TWO FIRST AMENDMENT FUTURES: CONSUMER PRIVACY LAW AND THE DEREGULATORY FIRST AMENDMENT

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2020 MICH. ST. L. REV. 897

ABSTRACT

After decades of calls for comprehensive consumer privacy laws in the United States, they are nearly here. The debates surrounding these laws, however, have paid scant attention to the inevitable First Amendment challenges. These challenges will occur in the context of the "deregulatory First Amendment," the Supreme Court's decades-long expansion of First Amendment limits on economic regulations. Scholars have compared this deregulatory agenda to the judicial excesses of the Lochner *era. The First Amendment, however, has even greater deregulatory potential today because contemporary economic and social activity depend upon exchanges of information. Accordingly, First Amendment challenges to consumer privacy laws will bring us to a crossroads. One path forward would continue the Court's deregulatory trajectory, drawing largely on the Court's recent decisions in* Sorrell v. IMS Health, Inc. *and* Reed v. Town of Gilbert. *That path would further constrain the administrative state by treating all consumer data flows as "speech" for First Amendment purposes and using the Court's recent approach to content discrimination to subject most consumer privacy laws to strict scrutiny, rather than the intermediate scrutiny that has applied to commercial speech for decades. An alternative path, however, would resolve challenges to consumer privacy laws under established First Amendment doctrine. That traditionalist path would treat consumer data as commodities rather than speech, analyze typical consumer privacy laws as imposing no more than incidental burdens on speech, and preserve the intermediate scrutiny standard for commercial*

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speech regulations. The consequences of this choice will reach far beyond consumer privacy law and could jeopardize many of the regulatory tools on which the modern administrative state depends.

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INTRODUCTION

Support for broad consumer privacy legislation in the United States has never been stronger. California's comprehensive consumer privacy law took effect in 2020, and other states are considering their own consumer privacy legislation.[1] Growing animosity toward digital

1. *See* CAL. CIV. CODE §§ 1798.100–1798.199 (West 2020); *see also, e.g.*, S. 6281, 66th Leg., Reg. Sess. (Wash. 2020); *see also State Comprehensive-Privacy Law Comparison*, INT'L ASS'N OF PRIV. PROS., https://iapp.org/media/pdf/resource_

platforms and industry's concern over complying with a patchwork of state laws have pushed Congress closer than ever before to passing broad consumer legislation.[2] This legislative momentum has prompted a robust debate about what form such legislation should take. Yet that debate rarely mentions a significant threat to consumer privacy legislation—a First Amendment challenge.

Such a First Amendment challenge will arise in the context of what Charlotte Garden has labeled the deregulatory First Amendment, the Supreme Court's decades-long expansion of First Amendment limitations on economic regulations.[3] This project has already undermined substantial government regulation of commercial activity. Before 1976, the Court did not even recognize commercial speech as a type of expression covered by the First Amendment.[4] Four decades later, however, commercial speech has risen to the second tier in the hierarchy of free speech protection, where government may not

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center/State_Comp_Privacy_Law.pdf [https://perma.cc/T7SA-2QMJ] (Oct. 14, 2020) (listing bills pending in Florida, Hawaii, Massachusetts, Minnesota, Nebraska, New Hampshire, New York, Virginia, and Washington).

2. *See 16 Ways Facebook, Google, Apple and Amazon Are in Government Cross Hairs*, N.Y. TIMES (Sept. 9, 2019), https://www.nytimes.com/interactive/2019/technology/tech-investigations.html [https://perma.cc/PJ7C-3JQF] ("The backlash over big tech is one of the few areas where Democrats and Republicans are increasingly in agreement . . . ."); Neema Singh Guliani, *The Tech Industry is Suddenly Pushing for Federal Privacy Legislation. Watch Out.*, WASH. POST (Oct. 3, 2018, 8:23 AM), https://www.washingtonpost.com/opinions/the-tech-industry-is-suddenly-pushing-for-federal-privacy-legislation-watch-out/2018/10/03/19bc473e-c685-11e8-9158-09630a6d8725_story.html [https://perma.cc/FB8V-MT2B] (describing industry groups advocating for federal privacy law that will preempt the emerging patchwork of state laws); Emily Birnbaum, *Senators Inch Forward on Federal Privacy Bill*, HILL (Dec. 4, 2019, 4:44 PM), https://thehill.com/policy/technology/473071-senators-inch-forward-on-federal-privacy-bill [https://perma.cc/3F5K-HELZ] (explaining that despite the host of pending consumer privacy bills, Congress appears to have coalesced around two approaches: a bill proposed by Senator Cantwell and a draft circulated by Senator Wicker); *see also* Charlie Warzel, *Will Congress Actually Pass a Privacy Bill?*, N.Y. TIMES (Dec. 10, 2019), https://www.nytimes.com/2019/12/10/opinion/congress-privacy-bill.html?searchResultPosition=9 [https://perma.cc/7L8D-VXQV]; Consumer Online Privacy Rights Act, S. 2968, 116th Cong. (2019) [hereinafter Cantwell Bill]; Setting an American Framework to Ensure Data Access, Transparency, and Accountability Act, S. 4626, 116th Cong. (2020) [hereinafter Wicker Bill].

3. *See* Charlotte Garden, *The Deregulatory First Amendment at Work*, 51 HARV. C.R.-C.L. L. REV. 323, 323–24 (2016).

4. *See* Frederick Schauer, *Commercial Speech and the Perils of Parity*, 25 WM. & MARY BILL RTS. J. 965, 968 (2017) (citing Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976)).

regulate speech unless the regulation directly advances a substantial state interest.[5] Some Justices and scholars are pushing to continue the Court's deregulatory project by granting commercial speech the same protection as noncommercial speech under the Court's usually fatal strict scrutiny test.[6]

The inevitable First Amendment challenge to consumer privacy laws could further the Court's deregulatory agenda. Much of the Court's deregulatory project has involved stretching the boundaries of what constitutes "speech" for First Amendment purposes.[7] Because consumer privacy law regulates the various phases of the consumer data lifecycle—data collection, processing, and sharing, as well as targeted marketing—these laws constrain commercial activity that bears a superficial resemblance to communication.[8] That facially communicative element invites courts to treat all data flows as speech, even though the businesses that trade in those data flows regard the data as a mere commodity.[9] Given the extent to which contemporary economic and social activity have become infused with data flows, continued First Amendment deregulation is likely to reach far beyond the consumer privacy context.[10] This Article examines how we arrived at this jurisprudential and regulatory crossroads, maps out two very different paths forward, and urges that courts adopt a traditionalist rather than deregulatory path to pull us back from the brink of First Amendment deregulation.

Part I describes how, starting in 1976 with the Court's holding that commercial speech falls within the First Amendment's coverage, the Court has expanded the scope of government regulation subject to First Amendment challenges. Scholars have variously labeled this phenomenon First Amendment Lochnerism, First Amendment expansionism, and the deregulatory First Amendment.[11] The reach of this deregulatory project will only increase as more of our economic

5. *See id.*
6. *See id.* at 969–70.
7. *See infra* Part I.
8. *See* Schauer, *supra* note 4, at 965.
9. *See infra* Section III.A.
10. *See* Amanda Shanor, *The New* Lochner, 2016 WIS. L. REV. 133, 171–72 (2016) (describing the shift towards an information-based economy and the larger importance of informational goods and services to our political economy); Neil M. Richards, *Why Data Privacy Law Is (Mostly) Constitutional*, 56 WM. & MARY L. REV. 1501, 1530 (2015) ("Today great chunks of human society are being transformed into digital forms, and we all leave digital footprints every day as we live our lives.").
11. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 780 (1976); *infra* Part I.

affairs depend upon exchanges of information, which makes regulation of economic activity appear on the surface to affect speech.[12]

Part II examines two recent steps in the Supreme Court's deregulatory First Amendment agenda.[13] The Court's decision in *Sorrell v. IMS Health, Inc.*, which struck down a Vermont law prohibiting pharmacies from sharing physicians' drug prescribing habits with pharmaceutical manufacturers, previewed several ways in which the deregulatory First Amendment might manifest itself in the consumer privacy context.[14] This Part also reviews the Court's decision in *Reed v. Town of Gilbert*.[15] Although *Reed* did not involve commercial speech, it clarified the Court's approach to determining which laws are content-based, and commentators have suggested that *Reed* may lead courts to treat consumer privacy laws—and much other economic regulation—as content-based laws subject to the usually fatal strict scrutiny standard.[16]

The final two Parts, Parts III and IV, consider two possible First Amendment futures that could flow from the impending challenges to consumer privacy laws.[17] Part III details the deregulatory path that would continue the Court's subversion of economic regulations to newly established speech interests.[18] Guided by the expansive dicta in *Sorrell*, courts could first treat all forms of consumer data as "speech" for First Amendment purposes.[19] Next, courts could build on *Reed*'s content-discrimination approach to hold that distinctions between different types of data, such as sensitive versus non-sensitive data, render consumer privacy laws content-based.[20] Third, courts could continue the emphasis on content discrimination by treating compelled privacy disclosures as content-based speech constraints subject to strict scrutiny.[21] Finally, building again on dicta in *Sorrell*, courts could hold that content-based constraints on commercial speech are subject to strict scrutiny rather than the *Central Hudson* test's intermediate scrutiny.[22]

12. *See infra* Part I.
13. *See infra* Part II.
14. *See* 564 U.S. 552, 580 (2011); *infra* Section II.A.
15. *See* 135 S. Ct. 2218, 2224 (2015); *See infra* Section II.B.
16. *See infra* Section II.B; *Reed*, 135 S. Ct. at 2225.
17. *See infra* Parts III, IV.
18. *See infra* Part III.
19. *See infra* Section III.A.
20. *See infra* Section III.B.
21. *See infra* Section III.C.
22. *See infra* Section III.D.

Part IV charts a traditionalist path that turns away from the deregulatory agenda by evaluating consumer privacy laws under established First Amendment doctrine.[23] First, courts could hold that laws regulating consumer data flows affect commodities, not speech.[24] Second, courts could recognize that consumer privacy laws pose, at most, incidental burdens on some speech and uphold such laws except to the extent that they single out particular speakers.[25] Third, courts could uphold most mandatory privacy disclosures under the *Zauderer* standard as factual and noncontroversial disclosures about companies' data practices.[26] Finally, given the diminished interests underlying commercial speech, courts could continue subjecting content-based commercial-speech constraints under *Central Hudson*'s version of intermediate scrutiny rather than strict scrutiny.[27]

I. THE DEREGULATORY FIRST AMENDMENT

Courts hearing First Amendment challenges must address two critical questions regarding the First Amendment's "coverage" and "protection."[28] The coverage question asks whether the First Amendment applies at all to the regulated activity.[29] If not, the First Amendment challenge fails.[30] If the First Amendment applies, the protection question asks what degree of scrutiny the court should apply in order to determine whether the law violates the First Amendment.[31]

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23. *See infra* Part IV.
24. *See infra* Section IV.A.
25. *See infra* Section IV.B.
26. *See infra* Section IV.C.
27. *See infra* Section IV.D.
28. *See* Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1769 (2004).
29. *See id.*; Margot E. Kaminski, *Privacy and the Right to Record*, 97 B.U. L. REV. 167, 175–76 (2017); Neil M. Richards, *Reconciling Data Privacy and the First Amendment*, 52 UCLA L. REV. 1149, 1170 (2005) (describing this as the "scope question"). Jane Bambauer questions Frederick Schauer's assertion that many types of speech in fact do not fall within the coverage of the First Amendment. *See* Jane Bambauer, *Is Data Speech?*, 66 STAN. L. REV. 57, 68–69 (2014) (arguing that "[c]ontrary to Schauer's thesis, intentional regulations of speech as speech have, as a default, triggered First Amendment scrutiny"). Nevertheless, Bambauer agrees that the First Amendment analysis requires an initial determination of "coverage" before proceeding to determine the level of scrutiny. *See id.* at 69.
30. *See* Schauer, *supra* note 28, at 1769.
31. *See id.* at 1766–68; Kaminski, *supra* note 29, at 175–76; Richards, *supra* note 29, at 1170; Shanor, *supra* note 10, at 195.

