Note

I Presume We're (Commercially) Speaking Privately: Clarifying the Court's Approach to the First Amendment Implications of Data Privacy Regulations

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Abstract

One of the distinguishing features of the information age we live in is the vast troves of information collected and compiled about us each day—particularly online. As we become more aware of just how much personal information is online, and as some of the biggest collectors of that information suffer breaches revealing our personal information, European and some U.S. jurisdictions have begun to implement new laws regulating how businesses use and share information in response to demands for stronger regulations to protect our information. Those privacy protections, however, are bound to come before the courts. First Amendment challenges to laws designed to protect individual privacy are nothing new, but recent decisions and a jumble of jurisprudence may leave courts, legislators, and regulated businesses at a loss for how those cases should, or will, come out. Though not definitive, it is likely that the sale or transfer of a user's information does qualify as protected speech, and it should. If the sale or transfer of users' information is speech protected by the First Amendment, it should be commercial speech, and thus subject to the intermediate level of scrutiny laid out in Central Hudson.

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In order to clarify the legal landscape of privacy and data regulations in the face of a massive, and ever increasing, universe of data collection and sale, three broad categories of data collection methods should be identified—voluntary public disclosures, voluntary private disclosures, and involuntary disclosures. Courts should use these categories when deciding whether a regulation passes constitutional muster. This will allow legislators to implement needed protections for the information users have the most interest in protecting—while still permitting businesses built on the model of data collection and sale to function and protecting the expression and speech at the core of the First Amendment.

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Introduction

On July 24, 2019, the Federal Trade Commission ("FTC") imposed a $5 billion fine on Facebook—the largest fine ever imposed by the FTC[1]—for its violations of a 2012 consent decree[2] which involved

[1] Lauren Feiner & Salvador Rodriguez, *FTC Slaps Facebook with Record $5 Billion Fine, Orders Privacy Oversight*, CNBC (July 25, 2019, 8:27 AM), https://www.cnbc.com/2019/07/24/

the mishandling of users' data.[3] This spurred political action, with Facebook CEO Mark Zuckerberg testifying before the Senate Judiciary and Commerce Committees (jointly)[4] and politicians on both sides introducing legislation to protect users' privacy more fully.[5] Although these bills have not advanced, consumer protection remains an important issue in the political sphere, leading some states to enact their own data privacy laws,[6] and state attorneys general to begin investigating Facebook for potential mishandling of consumer data.[7] Most states have not enacted their own laws, however,[8] and there remains no federal law on the subject.[9]

Consider a scenario where someone decides to take a quiz through Facebook.[10] She connects through her Facebook account, which grants the firm hosting the quiz access to her account information, including her name, location, and any information she has put on

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facebook-to-pay-5-billion-for-privacy-lapses-ftc-announces.html [https://perma.cc/SV8M-AVGP]; Lesley Fair, *FTC's $5 Billion Facebook Settlement: Record-Breaking and History-Making*, FED. TRADE COMM'N: BUS. BLOG (July 24, 2019, 8:52 AM), https://www.ftc.gov/news-events/blogs/business-blog/2019/07/ftcs-5-billion-facebook-settlement-record-breaking-history [https://perma.cc/SAT3-XPQ2].

2 Facebook, Inc., 154 F.T.C. 1 (2012).

3 Fair, *supra* note 1.

4 *Mark Zuckerberg Testimony: Senators Question Facebook's Commitment to Privacy*, N.Y. TIMES (Apr. 10, 2018), https://www.nytimes.com/2018/04/10/us/politics/mark-zuckerberg-testimony.html [https://perma.cc/T78C-SJQF].

5 *See* American Data Dissemination Act of 2019, S. 142, 116th Cong. (2019); Social Media Privacy Protection and Consumer Rights Act of 2019, S. 189, 116th Cong. (2019); Digital Accountability and Transparency to Advance Privacy Act, S. 583, 116th Cong. (2019); Information Transparency & Personal Data Control Act, H.R. 2013, 116th Cong. (2019).

6 CAL CIV. CODE §§ 1798.100–.199; ME. STAT. tit. 35-A, § 9301 (2020); VT. STAT. ANN. tit. 9, §§ 2430–2447 (2019).

7 *E.g.*, Brian Fung, *Facebook's Antitrust Headache Gets Worse: 47 Attorneys General Now Investigating*, CNN (Oct. 22, 2019, 1:23 PM), https://www.cnn.com/2019/10/22/tech/facebook-antitrust-investigation/index.html [https://perma.cc/QEE5-K82C].

