendment foreclosing state and local laws from protecting gay persons from discrimination as not rationally related to a legitimate state purpose under the Equal Protection Clause); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 435 (1985) (striking down under rational basis review a local ordinance that discriminated against the mentally disabled).

reasonable public policy, rather than protecting insiders against competition.”¹⁴⁰

Unlike Professor Bernstein and Mr. Sandefur, however, I am *quite* nervous about reviving *Lochner*—or anything like it. As our wisest Justice said of what he perceived as another “backward glance” at reinvigorating that era of more aggressive judicial review, “we know what happened.”¹⁴¹ Justice Breyer is correct, however, that the Court revived something very like *Lochner* in *Sorrell*, and that this form of intrusive judicial review has potential application in a broad swath of cases involving economic regulation of activity that happens to be expressive. We will not serve the cause of coherence in constitutional doctrine by ignoring the fact that the old categories are breaking down, even if considerably more work will be required before we know how to replace them.

CONCLUSION

Under current law, nude dancing is protected expression under the First Amendment.¹⁴² As one commentator explains, “[n]ude dancing has the potential to convey a powerful and particularized message of sexual desire and availability, as well as a message of appreciation of the nude female form.”¹⁴³ But if we accept this, then perhaps the plaintiffs challenging the PPACA’s individual mandate should have asserted a First Amendment claim, too: “Refusal to buy health insurance has the power to convey a powerful and particularized message of personal autonomy and self-reliance, as well as a message of political opposition to the federal government’s policy on health care reform.” My point is not to amend the PPACA plaintiffs’ complaint, but rather to show how easy it is to merge the world of “personal” and “economic” rights, notwithstanding the fact that much of contemporary constitutional doctrine depends on keeping them separate.

Ever since the Supreme Court’s famous “switch in time” in 1937, the Court has endeavored to stay clear of intervening in disputes about

140. Timothy Sandefur, *Equality of Opportunity in the Regulatory Age: Why Yesterday’s Rationality Review Isn’t Enough*, 24 N. ILL. U. L. REV. 457, 487 (2004).

141. *United States v. Lopez*, 514 U.S. 549, 608, 615 (1995) (Souter, J., dissenting).

142. *See City of Erie v. Pap’s A.M.*, 529 U.S. 277, 289 (2000) (plurality opinion) (“[G]overnment restrictions on public nudity such as the ordinance at issue here should be evaluated under the framework . . . for content-neutral restrictions on symbolic speech.”); *see also id.* at 326 (Stevens, J., dissenting) (agreeing that “nude dancing is a species of expressive conduct that is protected by the First Amendment”).

143. Kevin Case, Note, “*Lewd and Immoral*”: *Nude Dancing, Sexual Expression, and the First Amendment*, 81 CHI.-KENT L. REV. 1185, 1185 (2006).

economic regulation, while maintaining vigorous judicial scrutiny of restrictions on “personal” rights. Free speech doctrine has thus been built on the premise that it would rarely, if ever, intersect with the core regulatory concerns that prompted the Court’s retreat during the New Deal. The recent decision in *Sorrell*, however, makes clear that this premise no longer holds. Increasingly, traditional regulatory regimes will seek to govern activity that counts as expressive under modern First Amendment jurisprudence, thereby bringing the two halves of the Court’s “double standard” into conflict.

I have not tried to resolve this dilemma in this brief Essay. It is important simply to recognize, however, that *Sorrell* was a more difficult case than either the majority or the dissent fully recognized. That recognition might help pave the way for an effort to restructure constitutional doctrine along lines that do not depend on unsustainable distinctions. Cases like *Sorrell* are not going to go away, and the effort to reconcile the two halves of the post-New Deal settlement is likely to preoccupy the Court for many years to come.