This Part describes the decades-long expansion of First Amendment limits on the government's ability to regulate economic activity. The deregulatory First Amendment has affected the Court's approach to both the coverage question and the protection question. As explained below, the shift to an information economy means that economic regulations are more likely to affect information flows and therefore appear on the surface to regulate speech. For that reason, the impending First Amendment challenge to a comprehensive consumer privacy law will arise in a fact-pattern well-suited to accelerate the Court's deregulatory project.

Since the 1970s, the Court has gradually expanded the reach of the First Amendment to restrict government regulation, particularly in the commercial context.[32] Scholars have variously labeled this phenomenon First Amendment Lochnerism, First Amendment expansionism, and the deregulatory First Amendment.[33] The Lochnerism metaphor, offered by Supreme Court Justices[34] and scholars[35] alike, evokes the Supreme Court's deregulatory turn during

32. *See, e.g.*, Shanor, *supra* note 10, at 134–35; Kaminski, *supra* note 29, at 172 (arguing that "the First Amendment has become a blunt tool of deregulation").

33. *See, e.g.*, Garden, *supra* note 3, at 323 (discussing "a new generation of deregulatory First Amendment theories"); Leslie Kendrick, *First Amendment Expansionism*, 56 WM. & MARY L. REV. 1199, 1200 (2015) (describing "First Amendment expansionism, where the First Amendment's territory pushes outward to encompass ever more areas of law"); Jeremy K. Kessler & David E. Pozen, *The Search for an Egalitarian First Amendment*, 118 COLUM. L. REV. 1953, 1962 (2018) (describing "First Amendment Lochnerism"); Richards, *supra* note 29, at 1211–12 (comparing current First Amendment focus on freedom of information to Lochnerism); Richards, *supra* note 10, at 1529–31 (referring to "[d]igital *Lochner*"); Shanor, *supra* note 10, at 136 (describing the "new *Lochner*"); *cf.* Daniel J.H. Greenwood, *First Amendment Imperialism*, 1999 UTAH L. REV. 659, 659–60 (describing "First Amendment imperialism"); Morgan N. Weiland, *Expanding the Periphery and Threatening the Core: The Ascendant Libertarian Speech Tradition*, 69 STAN. L. REV. 1389, 1389 (2017) (referring to the Court's development of a new "libertarian tradition" underlying its First Amendment jurisprudence).

34. *See* Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2383 (2018) (Breyer, J., dissenting) (comparing Lochner era jurisprudence to the Court's use of "the First Amendment to strike down economic and social laws that legislatures long would have thought themselves free to enact"); Sorrell v. IMS Health, Inc., 564 U.S. 552, 603 (2011) (Breyer, J., dissenting) (arguing that the Court's approach threatens to "reawaken[] *Lochner*'s pre-New Deal threat of substituting judicial for democratic decisionmaking where ordinary economic regulation is at issue"); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 589 (1980) (Rehnquist, C.J., dissenting) (arguing that the Court's commercial speech protection risked a "return[] to the bygone era of *Lochner v. New York*").

35. *See* Kessler & Pozen, *supra* note 33, at 1963 (describing "First Amendment Lochnerism"); Richards, *supra* note 29, at 1211 (comparing current First

the early twentieth century.[36] During this period, the Court accepted businesses' arguments that constitutional liberty of contract barred government regulation of various workplace conditions.[37]

Similarly, during the current First Amendment Lochnerism, business interests have argued, often successfully, that the First Amendment prevents a host of laws "regulating commercial conditions such as employee safety and benefits; the location and organization of businesses; the composition and labeling of foodstuffs, drugs, and commercial products; and the treatment of customers."[38] Scholars trace the start of this movement to the Court's creation of a newly protected category of "commercial speech" in the 1970s.[39] Armed with this new doctrinal tool, corporations and trade groups brought First Amendment challenges to laws that involved not "core expression," but areas related to their "core profit-making activity."[40] The Roberts Court has furthered this deregulatory project by stretching the scope of First Amendment coverage to reach more economic activity, increasing the level of scrutiny for commercial speech and compelled speech, and opening the door to "new or aggressive forms of deregulatory First Amendment challenges."[41]

Morgan Weiland explains that the Court justified its deregulatory project by reshaping the theoretical justification for First Amendment protection.[42] Prior to this deregulatory movement, the primary First Amendment justifications were the liberal and republican traditions.[43] The liberal tradition protects individual rights against state intervention, thereby securing individual autonomy through "self-expression and self-realization."[44] The republican tradition protects individual rights for their instrumental value in creating collective autonomy necessary for "self-determination and

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Amendment focus on freedom of information to Lochnerism); Richards, *supra* note 10, at 1529–31 (referring to "digital *Lochner*); Shanor, *supra* note 10, at 136 (describing the "new *Lochner*").

36. *See* Kendrick, *supra* note 33, at 1207.

37. *See id*.

38. *Id.* at 1207–08.

39. *See* Garden, *supra* note 3, at 327; Shanor, *supra* note 10, at 142.

40. Garden, *supra* note 3, at 331 (citing John C. Coates IV, *Corporate Speech & the First Amendment: History, Data, and Implications*, 30 CONST. COMMENT. 223, 249 (2015)).

41. *See id.* at 332.

42. *See* Weiland, *supra* note 33, at 1394.

43. *See id.*

44. *See id.*

self-government."[45] Thus, the liberal tradition emphasizes speaker rights, whereas the republican tradition emphasizes listener rights.[46]

Weiland argues that the Court's deregulatory project rests upon a new "libertarian" tradition that treats "listeners' rights as an instrumental means to the end of vindicating corporate speech rights."[47] This libertarian approach "narrowly conceived of listeners as individual consumers or voters whose interest in free expression is to make informed choices in the market for goods or candidates."[48] The Court first advanced listeners' rights by using the interest in the "free flow of information" to justify striking down restrictions on corporate speech.[49] Then, Weiland explains, after subordinating listeners' rights to corporate speech rights, the Court abandoned the notion of corporate speech rights as a means to protect listeners' rights and instead "embrace[d] the corporate speech right as an end in and of itself."[50]

Two features of today's information economy render it even more susceptible to First Amendment deregulation.[51] First, we have shifted from a manufacturing-oriented economy to an economy "oriented principally toward the production, accumulation and processing of information."[52] Second, information flows play an "increasingly prominent role in the control of industrial production and in the management of all kinds of enterprises."[53] These features infuse economic activity with information flows, which make it "increasingly difficult to separate economic activity from expressive activity."[54] As a result, government regulation of business activity in the information economy is more likely to appear focused on "speech," and therefore more likely to fall within the First Amendment's coverage.[55] Therefore, Amanda Shanor argues, "the First Amendment has become the key battleground for challenging the

45. *See id.*
46. *See id.*
47. *See id.* at 1395.
48. *See id.*
49. *See id.* at 1396.
50. *Id.* at 1397.
51. *See* Kessler & Pozen, *supra* note 33, at 1971.
52. Julie E. Cohen, *The Regulatory State in the Information Age*, 17 THEORETICAL INQUIRIES L. 369, 371 (2016).
53. *See id.*
54. Kessler & Pozen, *supra* note 33, at 1972.
55. *See id.* at 1974 (citing Shanor, *supra* note 10, at 164, 171).

powers of the modern administrative state."[56] As in the original *Lochner* era, the deregulatory First Amendment "will tend to transfer decisions about the proper mode and extent of economic regulation from administrators and legislatures to courts, in what Justice Scalia has trenchantly termed a 'black-robed supremacy.'"[57]

Moreover, this deregulatory potential reaches beyond traditional commercial activity.[58] Because "nearly all human action—and so state regulation—operates through communication, the First Amendment possesses near[ly] total deregulatory potential."[59] For that reason, the deregulatory First Amendment threatens government regulation in such disparate areas as securities disclosure requirements, insider trading laws, workplace harassment laws, crimes such as conspiracy and fraud, and licensing requirements.[60] As Shanor argues, "The coming First Amendment coverage issues point out larger normative and political questions about what role we, as a democratic society, will countenance for both courts and private parties in limiting the powers of the political branches to structure our economic and social life."[61] Indeed, the "radical deregulatory potential of free speech claims" threatens "people's ability to govern by representative government at all."[62]

The next Part details two recent cases advancing the Court's deregulatory project: *Sorrell v. IMS Health, Inc*. and *Reed v. Town of Gilbert*.[63] Part III then examines how courts could build on *Sorrell* and *Reed* to continue the deregulatory path that threatens to undermine not only most of consumer privacy law, but also an even wider body of economic regulation.[64] Part IV, in contrast, charts a traditionalist path back from the deregulatory brink by relying on settled First Amendment doctrine to uphold most consumer privacy laws while retaining the ability to strike down regulations that single out specific speakers.[65]

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56. Amanda Shanor, *First Amendment Coverage*, 93 N.Y.U. L. REV. 318, 322 (2018).

57. Shanor, *supra* note 10, at 198 (citing United States v. Windsor, 133 S. Ct. 2675, 2698 (2013) (Scalia, J., dissenting)).

58. *See* Shanor, *supra* note 10, at 177.

59. *Id.*

60. *See id.* at 177, 180–81, 183.

61. Shanor, *supra* note 56, at 363.

62. Shanor, *supra* note 10, at 183.

63. *See generally* Sorrell v. IMS Health, Inc, 564 U.S. 552 (2011); Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015).

64. *See infra* Part III.

65. *See infra* Part IV.

II. RECENT WAYPOINTS IN THE COURT'S DEREGULATORY PROJECT

This Part examines two recent examples of the deregulatory First Amendment at work. The first, *Sorrell v. IMS Health, Inc.*, previewed how the deregulatory First Amendment may manifest itself in the consumer privacy context.[66] The second, *Reed v. Town of Gilbert*, did not involve consumer privacy law, but the Court's clarification of the content-discrimination test signaled the vulnerability of economic regulation to First Amendment challenges.[67] As described in Part III, these cases, in combination, offer a deregulatory roadmap for how to strike down most consumer privacy laws.[68]

A. *Sorrell v. IMS Health, Inc.*

The Supreme Court's 2011 decision in *Sorrell v. IMS Health, Inc.*, generated substantial commentary concerning its implications for consumer privacy law.[69] Although much of its deregulatory language is dicta, the opinion nevertheless lays out a roadmap for extending the deregulatory First Amendment to consumer privacy law and beyond.[70]

Sorrell involved a challenge to a Vermont law restricting the sharing and use of information about the medications that doctors prescribe, so-called prescriber-identifying information.[71] Drug manufacturers rely on prescriber-identifying information in their efforts to market their drugs to doctors.[72] In a process known as detailing, pharmaceutical salespeople visit doctors' offices in an attempt to persuade doctors to prescribe their company's drugs.[73] Detailing can be more effective if the salespeople tailor their

66. *See* 564 U.S. at 579.
67. *See* 135 S. Ct. at 2230.
68. *See infra* Part III.
69. *See* 564 U.S. at 552; *see also* Richards, *supra* note 10, at 1521; Bambauer, *supra* note 29, at 71; Shanor, *supra* note 10, at 177; Erin Bernstein & Theresa J. Lee, *Where the Consumer Is the Commodity: The Difficulty with the Current Definition of Commercial Speech*, 2013 MICH. ST. L. REV. 39, 51 (2013); Kyle Langvardt, *The Doctrinal Toll of "Information as Speech,"* 47 LOY. U. CHI. L.J. 761, 762 (2016); Felix T. Wu, *The Constitutionality of Consumer Privacy Regulation*, 2013 U. CHI. LEG. F. 69, 89 (2013). *See generally* Ashutosh Bhagwat, Sorrell v. IMS Health*: Details, Detailing, and the Death of Privacy*, 36 VT. L. REV. 855 (2012); Tamara R. Piety, *"A Necessary Cost of Freedom"? The Incoherence of* Sorrell v. IMS, 64 ALA. L. REV. 1 (2012).
70. *See Sorrell*, 564 U.S. at 580.
71. *See id.* at 557–58.
72. *See id.*
73. *See id.*

presentations based on the doctor's prescriber-identifying information.[74] Many pharmacies sell prescriber-identifying information to data miners, who in turn produce reports on prescriber behavior and lease the reports to pharmaceutical detailers.[75]