8 *E.g.*, *2019 Consumer Data Privacy Legislation*, NAT'L CONF. STATE LEGISLATURES (Jan. 3, 2020), http://www.ncsl.org/research/telecommunications-and-information-technology/consumer-data-privacy.aspx [https://perma.cc/LET5-4998] (collecting legislative actions on bills related to consumer data privacy throughout the states).

9 *E.g.*, Gabe Turner & Security.org Team, *47 States Have Weak or Nonexistent Consumer Data Privacy Laws*, SECURITY.ORG (Apr. 16, 2020), https://www.security.org/resources/digital-privacy-legislation-by-state/ [https://perma.cc/8J8A-X5EB].

10 This example is drawn largely from the facts of the Cambridge Analytica scandal. *See* Alvin Chang, *The Facebook and Cambridge Analytica Scandal, Explained with a Simple Diagram*, VOX (May 2, 2018, 3:25 PM), https://www.vox.com/policy-and-politics/2018/3/23/17151916/facebook-cambridge-analytica-trump-diagram [https://perma.cc/9J33-KE7L]. The legal challenge to the actual scandal was primarily based on deceiving consumers and breach of contract, not the First Amendment. *See In re* Facebook, Inc., Consumer Privacy User Profile Litigation, 402 F. Supp. 3d 767, 789–82 (N.D. Cal. 2019).

her public profile (perhaps age, sex, relationship status, etc.).[11] Answering the questions, she provides to both Facebook (through which the quiz is taken) and the hosting firm the information contained in the answers.[12] Unbeknownst to her, this connection also allows the hosting firm to receive information about her friends' accounts from Facebook.[13] Following the exposure of this transfer of the friends' data, government actors attempt to legislate what information a collector (like Facebook) can share without user consent.[14]

Facebook and these online trackers are data collectors.[15] Data collectors (throughout this Note, also called "online user data collectors") are both businesses and entities that collect data directly from the user, as well as data brokers that purchase data from user-facing businesses and third-party data collectors partnered with those user-facing businesses to create data repositories to which they then sell access.[16] These data collectors, like all legal entities, have First Amendment rights.[17] If that information were used for political speech (as the actual firm Cambridge Analytica used the information in 2015),[18] it would probably be protected with the same vigor as any other core First Amendment activity.[19] But, even the transfer from one firm to another for pecuniary gain may be commercial speech, thus falling within the protection of the First Amendment,[20] even if the protection is not as vigorous as that which guards political speech.[21] Even if this speech is the less protected commercial speech, as most courts that have examined similar issues believe it is,[22] there is still dispute over whether the law that regulates that transfer of data is valid under the First Amendment. This inquiry depends on what the

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11 *E.g.*, Chang, *supra* note 10.

12 *See id.*

13 *Id.*

14 *See Mark Zuckerberg Testimony: Senators Question Facebook's Commitment to Privacy*, *supra* note 4.

15 Natasha Singer, *What You Don't Know About How Facebook Uses Your Data*, N.Y. Times (Apr. 11, 2018), https://www.nytimes.com/2018/04/11/technology/facebook-privacy-hearings.html [https://perma.cc/8VEU-ZLH2].

16 *Id.*

17 *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 342–43 (2010).

18 *See* Chang, *supra* note 10.

19 *Cf. Citizens United*, 558 U.S. at 342–43 ("[P]olitical speech does not lose First Amendment protection 'simply because its source is a corporation.'" (quoting First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 784 (1978))).

20 *See* Sorrell v. IMS Health Inc., 564 U.S. 552, 553 (2011).

21 *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 562–63 (1980).

22 *See, e.g.*, U.S. W., Inc. v. FCC, 182 F.3d 1224, 1232 (10th Cir. 1999).

government's interest in regulating that speech is and on how the government chooses to regulate it.[23] Commercial speech has not been addressed by the Supreme Court in decades, and how its current jurisprudence should be applied to the novel area of transfers of personal data collected through the internet is unclear at best.[24]

In *Sorrell v. IMS Health Inc.*,[25] the Court firmly put to rest any doubt that regulations aimed at protecting privacy in the context of transmissions of data must accord with at least *some* basic First Amendment principles.[26] Even so, the specifics of how the First Amendment applies to privacy regulations is far from clear.[27] This lack of clarity leads legislatures to pass laws that do not, or may not, pass constitutional muster.[28] It causes industries involved in the collection and transfer of data to be uncertain of their obligations under these laws.[29] It also forces courts to struggle through a morass of uncertainty to reach decisions.[30]

This Note offers a solution to that lack of clarity. First, apply the test for commercial speech to transfers of data. Second, implement categorical presumptions about the importance of the government's interest that differ depending on how the data was collected and transferred. For data collected from public disclosure, the government's interest is insubstantial, whereas for data gathered without the user's knowledge, there should be a presumption the interest is important. This solution will allow legislators, industry, and the courts to proceed into the new world of online privacy legislation with increased certainty and clarity to effectively balance the interests in protecting individual's privacy in an increasingly tracked medium against the benefits provided to those users by services that rely on the collection and sale

23 *See Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 564.