Vermont enacted its Prescription Confidentiality Law, also known as Act 80, to protect doctors' privacy interest and to improve public health and reduce healthcare costs.[76] Act 80 imposed three restrictions.[77] First, Act 80 prohibited pharmacies and health insurers "from selling prescriber-identifying information, absent the prescriber's consent."[78] Second, Act 80 prohibited pharmacies from allowing prescriber-identifying information to be used for marketing purposes without the prescriber's consent.[79] Finally, Act 80 prohibited pharmaceutical manufacturers and pharmaceutical marketers from using prescriber-identifying information for marketing without the prescriber's consent.[80] An exception allowed unconsented sharing for health care research.[81] As the Court emphasized, Act 80 also authorized funding for an "evidence-based prescription drug education program" aimed at prescribers in an effort to promote the use of generic drugs rather than name-brand drugs, a practice known as counter-detailing.[82] Three Vermont data miners and an association of pharmaceutical manufacturers sued, alleging that Act 80 violated the First Amendment.[83] The District Court rejected the First Amendment challenge, but the Second Circuit reversed, and the Court granted the state's petition for a writ of certiorari.[84]

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74. *See id.* at 558.

75. *See id.*

76. *See id.* at 558, 572.

77. *See id.* at 559.

78. *See id.* Vermont contended for first time before the Supreme Court that this prohibition applied to sales for all purposes, as opposed only to sales for marketing purposes. *See id.* at 562–63. The Court assumed for purposes of argument that the provision applied to sales for any purposes and nevertheless held that the statute could not withstand First Amendment scrutiny even under the state's proposed interpretation. *See id.* at 563.

79. *See id.* at 559.

80. *See id.*

81. *See id.* The statute created additional exceptions for use to enforce compliance with health insurance formularies or preferred drug lists; use for "care management educational communications" to patients concerning treatment options; and use for law enforcement operations. *See id.* at 560 (quoting VT. STAT. ANN. tit. 18, § 4631(e)(4) (2020)).

82. *See id.*

83. *See id.* at 561.

84. *See id.* at 562.

The Court reasoned that Act 80 "enacts content-[ ]and speaker-based restrictions on the sale, disclosure, and use of prescriber-identifying information."[85] The Court found the content-based distinction in the text of the law itself because prescriber-identifying information could be shared freely for the purposes of educational communications, but it could not be shared without consent when used for marketing.[86] Similarly, the Court found the law to be speaker-based on its face because it disfavored specific speakers—pharmaceutical manufacturers.[87] The Court found further evidence of the content-based and speaker-based distinctions in Vermont's legislative findings that pharmaceutical detailers convey messages that conflict with the state's goals.[88] Thus, the Court noted, the law discriminates not just on content but on viewpoint.[89]

The Court did not explicitly decide whether the sharing and use of prescriber-identifying information constituted speech.[90] Instead, the Court first noted that there was no meaningful distinction between burdening and banning speech, citing cases imposing a financial burden on speech with particular content or by particular speakers.[91] Thus, rather than address whether sharing data constitutes speech, the Court reasoned that prohibiting the sharing or use of data for pharmaceutical marketing purposes burdens the pharmaceutical manufacturer's marketing speech.[92]

The Court compared Vermont's law to Minnesota's tax on the paper and ink used by large newspaper publishers in *Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue*.[93] The *Minneapolis Star* Court subjected the tax to strict scrutiny because it singled out the press for taxation and targeted a small group of

85. *See id.* at 563–64.
86. *See id.*
87. *See id.* at 564.
88. *See id.* at 565.
89. *See id.*
90. *See id.* at 571. In dicta, the Court observed that "[t]he State asks for an exception to the rule that information is speech, but there is no need to consider that request in this case." *Id.*
91. *See id.* at 565–66 (citing Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 115 (1991) (striking down law that required publishers of true crime stories to divert money owed to the criminals into a state victim compensation fund) and Minneapolis Star & Trib. Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 581 (1983) (striking down use tax on paper and ink that singled out large newspaper publishers)).
92. *See id.*
93. *See id.* at 571.

newspapers to bear the bulk of the tax.[94] The Court then struck down the tax because the State failed to demonstrate an adequate justification.[95] For the same reason, the Court in *Sorrell* reasoned that the challenge to Vermont's content-based and speaker-based law "can be resolved even assuming, as the State argues, that prescriber-identifying information is a mere commodity."[96] Thus, the Court did not have to rely on the "rule that information is speech," and instead relied on the long-recognized principle that regulation of unexpressive activity in order to impose content-based or speaker-based constraints on speech triggers heightened First Amendment scrutiny.[97]

The Court, however, avoided deciding what level of scrutiny to apply.[98] Although burdens on commercial speech are generally subjected to the *Central Hudson* test's version of intermediate scrutiny, the Court suggested that content-based burdens on commercial speech should trigger strict scrutiny.[99] However, the Court ultimately did not decide whether intermediate or strict scrutiny should apply because, it reasoned, Act 80 failed either test.[100]

B. *Reed v. Town of Gilbert*

Once a law is determined to fall within the First Amendment's coverage, the next step is to determine the degree of scrutiny to apply.[101] The Court chooses the degree of scrutiny based on whether the law is content-based or content-neutral.[102] Content-based laws trigger heightened scrutiny because such laws are more suspicious than content-neutral laws, and are therefore "presumptively

94. *See Minneapolis Star*, 460 U.S. at 583, 585, 591.
95. *See id.* at 592–93.
96. *See Sorrell*, 564 U.S. at 571.
97. *See id.* (citing *Minneapolis Star*, 460 U.S. at 575).
98. *See id.*
99. *See id.* at 566.
100. *See id.* at 571 ("[T]he outcome is the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied.").
101. *See* Schauer, *supra* note 28, at 1766–68; Kaminski, *supra* note 29, at 175–76; Richards, *supra* note 29, at 1170; Shanor, *supra* note 10, at 195–97.
102. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994); *see also* Clay Calvert, *Is Everything a Full-Blown First Amendment Case After Becerra and Janus?*, 2019 MICH. ST. L. REV. 73, 74; Matthew D. Bunker et al., *Strict in Theory, But Feeble in Fact? First Amendment Strict Scrutiny and the Protection of Speech*, 16 COMM. L. & POL'Y 349, 357–58 (2011); Leslie Kendrick, *Content Discrimination Revisited*, 98 VA. L. REV. 231, 237 (2012).

unconstitutional."[103] Under the usually fatal strict scrutiny standard, the challenged law must fail unless it is the least restrictive means to accomplish a compelling state interest.[104] In contrast, content-neutral laws trigger only intermediate scrutiny.[105] The various forms of intermediate scrutiny require only that the law advance a "substantial" state interest.[106] A law is content-based when it makes distinctions based on "the ideas or views expressed"[107] or on the speech's "communicative content."[108]

Reed v. Town of Gilbert involved a challenge to the Town of Gilbert's "Sign Code" governing the display of outdoor signs.[109] The Sign Code prohibited displaying signs without a permit but created twenty-three categories of signs exempt from the permit requirement.[110] The Court described three categories of signs relevant to the case: ideological signs, which communicate "a message or ideas for noncommercial purposes"; political signs, which include signs "designed to influence the outcome of an election called by a public body"; and "temporary directional signs," which include signs directing pedestrians and motorists to a "qualifying event"—an "assembly, gathering, activity, or meeting [involving] a religious, charitable, community service, educational, or other similar non-profit organization."[111] Ideological signs could have areas of up to twenty

103. *Turner Broad. Sys.*, 512 U.S. at 642; *see also* Reed v. Town of Gilbert, 135 S. Ct. 2218, 2226 (2015). *See generally* DAVID L. HUDSON, JR., THE FIRST AMENDMENT: FREEDOM OF SPEECH § 2:2 (2012).

104. *See* Williams-Yulee v. Fla. Bar, 575 U.S. 433, 444 (2015) (quoting Burson v. Freeman, 504 U.S. 191, 211 (1992)) ("'[I]t is the rare case' in which a State demonstrates that a speech restriction is narrowly tailored to serve a compelling interest. But those cases do arise."); Kendrick, *supra* note 102, at 238 (noting that the usually fatal nature of strict scrutiny renders the classification of the challenged law as content-based or content-neutral the pivotal determination in any First Amendment analysis); *Reed*, 135 S. Ct. at 2226; 1 RODNEY A. SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH § 2:67 (2019). *See generally* HUDSON, *supra* note 103.

105. *Turner Broad. Sys.*, 512 U.S. at 642.

106. *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 377 (1968) (stating the test for conduct with both expressive and unexpressive components); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980) (stating the test for commercial speech).

107. Bartnicki v. Vopper, 532 U.S. 514, 526 (2001) (citing *Turner Broad. Sys.*, 512 U.S. at 642–43).

108. Nat'l Inst. of Family & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2371 (2018) (quoting *Reed*, 135 S. Ct. at 2226).

109. *Reed*, 135 S. Ct. at 2224.

110. *Id.*

111. *Id.* at 2224–25. The definition of ideological signs excluded signs falling within the following categories: Construction Sign, Directional Sign, Temporary

square feet and be displayed in any zoning area at any time.[112] Political signs were subject to greater restrictions. They could be up to sixteen square feet on residential property or thirty-two square feet on nonresidential property and displayed for sixty days before a primary election and fifteen days before a general election.[113] Temporary directional signs were subject to even more stringent regulations. They could be no larger than six square feet, no more than twelve hours before and one hour after the qualifying event, with no more than four signs placed on a single property at any time.[114]

The Good News Community Church and its pastor wanted to post signs informing people of the time and location of their services.[115] The church did not have its own building for worship, so it held services at various locations around town.[116] Early on Saturday, church members would post signs displaying the time and location of upcoming services; they removed them around midday on Sunday.[117] The town cited the church for violating the Sign Code's provisions related to time limits on temporary directional signs and the failure to include the date of the event on the signs.[118] The church sued to enjoin enforcement of the Sign Code as a First Amendment violation.[119] The District Court granted summary judgment for the town, and the Ninth Circuit affirmed on the theory that the Sign Code's classifications were content-neutral.[120] The Supreme Court reversed, holding that the Sign Code was content-based and that it failed strict scrutiny.[121]

The Court's opinion in *Reed* was significant for its clarification of the content-neutrality test. Before *Reed*, Supreme Court precedent on content-neutrality was inconsistent, and circuits were split on the role of government motivation.[122] Some circuits held that a law

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Directional Sign Relating to a Qualifying Event, Political Sign, Garage Sale Sign, or sign owned or required by a governmental agency. *Id.* at 2224.

112. *See id.*

113. *See id.* at 2224–25.

114. *See id.* at 2225.

115. *See id.*

116. *See id.*

117. *See id.*

118. *See id.*

119. *See id.* at 2226 (citing Reed v. Town of Gilbert, 707 F.3d 1057, 1069 (9th Cir. 2013)).

120. *See id.* (citing *Reed*, 707 F.3d at 1069).

121. *See id.* at 2231.

122. *See* Ashutosh Bhagwat, *In Defense of Content Regulation*, 102 IOWA L. REV. 1427, 1435–36 (2017) ("The Court itself had been far from clear on this issue prior to *Reed*. While the Court had often eschewed motive inquiries, at other times it had suggested exactly the opposite."); *id.* at 1436 ("[T]he doctrinal confusion among

drawing content-based distinctions on its face was nevertheless content-neutral if justified by reasons other than the content of the speech.[123] Others reasoned that a law drawing content-based distinctions on its face was content-based regardless of the government's motivation.[124] *Reed* held that the former approach misapplied the Court's earlier opinion in *Ward v. Rock Against Racism* because *Ward* involved only a content-neutral ban.[125] The *Reed* Court reasoned that "[i]nnocent motives do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppress disfavored speech."[126]

Thus, after *Reed*, courts first examine whether a law is content-based on its face.[127] If it is, the law is subject to strict scrutiny.[128] If not, then they must determine whether the government's motive was content-based.[129] If the government's motive was content-based, then even a facially content-neutral law is subject to strict scrutiny.[130] Under the *Reed* Court's formulation, a law is content-based when it "applies to particular speech because of the topic discussed or the idea or message expressed."[131]

Scholars have criticized *Reed*'s approach as "a departure from the existing conception of content discrimination."[132] Urja Mittal argues that "*Reed* marked the first time that the Court articulated this broader two-pronged definition of content discrimination. As a result, content discrimination now encompasses not only viewpoint-based regulations but also subject matter-based regulations."[133] Robert Post described *Reed* as a "sweeping" decision whose logic endangered so many laws that it would effectively "roll consumer protection back to the [nineteenth] century."[134] Even Justice Breyer's concurrence in

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lower courts in this area was built on inconsistent signals from the Supreme Court itself.").

123. *See id.* at 1435.

124. *See id.*

125. *See Reed*, 135 S. Ct. at 2228–29.

126. *See id.* at 2229.

127. *See id.* at 2228.

128. *See id.*

129. *See id.* at 2228–29.

130. *See id.* at 2228.

131. *Id.* at 2226–27.

132. Urja Mittal, *The "Supreme Board of Sign Review":* Reed *and Its Aftermath*, 125 YALE L.J.F. 359, 360 (2016).

133. *Id.*

134. Adam Liptak, *Court's Free-Speech Expansion Has Far-Reaching Consequences*, N.Y. TIMES (Aug. 17, 2015), https://www.nytimes.com/2015/08/18/

Reed warned that "[r]egulatory programs almost always require content discrimination," and that "[t]o hold that such content discrimination triggers strict scrutiny is to write a recipe for judicial management of ordinary government regulatory activity."[135] Breyer warned that *Reed* could invalidate government regulation in countless areas, from securities regulation to prescription drug labeling practices.[136]

The next Part describes how courts hearing First Amendment challenges to consumer privacy laws could rely on aspects of *Sorrell* and *Reed* to chart a continued deregulatory path.[137] Part IV then shows how courts could repudiate the Court's deregulatory agenda and rely instead on settled First Amendment doctrine to uphold most consumer privacy laws while striking down laws targeting specific speakers.[138]

III. THE DEREGULATORY PATH: OVER THE EDGE

Courts faced with the inevitable First Amendment challenge could chart a path that continues the Court's deregulatory project.[139] First, courts could draw on sweeping dicta in *Sorrell* by treating all consumer data practices as "speech."[140] Next, courts could build on *Reed*'s approach to content-discrimination and hold that treating some types of consumer data differently than others renders consumer privacy laws content-based.[141] Then, courts could continue the emphasis on content-discrimination by treating compelled consumer

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us/politics/courts-free-speech-expansion-has-far-reaching-consequences.html [https://perma.cc/H7F3-XNTL]; *accord* Sarah J. Adams-Schoen, Reed *Applied: The Sign Apocalypse or Another Bump in the Road*, ZONING & PLAN. L. REP., July/Aug. 2016, at 4; Matthew Hector, *Groundbreaking Supreme Court Opinion Dooms Panhandling Law*, ILL. B.J., Oct. 2015, at 12; *but see generally* Enrique Armijo, Reed v. Town of Gilbert*: Relax, Everybody*, 58 B.C. L. REV. 65, 100 (2017) (concluding that *Reed* ameliorates the problem of excessive judicial review of content-based restrictions).

135. *Reed*, 135 S. Ct. at 2234 (Breyer, J., concurring).

136. *See id.* at 2235.

137. *See infra* Part III.

138. *See infra* Part IV.

139. *See* Bhagwat, *supra* note 122, at 1428 (explaining that the Supreme Court has restricted regulation by subjecting regulation of new categories of speech to strict scrutiny).

140. *See* Sorrell v. IMS Health, Inc., 564 U.S. 552, 557 (2011) (classifying Vermont's law prohibiting sale of prescriber identifying information as regulation of speech).

141. *See Reed*, 135 S. Ct. at 2224 (holding that differentiation of treatment between yard signage based on messaging is content-based regulation that does not pass strict scrutiny).

privacy notices as content-based speech constraints subject to strict scrutiny.[142] Finally, building again on dicta in *Sorrell*, courts could hold that content-based constraints on commercial speech are subject to strict scrutiny rather than the *Central Hudson* test's intermediate scrutiny.[143]

A. Treating Data as Speech

The Court in *Sorrell* referred to a "rule that information is speech."[144] Although *Sorrell* involved restraints on sharing data and using that data for marketing purposes, future courts could rely upon the "information is speech" dicta to bring all collection, processing, and sharing of information within the First Amendment's coverage.[145] As the Court explained, "Facts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs. There is thus a strong argument that prescriber-identifying information is speech for First Amendment purposes."[146] In addition, the Court observed that "[a]n individual's right to speak is implicated when information he or she possesses is subjected to 'restraints on the way in which the information might be used' or disseminated."[147] Thus, *Sorrell*'s dicta supports treating consumer data collection, processing, and sharing as speech.[148]

Jane Bambauer offers the leading argument that information is speech.[149] Bambauer's argument goes beyond the sharing of data,

142. *See id.*

143. *Compare Sorrell*, 564 U.S. at 565 (explaining that heightened scrutiny is due when a law's purpose is to "impose a specific, content based burden on protected expression"), *with* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 573 (1980) (Blackmun, J., concurring) (describing the four-part test laid out in the Court's opinion as one of intermediate scrutiny).

144. *Sorrell*, 564 U.S. at 571.

145. *See id.* at 570 (supporting the idea that processes of forming ideas should constitute speech, as data constitutes speech because of its role in forming speech).

146. *Id.*

147. *Id.* at 568 (quoting Seattle Times Co. v. Rhinehart, 467 U.S. 20, 32 (1984)). The Court made this observation in the course of distinguishing Los Angeles Police Department v. United Reporting Publishing Co., 528 U.S. 32 (1999), in which the Court upheld a law that restricted dissemination of the government's own information rather than information in private hands. *Sorrell*, 564 U.S. at 568 (citing *United Reporting*, 528 U.S. at 40).

148. *See id.* at 570 (supporting the proposition that the "sale[], transfer, and use" of information should be protected as speech).

149. *See* Bambauer, *supra* note 29, at 57.

which has at least some facial communicative component.[150] Instead, she argues that even the collection of data should, in many cases, constitute First Amendment speech.[151]

Bambauer's argument begins with the proposition that "the freedom of speech carries an implicit right to create knowledge. When the government deliberately interferes with an individual's effort to learn something new, that suppression of disfavored knowledge is presumptively illegitimate and must withstand judicial scrutiny."[152] She argues that one important goal of free speech rights should be "expanded knowledge" and that ensuring accurate information by protecting information creation is a means to accomplish that goal.[153] In this regard, Bambauer's approach exemplifies Weiland's libertarian tradition by treating the expansion of knowledge as a goal in itself, rather than focusing on the liberal tradition's individual self-expression or the republican tradition's collective self-governance.[154]

Recognizing the inherent uncertainty about whether the subject of a given regulation is speech, Bambauer proposes that courts resolve that uncertainty by considering the regulation's purpose.[155] "[S]tate action will trigger the First Amendment any time it purposefully interferes with the creation of knowledge."[156] As applied to consumer privacy law, under Bambauer's approach, "for all practical purposes and in every context relevant to the current debates in information law, data is speech. Privacy regulations are rarely incidental burdens to knowledge. Instead, they are deliberately designed to disrupt knowledge creation."[157]

Bambauer recognizes the deregulatory implications of this approach. She notes that her proposal would trigger First Amendment challenges to HIPAA; two-party consent wiretapping statutes; consumer privacy laws, including laws limiting online tracking; and

150. *See id.*

151. *See id.* at 61; *see also* Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049, 1050–51 (2000) (arguing that "the right to information privacy—my right to control your communication of personally identifiable information about me—is a right to have the government stop you from speaking about me").

152. Bambauer, *supra* note 29, at 60.

153. *See id.* at 63.

154. *See* Weiland, *supra* note 33, at 1394.

155. *See* Bambauer, *supra* note 29, at 63.

156. *Id.*

157. *Id.*

location tracking to name just a few.[158] Indeed, other scholars have similarly argued that adopting the "information is speech" position would reach far beyond consumer privacy law and would undermine government regulation in a host of areas, thus advancing the Court's deregulatory project.[159]

B. Treating Consumer Privacy Laws as Content-Based Constraints on Speech

Once a court determines that a law regulating data collection, processing, or sharing restricts speech, the court must next decide whether the law is content-based or content-neutral.[160] Recall that, under *Reed*, there are two ways for a speech regulation to be content-based: a content-based distinction on the face of the regulation or a content-based motivation behind the regulation.[161] A content-neutral justification cannot "save" a law that draws content-based distinctions on its face.[162]

The typical consumer privacy law creates separate restrictions based on the nature of the data. For example, the Cantwell Bill pending in the Senate requires opt-in consent for collecting, analyzing, using, or transferring "sensitive" data, but requires only opt-out consent for the same activities in connection with "non-sensitive" data.[163] "Sensitive" data include government-issued identifiers; information about physical or mental health or disability; financial account numbers; biometric and geolocation information; communications metadata; email addresses; telephone numbers; information about race, ethnicity, national origin, religion, union membership, sexual

158. *See id.* at 61–62. Bambauer notes that a First Amendment challenge is not insurmountable. *Id.* at 64. "It simply requires, as it should, a lively inquiry into whether the harms caused by the collection of information are probable enough, and serious enough, to outweigh the right to learn things." *Id.*

159. *See* Ashutosh Bhagwat, *When Speech Is Not "Speech,"* 78 OHIO ST. L.J. 839, 855 (2017) (adopting Sorrell's approach threatens "profound implications for a host of modem regulatory schemes from regulation of prescription drugs to securities regulation"); *see also* Richards, *supra* note 10, at 1531 ("If our lives become digital, but data is speech, regulation of many kinds of social problems will become impossible."); Julie E. Cohen, *The Zombie First Amendment*, 56 WM. & MARY L. REV. 1119, 1132 (2015) ("*Sorrell* portends wholesale constitutionalization of entire sectors of commercial activity and a broad and enduring marginalization of regulatory authority.").

160. *See* Reed v. Town of Gilbert, 135 S. Ct. 2218, 2228 (2015).

161. *See id.*

162. *See id.* at 2229.

163. *See* Cantwell Bill, *supra* note 2, § 105(b), (c).

orientation, or behavior; and more.[164] If *Reed* is to be taken at face value, these distinctions are based on the "subject matter" or "topic" of the data, in which case a future court could certainly rely on *Reed* to hold that these constraints are content-based and therefore subject to strict scrutiny.[165] Margot Kaminski has warned of exactly that possibility—that consumer privacy laws will be treated as content-based after *Reed* because they impose different constraints on sensitive versus non-sensitive data.[166]

Similarly, courts could treat consumer privacy laws as drawing speaker-based distinctions that subject those laws to strict scrutiny. Consumer privacy laws generally limit their application to businesses over a certain size.[167] For example, most provisions of the Cantwell Bill apply only to businesses that earn annual revenues over $25 million, process data on over 100,000 individuals or households per year, or derive more than 50% of their annual revenue from transfers of covered data.[168] The California Consumer Privacy Act contains similar distinctions based on the business's revenues or number of data subjects.[169] Treating some businesses differently could theoretically run afoul of *Sorrell*'s admonition against speaker-based restrictions, although the class of speakers that consumer privacy laws "single out"

164. *See id.* § 2(20).