24 *See infra* Section I.C.

25 564 U.S. 552 (2011).

26 *See id.* at 580.

27 *See infra* Section II.C.

28 *See Sorrell*, 564 U.S. at 563 (striking down a Vermont law that limited sale, disclosure, and use of prescriber-identifying information by pharmacies and pharmaceutical manufacturers on First Amendment grounds).

29 *See, e.g.*, Amy He, *Very Few US Businesses are CCPA-Ready*, EMARKETER (Sept. 10, 2019), https://www.emarketer.com/content/very-few-us-businesses-are-ccpa-ready [https://perma.cc/QL6E-V94Y] (noting concerns with enforcement and compliance as reasons businesses are choosing not to comply with California Consumer Privacy Act (CCPA), CAL CIV. CODE §§ 1798.100–.199 (West 2018)).

30 *See, e.g.*, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 762 (1985) (attempting to define commercial speech); Boelter v. Advance Mag. Publishers Inc., 210 F. Supp. 3d 579, 597 (S.D.N.Y. 2016) (discussing what type of speech the sale of subscriber data to a data miner is).

of data to make their business models work. By examining limits on data transfers[31] according to the way the information was collected in the first instance, users' expectations of privacy are protected, and firms are able to continue their business models by selling information that falls outside this privacy interest—for instance, publicly liked pages. Using this method, courts will have a clear test to apply when legislation is challenged, creating uniformity across jurisdictions that allows businesses to operate in an online world that does not recognize the physical boundaries of a state or appellate circuit.

Part I of this Note examines the basic framework of First Amendment analysis generally and commercial speech—the most natural category for sales and transfers of personal information—specifically. Part II analyzes the difficulties of applying current First Amendment tests to privacy regulations targeting data collectors, and the uncertainty those difficulties pose for courts, legislatures, and businesses. Part III explains in greater detail the different categories of collected data; how different collection methods and users' privacy interests can be used in practice as as proxies for different presumptions of importance; and the advantages and concerns that arise from this solution.

I. Uncertainty in the First Amendment's Application to Commercial Data Transfers

The transmission of information from individual to individual is central to the First Amendment,[32] and that freedom of speech is central to America's understanding of liberty.[33] As fundamental a value as freedom of speech is, so too is privacy—the ability to keep some parts of our lives outside of the public realm.[34] This tension is nothing

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31 In this case, data transfers are the transmission, either gratuitously or for a fee, of an individual user's personal information from one firm to another.

32 *See, e.g.*, Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.").

33 *See* Baumgartner v. United States, 322 U.S. 665, 673–74 (1944) ("One of the prerogatives of American citizenship is the right to criticize public men and measures—and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation.").

34 Famously, this proposition was summed up by Justice Brandeis when he said, "[The Framers] sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). While Justice Brandeis spoke only of protections

new.[35] This Part examines first principles of the First Amendment; the evolution of the standards, tests, and protections for commercial speech under the First Amendment today; and the proposition that personal (and private) information is speech within the First Amendment.

A. First Principles of the First Amendment

The First Amendment speech clause states, "Congress shall make no law . . . abridging the freedom of speech."[36] While by its text the First Amendment applies only to the federal government, the Supreme Court has interpreted the Fourteenth Amendment to incorporate the First Amendment's protections with equal force against state legislatures and executives.[37]

The Court has understood the First Amendment's purpose is to ensure that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[38] The core of the First Amendment has always been understood to be the protection of the ability to have open discussion on political matters.[39] That protection, however, has extended to speech on matters not so clearly political on the understanding that silencing any speech, no matter how unimportant it may seem, allows the government to set the boundaries of acceptable discourse and thereby prevent the development of new ideas.[40]

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against the government, Americans' desire to be "let alone" is with regards to online collectors of personal information as well.