165. *See Reed*, 135 S. Ct. at 2230; Bhagwat, *supra* note 159, at 863–64 (reasoning that the *Sorrell* dicta combined with *Reed*'s test for content-discrimination means that restraints on the disclosure of particular types of data are content-based and therefore subject to strict scrutiny).

166. *See* Margot E. Kaminski, *The First Amendment and Data Privacy: Between* Reed *and a Hard Place*, FIRST AMEND. NEWS (Sept. 20, 2018, 4:43 AM), https://concurring312.rssing.com/chan-5607377/all_p16.html [https://perma.cc/U4Y8-GGNP]; *see also* Bhagwat, *supra* note 159, at 864 ("In the modern information economy, information, which is to say personal data, is perhaps the key commodity being traded by firms and individuals. For technology firms, the importance of data is obvious . . . . For individuals it is no less significant. After all, I 'pay' Google and Facebook for free service by exchanging my personal data for their services. To conclude that the First Amendment forbids essentially all economic regulation of such transactions returns to the age of *Lochner* with a vengeance. But that is where the Court appears to be leading us.").

167. *See, e.g.*, Cantwell Bill, *supra* note 2, §§ 2(9)(C), 2(23) (applying the legislation to businesses above a certain revenue and data level); CAL. CIV. CODE § 1798.140(c) (West 2020) (limiting legislation based on a business's revenue or data subjects).

168. Cantwell Bill, *supra* note 2, §§ 2(9)(C), 2(23).

169. *See* CIV. § 1798.140(c) (applying only to entities doing business in California with at least $25 million annual revenues, personal data on at least 50,000 individuals, households, or devices, or at least 50% annual revenue drawn from sales of personal information).

bears little resemblance to the narrow class of pharmaceutical manufacturers singled out in *Sorrell*.[170]

C. Subjecting Compelled Privacy Disclosures to Strict Scrutiny Rather than the *Zauderer* Test

Expansive application of *Reed*'s content-discrimination test may also jeopardize mandatory disclosure requirements, a ubiquitous regulatory tool in the information age.[171] As Justice Breyer warned, "Virtually every disclosure law could be considered 'content based,' for virtually every disclosure law requires individuals to 'speak a particular message.' . . . [Such an approach] could radically change prior law, perhaps placing much securities law or consumer protection law at constitutional risk, depending on how broadly its exceptions are interpreted."[172]

As Margot Kaminski explains, the Court has extended *Reed*'s content-based approach to mandatory disclosure requirements.[173] *National Institute of Family Life and Advocacy v. Becerra* involved a challenge to California's requirement that crisis pregnancy centers make certain disclosures to patients.[174] Crisis pregnancy centers, according to a report commissioned by the state legislature, are pro-life organizations that offer limited free pregnancy counseling services and that "aim to discourage and prevent women from seeking abortions."[175] The law required licensed crisis pregnancy centers to distribute a government-drafted notice of state programs providing access to family planning services, prenatal care, and abortion.[176] The Court held that the licensed center notice was content-based because it compelled the facility to promote the availability of abortion

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170. *Accord* Kaminski, *supra* note 166 (arguing that exemptions for small or medium-sized companies "could give rise to a challenge of regulation as content-based or even viewpoint based"); *cf.* Minneapolis Star & Trib. v. Minn. Comm'r of Rev., 460 U.S. 575, 582–83, 593 (1983) (holding that a tax on paper and ink that targeted a handful of the state's largest newspapers violated the First Amendment).

171. *See* Shanor, *supra* note 10, at 164 (describing the movement toward "lighter-touch" regulation, which often takes the form of "regulation or required disclosure of information upon which the public can make choices").

172. Nat'l Inst. of Family & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2380 (2018) (Breyer, J., dissenting) (citing Reed v. Town of Gilbert, 135 S. Ct. 2218, 2234–35 (2015) (Breyer, J., concurring)).

173. *See* Kaminski, *supra* note 166 (citing *Becerra*, 138. S. Ct. 2361 (2018)).

174. *See Becerra*, 138 S. Ct. at 2368.

175. *See id.*

176. *See id.* at 2369.

services, which they were "devoted to opposing," and thereby altered the content of their speech.[177]

Rejecting the state's argument that "professional speech" is a separate category of speech subject to reduced scrutiny, the Court identified only two types of compelled speech that can avoid strict scrutiny.[178] One such category appears in *Zauderer v. Office of Disciplinary Council of the Supreme Court of Ohio*.[179] The *Zauderer* standard, the Court explained, applies to mandatory disclosures affecting "commercial advertising" that require the disclosure of "purely factual and uncontroversial information about the terms under which . . . services will be available."[180] Such regulations will be upheld unless they are "unjustified or unduly burdensome."[181] The Court identified two reasons why the state-mandated abortion services disclosure did not fall within *Zauderer*. First, it did not describe factual information about the services the centers provided; instead, it described services that the state offered.[182] Second, the information about abortion services, which the centers were dedicated to opposing, was not "uncontroversial."[183] Thus, the mandated disclosure was a content-based constraint on speech subject to strict scrutiny, which the law could not survive.[184]

Relying on *Reed* and *Becerra*, future courts may treat the mandatory disclosures in some consumer privacy laws as content-based and therefore subject to strict scrutiny. Margot Kaminski has suggested that "the Court's recent First Amendment cases now shut

177. *See id.* at 2371.

178. *See id.* at 2371–72.

179. *See* 471 U.S. 626, 651 (1985). The *Becerra* Court explained that the other situation justifying reduced scrutiny of compelled disclosures involved "regulations of professional conduct that incidentally burden speech." 138 S. Ct. at 2373. The Court, however, held that the mandatory disclosure requirement in this case did not involve regulation of professional conduct. *Id.* (distinguishing the informed consent requirement that survived a First Amendment challenge in Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992)).

180. *Becerra*, 138 S. Ct. at 2372 (quoting *Zauderer*, 471 U.S. at 651).

181. *Id.*

182. *See id.* at 2372.

183. *See id.*

184. *See id.* at 2375. The state law also required unlicensed crisis pregnancy centers to distribute a government-drafted notice stating that the facility does provide licensed medical services. *See id.* at 2370. The Court did not decide whether the *Zauderer* standard applied to that mandatory disclosure because, even if it did, it could not survive *Zauderer*'s "unjustified or unduly burdensome" standard. *See id.* at 2377 (reasoning that the state's asserted justification was "purely hypothetical" and that the notice imposed an undue burden).

down disclosure as a regulatory tool. Under *Becerra*'s reasoning, *any* disclosure requirement could potentially be characterized as content-based."[185] Although the government would surely try to bring such disclosures within the more forgiving *Zauderer* standard, *Becerra* offers several avenues for courts to reject such a standard.[186] First, *Becerra* suggested that the *Zauderer* standard applied only to "commercial advertising," and the compelled disclosures in consumer privacy laws necessarily apply before any ad could be delivered.[187] In addition, *Zauderer* justified its approach on the state's interest in avoiding consumer deception.[188] Future courts could take the position that compelled disclosures concerning consumer privacy practices should not fall within *Zauderer*'s scope because, while they may inform consumers, they are not part of any consumer-directed speech that would be deceptive without the disclosures.[189] Finally, even if the *Zauderer* standard applied, courts could rely on *Becerra*'s claim that applying mandatory disclosures to some classes of speakers but not others may render a law "unduly burdensome" in violation of the *Zauderer* standard.[190]

185. Kaminski, *supra* note 166.

186. *See Becerra*, 138 S. Ct. at 2372.

187. *See, e.g.*, Cantwell Bill, *supra* note 2, § 102(b) (requiring a "publicly and persistently available" privacy policy describing data processing and transfer activities); *id.* (requiring covered entities to provide "direct notification" regarding material changes to its policy or practices and obtain affirmative express consent to such practices with respect to previously collected data); CAL. CIV. CODE § 1798.100(a) (West 2020) (stating that a business must provide, upon the consumer's request, the categories and specific pieces of personal information the business has collected about the consumer); § 1798.100(b) (stating that a business must inform a consumer of the categories and purpose of collection "at or before the point of collection").

188. Zauderer v. Off. of Disciplinary Couns. of the Sup. Ct., 471 U.S. 626, 651 (1985) ("[A]n advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers.").

189. *Cf. Repackaging* Zauderer, 130 HARV. L. REV. 972, 980–81 (2017) (discussing split in lower courts about whether *Zauderer* applies beyond "disclosures intended to address either deceptive or potentially deceptive speech").

190. *Becerra*, 138 S. Ct. at 2378 (citing Citizens United v. FEC, 558 U.S. 310, 340 (2010) and Sorrell v. IMS Health Inc., 564 U.S. 552, 580 (2011)) ("This Court's precedents are deeply skeptical of laws that 'distinguis[h] among different speakers, allowing speech by some but not others. Speaker-based laws run the risk that 'the State has left unburdened those speakers whose messages are in accord with its own views.'").

D. Subjecting Content-Based Commercial Speech Regulations to Strict Scrutiny

Finally, courts may rely on *Sorrell* and *Reed* to expand the Court's deregulatory project by subjecting most commercial speech regulation to strict scrutiny. Assuming that consumer data collection, processing, or sharing are held to constitute speech, the government will surely argue that they constitute only commercial speech and are therefore subject to intermediate scrutiny under the *Central Hudson* test.[191] *Sorrell* and *Reed*, however, combined to lay the groundwork for subjecting most if not all commercial speech to strict scrutiny.[192]

Sorrell, albeit in dicta, invited precisely this attack on commercial speech.[193] *Sorrell* noted that the Vermont's Act 80 was

> designed to impose a specific, content-based burden on protected expression. It follows that heightened judicial scrutiny is warranted. . . . Even if the hypothetical measure on its face appeared neutral as to content and speaker, its purpose to suppress speech and its unjustified burdens on expression would render it unconstitutional. Commercial speech is no exception.[194]

Thus, although the Court ultimately avoided deciding whether strict scrutiny or the *Central Hudson* test should apply, the opinion suggests the Court's willingness to subject content-based constraints on commercial speech to strict scrutiny.[195] And once the Court adopts that position, *Reed*'s approach to content-discrimination suggests that the mere distinction between commercial and noncommercial speech constitutes content-discrimination, effectively subjecting all commercial speech regulation to strict scrutiny. Indeed, "[c]ommercial speech advocates have . . . argued that because commercial speech regulation necessarily targets speech because of the topic discussed, namely its commercial content, *Reed* requires strict scrutiny of all commercial speech."[196]

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191. *See* U.S. W., Inc. v. FCC, 182 F.3d 1224, 1233–34 (10th Cir. 1999) (evaluating opt-in consent requirement on use of customer proprietary network information for marketing purposes under *Central Hudson* test).

192. *See Sorrell*, 564 U.S. at 565; Reed v. Town of Gilbert, 135 S. Ct. 2218, 2231 (2015).

193. *See Sorrell*, 564 U.S. at 602.

194. *Id.* at 565–66.

195. *U.S. W. Inc.*, 182 F.3d at 1239.

196. *See* Shanor, *supra* note 10, at 179 (citing Transcript of Proceedings Held on 8/20/15 at 14, CTIA-The Wireless Ass'n v. City of Berkeley, No. C-15-2529 EMC, 2015 U.S. Dist. LEXIS 126071 (N.D. Cal. Sept. 21, 2015) (No. 50)) (detailing

Such an approach would be the coup de grâce in the Court's deregulatory project. As Shanor warns,

> [W]ere *Reed* applied universally as advocates urge, the commercial speech doctrine—along with other topic-based sub-doctrines such as those that currently permit the greater regulation of child pornography, obscenity, fraud, perjury, price-fixing, conspiracy, or solicitation—would be rendered obsolete, thereby rendering large swaths of the administrative state presumptively unconstitutional.[197]

IV. THE TRADITIONALIST PATH: BACK FROM THE BRINK

There is, however, another way. Courts faced with First Amendment challenges to consumer privacy law could read *Sorrell* and *Reed* narrowly and rely on settled First Amendment doctrine to avoid invalidating consumer privacy laws. First, courts could hold that laws regulating consumer data regulate commodities, not speech. Next, courts could recognize that most consumer privacy laws pose at most incidental burdens on speech and are therefore subject only to rational basis review unless they single out particular speakers. Third, courts could uphold most mandatory privacy disclosures under the *Zauderer* standard as factual and noncontroversial disclosures about companies' data practices. Finally, given the diminished interests underlying commercial speech, courts could continue reviewing content-based commercial speech constraints under *Central Hudson*'s version of intermediate scrutiny rather than under strict scrutiny.

A. Treating Data Collection, Processing, and Sharing as Commercial Activity, Not Speech

The most effective way to pull back from the Court's deregulatory project while leaving First Amendment jurisprudence on solid footing would be to head off the problem in the coverage stage. To the extent that consumer privacy law regulates the collection, processing, or sharing of consumer data, courts should not treat such commercial activities as speech. Instead, courts should recognize the reality that the data flows are commodities without any expressive import to the parties to these transactions.

To start down this path, court should first recognize that *Sorrell*'s reference to a "rule that information is speech" lacks doctrinal

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Theodore Olson's argument that content-based commercial speech regulations should be subject to strict scrutiny under *Reed*).

197. Shanor, *supra* note 10, at 179.

support.[198] The Court cited no authority for that "rule."[199] The only attempt to support such a rule came in the prior paragraph, where the Court claimed, "This Court has held that the *creation* and dissemination of information are speech within the meaning of the First Amendment."[200] Yet none of the cases the Court cited to support its claim dealt with the bulk collection or transfer of raw data. Instead, the Court in *Bartnicki v. Vopper* involved sharing an audio recording with a radio broadcaster and playing it on the air.[201] *Rubin v. Coors Brewing Co.* addressed the printing of information on beer labels.[202] And *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.* involved the sale of a credit report to the credit reporting agency's subscribers.[203] Thus, the cases upon which the *Sorrell* Court relied all dealt with the communication of information to its intended audience—radio listeners in *Bartnicki*, beer purchasers in *Coors Brewing*, and credit report subscribers in *Dun & Bradstreet*.[204]

Future courts should reject *Sorrell*'s "rule" and recognize instead that businesses engage in speech when they publish information to end users, as in the cases that *Sorrell* cited. Under such an approach, the bulk collection and transfer of consumer data by commercial parties does not constitute speech. In those circumstances, the consumer data serve only as a commodity because the data collection, processing, and transfers lack any expressive meaning.[205] The data are valuable only because of the business functions that the data allow businesses

198. *Sorrell*, 564 U.S. at 571. The Court referred to this "rule" in the course of rejecting Vermont's argument that the "sales, transfer, and use of prescriber-identifying information are conduct, not speech." *Id.* at 570. Ultimately, however, the Court did not have to decide whether to apply such a rule, because it relied on a narrower ground for its decision. Even if the information at issue were not speech, the Court reasoned, Vermont's law nevertheless imposed a burden on particular speakers and viewpoints, and therefore was subject to heightened scrutiny. *See id*. at 571 (citing *Minneapolis Star*, 460 U.S. at 575)).

199. *Id.* at 571 ("The State asks for an exception to the rule that information is speech . . . .").

200. *Id.* at 570 (emphasis added).

201. *See* 532 U.S. 514, 519 (2001).

202. *See* 514 U.S. 476, 481 (1995).

203. *See* 472 U.S. 749, 751 (1985).

204. *See* Langvardt, *supra* note 69, at 775 ("From the perspective of 'theory,' the information [as speech] rule seems to come from nowhere.").

205. *Cf.* Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVIS L. REV. 1183, 1196 (2016) (recognizing the argument that "data, when collected, collated, used, and sold in bulk, is not speech" but "a commodity," and noting that the speech determination should turn not on the form of the data but on "its *social characterization* or *social function*").

to perform, such as predicting whether consumers will be profitable, how much consumers are willing to pay, whether consumers are good credit, housing, insurance, or employment risks, and what marketing efforts will likely persuade or manipulate consumers.[206]

In addition, the unique nature of the constraint at issue in *Sorrell* should limit *Sorrell*'s reach. Act 80 not only targeted the marketing of prescription drugs by drug manufacturers, but it did so in order to undermine the persuasiveness of pharmaceutical manufacturers' speech and thereby tilt the debate over public health policy in the state's favor.[207] These circumstances offered the Court an extremely narrow basis on which to decide the case, and future courts should understand *Sorrell* on that narrow basis unless the Court holds otherwise.[208]

Further, dicta in the Court's earlier decision in *Bartnicki* dispels the notion that all information is speech.[209] In *Bartnicki*, the president and chief negotiator of a teacher's union engaged in contentious contract negotiations with the local school board.[210] An unidentified person recorded a cell phone conversation between the president and chief negotiator, and the recording ended up in the mailbox of Jack Yocum, the head of an organization that opposed the union's demands.[211] Yocum played the recording for some school board members and delivered the tape to Vopper, a radio commentator, who in turn played the recording on the air.[212] The president and chief negotiator sued Vopper, Yocum, and others for damages under state

206. *See, e.g.*, Shaun B. Spencer, *The Problem of Online Manipulation*, 2020 U. ILL. L. REV. 959, 962 (2020) (describing how "the explosion of online behavioral advertising in the Digital Age allowed marketers to target manipulative techniques in real time to particular consumers or types of consumers"); Shaun B. Spencer, *Privacy and Predictive Analytics in E-Commerce*, 49 NEW ENGL. L. REV. 629, 633 (2015) (describing the use of consumer data and predictive analytics in such business functions as "(1) targeted advertising; (2) price discrimination; (3) customer segmentation; and (4) eligibility determinations for particular financial and insurance products").

207. *See* Sorrell v. IMS Health Inc., 564 U.S. 552, 563–64 (2011); *see also* Richards, *supra* note 10, at 1523; Cohen, *supra* note 159, at 1130.

208. *See* Cohen, *supra* note 159, at 1130 (describing *Sorrell* as a case not about information privacy, but about "market manipulation" by the state).

209. *See infra* text accompanying notes 221–222. *See generally* Bartnicki v. Vopper, 532 U.S. 514 (2001).

210. *See* 532 U.S. at 518.

211. *See id.* at 519.

212. *See id.*

and federal wiretap laws.[213] The Court assumed that Yocum and Vopper played no part in the interception and accessed the tapes legally, even if the original interception was illegal.[214]

The Court held that the Wiretap Act's prohibition against disclosing the contents of an intercepted wire communication was "a regulation of pure speech" because the delivery of a tape recording was the delivery of information similar to delivery of a handbill or pamphlet.[215] The Court noted in dicta, however, that a separate Wiretap Act provision on "use" of the illegally intercepted contents regulated conduct, not speech.[216] Such conduct might involve a business using the contents to create a competing product, an investor using the contents to trade in securities, a negotiating party using the contents to prepare a negotiating strategy, a supervisor using the contents to discipline a subordinate, or a blackmailer using the contents for extortion.[217] Thus, even when those contents might inform future speech, the Court rejected the notion that using the information constituted speech.[218]

Scholars also support treating consumer data flows as conduct rather than speech. Neil Richards, for example, is the leading advocate of the position that consumer privacy laws rarely burden speech.[219] Richards notes that the Court has rejected claims that a variety of privacy-protective laws violate the First Amendment, such as trespass,

213. *See id.* at 519–20. The Court observed that the state law was similar to the federal wiretap act and based its analysis on the federal Wiretap Act. *See id.* at 520 n.3, 526.

214. *See id.* at 525. The Court further assumed that the conversation was a matter of public concern. *See id.*

215. *See id.* at 526–27 (quoting Bartnicki v. Vopper, 200 F.3d 109, 120 (3d Cir. 1999), *aff'd*, 532 U.S. 514 (2001)) ("[I]f the acts of 'disclosing' and 'publishing' information do not constitute speech, it is hard to imagine what does fall within that category, as distinct from the category of expressive conduct.").

216. *See id.*

217. *See id.* at 527 n.10. While the Court emphasized that the disclosure prohibition implicated core First Amendment purposes because it sanctioned "the publication of truthful information of public concern." *See id.* at 533–34. The Court expressed no opinion on whether the asserted interest in the privacy of communications would have been sufficient if the intercepted content were "disclosures of trade secrets or domestic gossip or other information of purely private concern." *See id.* at 533.

218. *See id.* at 527, 527 n.10.

219. *See e.g.*, Felix T. Wu, *The Commercial Difference*, 58 WM. & MARY L. REV. 2005, 2051 (2017) (arguing against the transfer of consumer data as speech); *see also* Richards, *supra* note 29, at 1149; Richards, *supra* note 10, at 1501.

eavesdropping, wiretapping, stalking, and industrial espionage.[220] He argues that consumer data flows should be treated like many of the other forms of "speech" that are regulated all the time without triggering First Amendment scrutiny—such as "product labeling requirements, murder-for-hire contracts, securities disclosures and non-disclosures, insider trading rules, agreements to restrain trade, sexually harassing speech that creates a hostile [work] environment in the workplace, and regulations of truthful but misleading commercial offers."[221]

Richards argues that the Court should not repeat the mistakes of the *Lochner* Court by treating "private property [as] the bulwark of political liberty."[222] As Richards explains, the broad government power to regulate economic matters was necessary for regulations occasioned by the ills of the Industrial Revolution, such as "minimum wages, maximum hours, workplace safety, and the right to collective bargaining."[223] Yet the Court's "conservative economic, libertarian view of the Constitution" hamstrung the government's attempts to deal with the regulatory "needs of a modern, industrial economy."[224] Richards warns against repeating that mistake today: "If our lives become digital, but data is speech, regulation of many kinds of social problems will become impossible."[225]

Felix Wu offers another reason for rejecting the "data as speech" rule.[226] He argues that laws limiting data transfers among commercial entities should not be "speech" because the Court's commercial speech cases were intended to protect speech targeting "noncommercial listeners."[227] Wu reasons that "[c]ommercial brokerage data may inform, but such transactions do not inform 'people' or 'the public,' and thus fall outside the transactions envisioned in the commercial speech cases."[228]

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220. *See* Richards, *supra* note 10, at 1515 n.51 (citing Richards, *supra* note 29).

221. *Id.* at 1526.

222. *See id.* at 1530.

223. *See id.*

224. *See id.*

225. *Id.* at 1531.

226. *See* Felix T. Wu, *The Constitutionality of Consumer Privacy Regulation*, 2013 U. CHI. LEGAL F. 69, 90 (2013).

227. *See id.* at 90.