35 *See generally, e.g.*, Catherine Crump, Note, *Data Retention: Privacy, Anonymity, and Accountability Online*, 56 STAN. L. REV. 191, 216 (2003) (explaining the then-current forms of internet anonymity and data collection); Note, *Privacy in the First Amendment*, 82 YALE L.J. 1462 (1973) (explaining the historical tension between individual's privacy and the right of the press and public to speak about them).

36 U.S. CONST. amend. I.

37 *See* Stromberg v. California, 283 U.S. 359, 368 (1931). Although *Stromberg* was the first case where the Court held explicitly that the First Amendment applied to the states through the Fourteenth Amendment, the Court had, in dicta, assumed as much in earlier decisions dating back to 1925. *See* Gitlow v. New York, 268 U.S. 652, 664 (1925).

38 W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

39 *See* Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("[The Framers] believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth.").

40 *See, e.g.*, Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 790 (2011) ("The Free Speech Clause exists principally to protect discourse on public matters, but we have long recognized that it is difficult to distinguish politics from entertainment, and dangerous to try.").

In order to effectuate this principle, the Supreme Court has established the basic steps to examine any regulation of speech.[41] First, a court examines the regulation to determine if the speech is regulated on the basis of content or viewpoint.[42] If the regulation does discriminate on either of those grounds, it must survive strict scrutiny,[43] unless all the content regulated falls within one of the very few historical categories of speech outside the protection of the Amendment.[44] If the regulation is content and viewpoint neutral, the court looks to the speech being regulated, and if the speech being regulated is not within one of those few categories outside the protection of the First Amendment, that speech is protected.[45] A court then asks what sort of restriction is imposed by the law—a restriction on the time, place, and manner of speech;[46] a restriction on commercial speech;[47] or a restriction on mixed speech and action.[48] Any restriction that falls within the first two categories must pass intermediate scrutiny[49] while a restriction in the third category may face strict scrutiny.[50] A restriction that

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41 *See, e.g.*, Cohen v. California, 403 U.S. 15, 19–26 (1971) (laying out an analytical framework for First Amendment analysis).

42 *See* Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972) ("[T]he First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").

43 *See* Reed v. Town of Gilbert, 576 U.S. 155, 165 (2015) ("A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive . . . .").

44 *See, e.g.*, Miller v. California, 413 U.S. 15, 24 (1973) (obscenity); Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942) (fighting words); Brandenburg v. Ohio, 395 U.S. 444, 448 (1969) (incitement). Even when speech falls into one of those few exceptions to the protection of the First Amendment, viewpoint discrimination can still cause a law regulating that speech to be unconstitutional. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992).

45 *See Cohen*, 403 U.S. at 19–22 (describing the "relatively few categories" for which the Court has held the government may "deal more comprehensively with certain forms of individual expression").

46 *See, e.g.*, Thomas v. Chi. Park Dist., 534 U.S. 316, 323 n.3 (2002).

47 *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 561 (1980).

48 *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 404 (1989).

49 *See* Clark v. Cmty. for Creative Nonviolence, 468 U.S. 288, 293 (1984) (time, place, manner); *Thomas*, 534 U.S. at 323 (same); *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 564 (commercial speech).

50 A restriction falling into this category of mixed speech and conduct might, nevertheless, face no special scrutiny, because if a court determines the regulation targets conduct, without regard to the expressive content of that conduct, it is not considered a restriction on speech at all. *Compare* United States v. O'Brien, 391 U.S. 367, 375, 382 (1968) (finding that burning draft cards not expressive conduct because the government has a legitimate purpose in keeping those cards intact without regard to whether they are destroyed in public or in private), *with Johnson*, 491 U.S. at 406 (law forbidding burning a U.S. flag subject to strict scrutiny because purpose of law is to regulate expression of ideas).

does not fall into one of these categories restricts protected speech and must pass strict scrutiny.[51]

This Section examines in more detail two concepts that often arise in First Amendment cases related to privacy and data regulations—discriminatory regulations and levels of scrutiny.

1. *Content, Viewpoint, and Speaker Discrimination*

Content discrimination is the application of different laws, or the different application of the same law, to speech depending on what the speaker is speaking about.[52] The Court's near total ban on content discrimination is based on the desire to protect the fundamental purpose of the First Amendment—namely the open and vigorous "discourse on public matters."[53] The government cannot decide the winner of that debate by limiting the topics that may be discussed.[54] Because they withdraw topics from the public discourse, "content-based regulations are presumptively invalid."[55] Content differentiation, however, does not automatically doom a law. The distinction between core First Amendment speech (e.g. political speech) and commercial speech is largely defined based on content.[56] Sometimes, like in cases where the Court has defined commercial speech coextensively with advertisements, the Court permits greater regulation of

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51 *See, e.g.*, Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 799 (2011); *Johnson*, 491 U.S. at 403 (explaining that if state's regulation is related to expression, "we are outside of *O'Brien*'s test, and we must ask whether this interest justifies Johnson's conviction under a more demanding standard").