228. *Id.* at 91; *see also* Wu, *supra* note 219, at 2050–51 (advocating a theory that corporate and commercial speech are "derivative speech," in that "we care about the speech interest for reasons other than caring about the rights of the entity" asserting a First Amendment claim, and arguing that "transfers of personal data among

Finally, rejecting an "information is speech" rule avoids the risk that expanding the First Amendment's coverage will dilute its protection.[229] Shanor explains that "expanding the scope of coverage may create pressure to lower levels of protection within that coverage . . . and that dilution may spill over into traditional areas of First Amendment coverage in ways that are now difficult to anticipate."[230] Kyle Langvardt makes a similar argument that adopting a broad "information is speech" rule will lead courts to expand the First Amendment's coverage and then mitigate the effect of that expansion by "diluting" the protections afforded under strict and intermediate scrutiny.[231] Justice Breyer warned a similar risk in *Reed*, when he observed that a dramatic expansion in the number of regulations subject to strict scrutiny could lead courts to "water down" the strict scrutiny standard.[232] And the Court recognized that risk in *Ohralik v. Ohio State Bar Ass'n*, where Justice Powell's opinion for the Court rejected the call to extend commercial speech the same protection as noncommercial speech: "To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech."[233]

B. Treating Consumer Privacy Laws as, at Most, Incidental Burdens on Speech That Do Not Single Out Expressive Activity

Holding that consumer data collection, processing, and sharing are not speech would not put consumer privacy law beyond the reach of the First Amendment. Direct restrictions on targeted marketing would, of course, restrict commercial speech.[234] And even laws constraining data collection, processing, and sharing could, in limited circumstances, run afoul of the First Amendment.

The Court has long recognized that regulation of unexpressive conduct can still be subject to First Amendment scrutiny if it "has the

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commercial entities" should not be First Amendment "speech" because the transactions occur between two parties who lack "intrinsic First Amendment interests" and who only place significance on the transaction as an item of commerce and an input into an eventual commercial transaction).

229. *See* Shanor, *supra* note 56, at 360.

230. *Id.*

231. *See* Langvardt, *supra* note 69, at 813.

232. *See* Reed v. Town of Gilbert, 135 S. Ct. 2218, 2237 (2015) (Breyer, J., concurring).

233. 436 U.S. 447, 456 (1978).

234. *See, e.g.*, U.S. W., Inc. v. FCC, 182 F.3d 1224, 1233 (10th Cir. 1999).

inevitable effect of singling out those engaged in expressive activity."[235] In *Arcara v. Cloud Books, Inc.*, the state sued to close an adult bookstore for violating a law defining "places of prostitution, lewdness, and assignation" as public health nuisances.[236] The suit alleged that the bookstore was aware of sexual activity and prostitution on the premises.[237] The Court rejected the bookstore's First Amendment defense because the public nuisance law was not targeted as expressive activity.[238] The Court explained that the mere fact that a law will have "some effect" on First Amendment activities does not trigger First Amendment scrutiny.[239] Instead, regulation of "nonexpressive activity" only triggers First Amendment scrutiny where the law "has the inevitable effect of singling out those engaged in expressive activity."[240] Rather than single out bookstores or others engaged in expressive activity, the public nuisance law applied to any premises permitting prostitution or lewdness.[241] Thus, the law was not subject to First Amendment scrutiny.[242]

The same issue arose in *Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue*, although the Court reached a different result because the law singled out a small group of speakers.[243] The state of Minnesota taxed the cost of paper and ink used to publish "periodic publications."[244] Because the tax exempted the first $100,000 worth of paper and ink consumed in a year, only a small group of newspaper publishers actually owed any tax, and even fewer paid any significant amount of tax.[245] One newspaper publisher challenged the tax on First Amendment grounds.[246] The Court first noted that the tax was not a generally applicable use tax on paper and ink but instead applied only to publications protected by the First Amendment.[247] The Court concluded that "Minnesota has singled out

235. Arcara v. Cloud Books, Inc., 478 U.S. 697, 706–07 (1986); *see also* Minneapolis Star & Trib. Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 582 (1983) (holding a tax that "singled out the press for special treatment . . . cannot stand unless the burden is necessary to achieve an overriding governmental interest").

236. *Arcara*, 478 U.S. at 699.

237. *See id.*

238. *See id.* at 705.

239. *See id.* at 706.

240. *Id.* at 706–07.

241. *See id.* at 705.

242. *See id.* at 707.

243. *See* 460 U.S. at 592–93.

244. *See id.* at 577.

245. *See id.* at 591.

246. *See id.* at 579.

247. *See id.* at 581.

the press for special treatment" by "target[ing] a small group of newspapers."[248] The Court then struck down the tax because it was not "necessary to achieve an overriding governmental interest."[249]

Such an approach represents the appropriate balance in the case of consumer data. If the government attempts to use consumer privacy laws to single out specific speakers, then the state should have to demonstrate that the law was "necessary to achieve an overriding governmental interest."[250] That, for example, is how the *Sorrell* Court could, or should, have approached Vermont's Act 80 because the law singled out the marketing speech of name-brand pharmaceutical manufacturers based on the state's disapproval of their viewpoint.[251]

C. Analyzing Compelled Consumer Privacy Disclosures Under the *Zauderer* Test

Courts should analyze mandatory consumer privacy notices under the *Zauderer* test rather than subjecting them to strict scrutiny.[252] As discussed above, *Zauderer* upheld a state bar requirement that an attorney "include in his advertising purely factual and uncontroversial information about the terms under which his services will be available."[253] In *Zauderer*, the state bar required that any attorney advertisement mentioning contingent fees include a disclosure that the client could be responsible for litigation costs if the client's case were unsuccessful.[254] Later, in *Becerra*, the Court declined to apply the *Zauderer* standard to the state's requirement that crisis pregnancy centers disclose the availability of state-provided abortion services because (1) the disclosure was not a factual description of services that the centers offered; and (2) the disclosure was anything but "uncontroversial" given the centers' anti-abortion position.[255] Consumer privacy notice and disclosure requirements are analogous to the advertising disclosure in *Zauderer* because they are merely

248. *Id.* at 582, 591.

249. *Id.* at 582. The Court reasoned that the state's legitimate interest in raising revenue could not justify a tax singling out the press because the state could accomplish the same objective by taxing businesses generally. *See id.* at 586.

250. *Id.* at 582.

251. *See* Sorrell v. IMS Health, Inc., 564 U.S. 552, 563–74 (2011).

252. *See* Zauderer v. Off. of Disciplinary Couns., 471 U.S. 626, 651 (1985) (detailing the *Zauderer* test).

253. *Id.*

254. *See id.* at 650.

255. *See* Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2372 (2018).

factual descriptions of the companies' data processing practices.[256] Moreover, unlike the mandatory disclosure about state-sponsored abortion services in *Becarra*, there is nothing controversial about the content of consumer privacy disclosures.[257]

In theory, businesses could object that *Zauderer* only applied to advertisements published to consumers.[258] They could attempt to distinguish *Zauderer* because consumer privacy laws generally require "standalone" notices, whether posted on websites or delivered to consumers upon request, rather than notices contained in specific advertisements. This distinction, however, is too formalistic to justify rejecting the *Zauderer* approach. Mandatory disclosures inform consumers about businesses' overall collection, sharing, and use of consumer information.[259] Since these practices do not relate to the content of discrete advertisements or transactions, attaching a disclosure to a particular message would not accomplish the purpose of informing consumers.

Businesses could also argue that compelled consumer privacy disclosures fall outside of *Zauderer*'s interest in preventing consumer deception.[260] Courts, however, should understand mandatory consumer privacy disclosures as necessary to avoid the deception inherent in the byzantine world of online commerce and digital surveillance. Moreover, some lower courts have expanded the *Zauderer* approach "beyond the problem of deception" "to encompass

256. *See Zauderer*, 471 U.S. at 651 (noting the advertising disclosure in *Zauderer*).

257. *See Becarra*, 138 S. Ct. at 2372.

258. *See Zauderer*, 471 U.S. at 651; *Becerra*, 138 S. Ct. at 2372 (describing *Zauderer* as applying to "commercial advertising").

259. *See, e.g.*, CAL. CIV. CODE § 1798.100(a) (West 2020) (providing consumers the right to request disclosure of personal information collected); *id.* § 1798.100(b) (requiring disclosure of categories of personal information to be collected and purposes of collection); *id.* § 1798.110(a) (providing consumers the right to request disclosure of categories of personal information collected, sources from which personal information is collected, and types of third parties with whom personal information is shared); *id.* § 1798.115(a) (providing consumers the right to request disclosure of categories of personal information collected and sold and categories of third parties to whom personal information is sold); Cantwell Bill, *supra* note 2, at § 102(b) (mandating disclosure of categories of covered data collected and transferred as well as "processing purposes" for collected data and purposes of data transfers); Wicker Bill, *supra* note 2, at § 102(b) (mandating disclosure of categories of covered data collected and transferred as well as "processing purposes" for collected data and purposes of data transfers).

260. *See Zauderer*, 471 U.S. at 651 (noting that "an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers").

nonmisleading disclosure requirements" that "better inform consumers about the products they purchase."[261] Consumer privacy disclosures serve precisely that informative purpose.

Finally, though *Becerra* suggested that singling out particular speakers could render a notice requirement "unduly burdensome" under *Zauderer*, the types of speaker-based distinctions in consumer privacy law bear no resemblance to the state's singling out anti-abortion crisis pregnancy centers to deliver a pro-abortion message.[262] The speaker-based distinctions in comprehensive consumer privacy laws measure, for example, the size of the business—whether measured through annual revenue, the volume of consumer data collected, or the percentage of revenue derived from selling consumer data.[263] These dividing lines are inherent in the line-drawing that accompanies all economic regulation; they do not raise the specter of singling out speakers with whom the state disagrees.

D. Subjecting Content-Based Commercial Speech Regulations to Only Intermediate Scrutiny

Finally, to the extent that some consumer privacy laws impose content-based burdens on commercial speech, courts should reject the businesses' efforts to subject all content-based speech constraints to strict scrutiny.[264] The Court affords commercial speech less protection

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261. *See Repackaging* Zauderer, *supra* note 189, at 980–81 (2017).

262. *See Becerra*, 138 S. Ct. at 2378.

263. *See, e.g.*, CAL. CIV. CODE § 1798.140(c) (West 2020) (defining "business" covered by the act in terms of annual gross revenues, number of individuals, households, or devices whose information is bought, received, sold, or shared, or percentage of annual revenues derived from selling personal information); Cantwell Bill, *supra* note 2, § 102(2)(9)(C) (exempting small businesses from the "covered entity" category); *id.* §102(23) (defining "small businesses" in terms of annual revenues, number of individuals whose data is processed, and percentage of revenues derived from transferring covered data); Wicker Bill, *supra* note 2, § 108(c) (exempting small businesses from certain provisions and defining small businesses in terms of annual gross revenues, number of individuals whose data is processed, number of employees, and percentage of revenues derived from transferring covered data).

264. That is what the courts have done so far. As of the publication date of this Article, every circuit that has reached the question has rejected the argument that *Sorrell* replaced or modified the *Central Hudson* test. For example, in Retail Digit. Network, LLC v. Appelsmith, a Ninth Circuit panel held that "*Sorrell* requires heightened judicial scrutiny of content-based restrictions on non-misleading commercial speech regarding lawful products, rather than . . . intermediate scrutiny," and voted to reverse the district court's entry of summary judgment and remand for the district court to apply strict scrutiny. 810 F.3d 638, 642 (9th Cir. 2016), *rev'd sub*

than other speech because of its "subordinate position in the scale of First Amendment values."[265] As Shanor explains, commercial speech "is not a speaker-oriented autonomy right."[266] Instead, commercial speech serves the speaker's economic interest, in addition to "assist[ing] consumers and further[ing] the societal interest in the fullest possible dissemination of information."[267]

Sorrell's suggestion that content-based constraints on commercial speech may trigger heightened scrutiny ignores the nature of commercial speech regulations. Any conceivable commercial speech regulation will, in some sense, single out content, if one construes the term "content" broadly enough. *Reed*'s suggestion that treating any "topic" differently, and its example of "politics" as one such topic, suggests the possibility that treating commercial speech differently from other speech constitutes content-discrimination.[268] But such an approach puts too much doctrinal weight on *Reed*, which did not involve commercial speech. It strains credulity to believe that

nom Retail Digit. Network, LLC v. Prieto, 861 F.3d 839 (9th Cir. 2017) (en banc). Reviewing that decision *en banc*, however, the full bench rejected the panel's approach and affirmed the district court's entry of summary judgment. *Prieto*, 861 F.3d at 842. The full bench held that *Sorrell* did not change the intermediate scrutiny required under the *Central Hudson* test's intermediate scrutiny of restrictions on commercial speech. *Id.* at 845–46. Other circuits have reached the same result. *See* Vugo, Inc. v. City of New York, 931 F.3d 42, 50 (2d Cir. 2019) ("We agree with our sister circuits that have held that Sorrell leaves the Central Hudson regime in place, and accordingly we assess the constitutionality of the City's ban under the Central Hudson standard."); *In re* Brunetti, 877 F.3d 1330, 1350 (Fed. Cir. 2017) ("[P]urely commercial speech [is] reviewed according to the intermediate scrutiny framework established in *Central Hudson*."); Flying Dog Brewery, LLLP v. Mich. Liquor Control Comm'n, 597 F. App'x 342, 365 (6th Cir. 2015) ("[A]lthough *Sorrell* stated that 'heightened judicial scrutiny' applied, it reaffirmed the use of the *Central Hudson* test."); 1-800-411-Pain Referral Serv., LLC v. Otto, 744 F.3d 1045, 1055 (8th Cir. 2014) ("The upshot is that when a court determines commercial speech restrictions are content- or speaker-based, it should then assess their constitutionality under *Central Hudson*."); Educ. Media Co. at Va. Tech, Inc. v. Insley, 731 F.3d 291, 298 (4th Cir. 2013) ("However, like the Court in *Sorrell*, we need not determine whether strict scrutiny is applicable here, given that, as detailed below, we too hold that the challenged regulation fails under intermediate scrutiny set forth in *Central Hudson*.").

265. Ohralik v. Ohio Bar Ass'n, 436 U.S. 447, 456 (1978).

266. Shanor, *supra* note 10, at 146.

267. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 562–63 (1980).

268. *See* Shanor, *supra* note 10, at 179 (noting commercial speech advocates advancing the argument that all commercial speech discriminates based on content).

Reed unwound decades of commercial speech jurisprudence, without mentioning it, in a case that did not even involve commercial speech.[269]

Should the Court eventually tackle that question, the Court should leave the commercial speech doctrine intact because of the type of speech interests at stake. As Wu explains, the Court traditionally justified commercial speech protection in order to serve the interest of the audience and thereby benefit "consumers and society as a whole."[270] Admittedly, the fact that commercial speech relates solely to the speaker and audience's "economic interests" does not exclude commercial speech from the First Amendment's coverage.[271] But the solely economic interest does explain why the speaker's interest is diminished, and the government's regulatory interest is elevated, thus justifying the Court's longstanding use of *Central Hudson*'s intermediate scrutiny standard. Abandoning that balance would threaten large swaths of the administrative state.[272] To the extent that such widespread deregulation is desirable as a policy matter, it should be pursued through the political branches rather than the courts.

Finally, as a fallback position, courts could decide that only viewpoint-based commercial speech constraints should be subject to strict scrutiny, rather than all content-based commercial speech constraints. Justice Kennedy, joined by Justices Ginsburg, Sotomayor, and Kagan, hinted at such an approach in his concurrence in *Matal v. Tam*.[273] Kennedy explained that "[u]nlike content based discrimination, discrimination based on viewpoint, including a regulation that targets speech for its offensiveness, remains of serious concern in the commercial context."[274] Given the Court's finding of viewpoint discrimination in *Sorrell*, Kennedy's approach would have been a narrower path to impose strict scrutiny on Vermont's regulation

269. *See id.* at 179. Indeed, some courts have already rejected such claims. *See* Dan V. Kozlowski & Derigan Silver, *Measuring* Reed*'s Reach: Content-Discrimination in the U.S. Circuit Courts of Appeals After* Reed v. Town of Gilbert, 24 COMM. L. & POL. 191, 239–40 (2019) ("The Ninth Circuit has also repeatedly rejected the argument that *Reed* overturned [*Central Hudson*] and that strict scrutiny now applies to content-based regulations that target commercial speech.").

270. Wu, *supra* note 219, at 2023 (quoting Va State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 763–64 (1976)).

271. *See Central Hudson*, 447 U.S. at 561.

272. Shanor, *supra* note 10, at 179.

273. *See* 137 S. Ct. 1744, 1767 (2017) (Kennedy, J., concurring).

274. *Id.* at 1767 (noting that commercial speech is "no exception . . . to the principle that the First Amendment requires heightened scrutiny whenever the government creates a regulation of speech because of disagreement with the message it conveys").

of marketing communications. Such an approach would preserve much of the government's ability to regulate economic affairs, while still triggering strict scrutiny if the government uses its regulatory power to silence viewpoints with which it disagrees.

CONCLUSION

We will soon see a series of First Amendment challenges to consumer privacy laws. Businesses and trade groups bringing those challenges will have significant doctrinal momentum on their side based on the Court's decades-long implementation of the deregulatory First Amendment. If one views the recent decision in *National Institute of Family and Life Advocates v. Becerra* as a rough proxy for the Justices' views on the deregulatory First Amendment, it suggests that four of the seven Justices who remain on the Court as of this writing would continue the Court's deregulatory project.[275] Justice Thomas wrote the majority opinion, joined by Chief Justice Roberts and Justices Alito and Gorsuch, as well as the now-retired Justice Kennedy. Justice Breyer wrote the dissent, joined by Justices Kagan and Sotomayor and the late Justice Ginsburg.[276]

Justice Kavanaugh seems likely to side with Chief Justice Roberts and Justices Thomas, Alito, and Gorsuch on the issues discussed above.[277] He wrote the opinion for the Court in *Barr v.*

275. *See generally* 138 S. Ct. 2361 (2018).

276. *See id.* at 2367.

277. Justice Barrett's academic and judicial writings have not expressed a position on the deregulatory First Amendment. *See* Thomas Jipping & Zack Smith, *Amy Coney Barrett on the First Amendment*, HERITAGE FOUND. (Oct. 7, 2020), https://www.heritage.org/courts/commentary/amy-coney-barrett-the-first-amendment [https://perma.cc/4WDY-5HU5] (describing First Amendment opinions authored and joined by then-Judge Barrett, none of which have strong implications for the deregulatory First Amendment); Grayson Clary, *Reporters Committee Examines Judge Amy Coney Barrett's Record on Press Rights Issues*, REPS. COMM. FOR FREEDOM OF THE PRESS (Oct. 9, 2020), https://www.rcfp.org/amy-coney-barrett-press-rights/ [https://perma.cc/S85R-8CE6] ("Judge Barrett's scholarship sheds relatively little light on how she would approach First Amendment questions as a justice. She has characterized in passing Justice Antonin Scalia's views on what originalism requires in the free speech context, but she has not elaborated on her own."). Based on her overall record, however, Justice Barrett appears likely to vote with the other five conservative justices. *See, e.g.*, Kevin Cope & Joshua Fischman, *An Empirical Analysis of Judge Amy Coney Barrett's Record on the Seventh Circuit*, SSRN (Univ. of Va. Sch. of L., Working Paper, 2020), https://ssrn.com/abstract=3710951 [https://perma.cc/E2HN-LAJW] (analyzing a three-year sample of opinions during then-Judge Barrett's time on the Seventh Circuit and finding that "Judge Barrett's voting record during her tenure on the court places

American Ass'n of Political Consultants, Inc., which involved a First Amendment challenge to the portion of the Telephone Consumer Protection Act prohibiting robocalls to cell phones.[278] In 2015, Congress added an exception allowing robocalls to cell phones if made to collect debts owed to or guaranteed by the United States government.[279] The plaintiffs, four organizations who wished to make robocalls to cell phones for purposes of political outreach, challenged the robocall ban on First Amendment grounds.[280] The Supreme Court decided the case in a set of fractured opinions that sheds precious little light on how Justice Kavanaugh might approach future First Amendment challenges to consumer privacy laws.[281] Six Justices held that the robocall ban violated the First Amendment, and seven Justices held that the appropriate remedy was to strike the exception allowing robocalls to collect government-backed debt rather than to strike the entire robocall ban.[282]

In Justice Kavanaugh's opinion for the Court, he and the other four conservative Justices followed *Reed*'s approach for determining when laws are content-based for purposes of the First Amendment analysis.[283] Thus, *Reed*'s approach to assessing content discrimination appears to be here to stay, at least in light of the Court's current composition. However, the nature of the robocall ban at issue means that *Barr* will likely have little application to future challenges to consumer privacy laws. The robocall ban did not limit one subset of

her within a group of the circuit's six most conservative judges, and possibly more conservative than every other judge considered").

278. *See* 140 S. Ct. 2335, 2343 (2020).

279. *See id.* at 2344–45.

280. *See id.* at 2345.

281. *See generally id.* (displaying a three-part opinion with three separate concurring opinions).

282. *See id.* at 2343. With regard to the appropriate degree of scrutiny, five justices (Kavanaugh, Roberts, Thomas, Alito, and Gorsuch) took the position that the robocall ban was subject to, and failed, strict scrutiny; one justice (Sotomayor) took the position that it was subject to, and failed, intermediate scrutiny; and three justices (Breyer, Ginsburg, and Kagan) took the position that the ban was subject to, and survived, intermediate scrutiny. *See id.* at 2356; *id.* at 2357 (Sotomayor, J., concurring); *id.* at 2363 (Breyer, J., concurring). As to the appropriate remedy for the First Amendment violation, however, seven justices (Kavanaugh, Roberts, Alito, Sotomayor, Breyer, Ginsburg, and Kagan) held that the government-backed debt collection should be severed, leaving the robocall ban intact. *See id.* at 2356; *id.* at 2357 (Sotomayor, J., concurring); *id.* at 2363 (Breyer, J., concurring). In contrast, two justices (Gorsuch and Thomas) would have stricken the robocall ban in its entirety. *See id.* at 2367 (Gorsuch, J., concurring).

283. *See id.* at 2346.

commercial speech.[284] Instead, it privileged one subset of commercial speech—government-backed debt collection—to the detriment of all other speech, including the plaintiffs' political speech.[285] Thus, *Barr* does not control how the Court will approach a First Amendment challenge to a consumer privacy law targeting solely commercial speech.

Barr does, however, offer guidance on drafting consumer privacy legislation with the best chance of surviving First Amendment scrutiny.[286] First, a majority of the Court is likely to apply strict scrutiny to laws that target particular content or speakers.[287] The targeting may appear in a ban that applies to a narrow category, like pharmaceutical manufacturers in *Sorrell*, or in an exception that favors a particular category, like government-backed debt collection robocalls in *Barr*.[288] Thus, consumer privacy legislation that applies broadly, with no or minimal exceptions, is more likely to be treated as content-neutral and will therefore avoid strict scrutiny. Second, the strong support for severing the content-discriminatory exception in *Barr* means that legislators should draft consumer privacy laws so that the default position is a ban or limit on data processing with any sector-specific provisions added as exceptions that allow processing. That way, even if exceptions render the law content-based, the likely result is that the exception will be stricken, and the law's broad privacy-protective function will survive.[289]

Those measures, however, merely push at the margins of the Court's expansionist First Amendment project. If the Court continues its deregulatory trajectory, it may threaten substantial government regulation not only in the consumer privacy sphere, but also across a broad spectrum of economic and social activity. Governments and privacy advocates, therefore, must be prepared to push back against the deregulatory First Amendment to limit the reach of dicta that could further that deregulatory course, and to chart a path towards a traditionalist First Amendment that protects valid speech interests without undermining the regulatory state. This Article offers guidance on how to chart that path.

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284. *See id.*
285. *See id.*
286. *See id.* at 2347.
287. *See id.*
288. *See generally id.*; Sorrell v. IMS Health, Inc., 564 U.S. 552 (2011).
289. The legislation should, of course, contain an express severability provision. *See Barr*, 140 S. Ct. at 2349.