52 *See, e.g.*, Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 530, 537 (1980) ("The First Amendment's hostility to content-based regulation extends . . . to prohibition of public discussion of an entire topic.").

53 *Brown*, 564 U.S. at 790.

54 *See, e.g.*, Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95–96 (1972) ("To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964))).

55 R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992); *accord* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 828 (1995) ("It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys.").

56 *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 773 (1976). Additionally, the question of whether speech falls into an unprotected category necessarily requires examining the content of that speech. *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942) (describing "fighting words" as speech content falling within the purview of unprotected speech).

speech based on the content of that speech.[57] The way to understand content *discrimination*, then, is that the Court permits examining content to determine what category of speech is at issue (core, commercial, or unprotected), but *within* that category, speech may not be differently treated based on what topics or issues it covers.[58] If a law does discriminate based on content, it must survive the much more demanding strict scrutiny standard to be upheld.[59]

Viewpoint discrimination is, in essence, "an egregious form of content discrimination."[60] It is the differential treatment by the law of speech based on what a speaker says.[61] Just as it is inconsistent with the fundamental values of the First Amendment to proscribe what subjects shall be discussed, it is even more egregious to allow debate on a topic but only permit one side of that debate to speak.[62] Although there are legitimate reasons to distinguish speech based on its content, any differential treatment based on viewpoint is almost certain to doom a law.[63] This remains true even if the speech at issue falls into one of the categories outside the protection of the First Amendment.[64]

57 *See* Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 482 (1989). (explaining that "speech that *proposes* a commercial transaction, which is what defines commercial speech," receives less protection based on the content of the speech being a proposal).

58 *See R.A.V.*, 505 U.S. at 383–84 ("[A]reas of speech can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* (obscenity, defamation, etc.)—not that they . . . may be made the vehicles for content discrimination unrelated to their distinctively proscribable content. Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government.").

59 *See* Sorrell v. IMS Health Inc., 564 U.S. 552, 557–58 (2011); *cf. Police Dep't of Chi.*, 408 U.S. at 95 ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").

60 *Rosenberger*, 515 U.S. at 829.

61 *See* Texas v. Johnson, 491 U.S. 397, 398 (1989) (holding a law that made burning a flag in protest illegal, while permitting burning a flag out of respect is unconstitutional); *see also* Cantwell v. Connecticut, 310 U.S. 296, 311 (1940) (overturning a conviction based off of disapproval of pro–Jehovah's Witness and anti–Roman Catholic speech).

62 *See, e.g.*, *Police Dep't of Chi.*, 408 U.S. at 96 ("[G]overnment must afford all points of view an equal opportunity to be heard.").

63 *See Rosenberger*, 515 U.S. at 829 ("The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."). *But see* Matal v. Tam, 137 S. Ct. 1744, 1768 (2017) (Kennedy, J., concurring) ("[T]he Court's precedents have recognized just one narrow situation in which viewpoint discrimination is permissible: where the government itself is speaking or recruiting others to communicate a message on its behalf.").

64 *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 378 (1992) (finding the law unconstitutional when it permitted use of unprotected speech to protest racial hatred but criminalized the use of the same speech in favor of racial hatred).

Finally, speaker discrimination, much as it sounds, is differential treatment by laws based not on what is being said, but based on *who* is saying it.[65] While speaker discrimination can be impermissible, and thus serve as a reason to strike a law down, some classes of speaker have been held to be differentially regulatable. Historically, this has included the speech of television and radio broadcasters[66] and electronic communications[67]—a category that online data collectors would appear to fall into.

2. *Levels of Scrutiny*

Strict scrutiny is the most intense level of review a court may use in deciding on the constitutionality of a law.[68] It requires the law serve a "compelling interest and [be] narrowly tailored to achieve that interest"—that is, strict scrutiny requires the law serve a governmental interest of the highest order, be essential to achieve that interest, and restrict the minimum possible amount of speech in achieving that interest.[69] As a practical matter, it is "the rare case[ ] in which a speech restriction withstands strict scrutiny."[70] Intermediate scrutiny, on the other hand, requires the state have an important or "substantial interest," and the law must "directly advance the state interest involved" and be necessary to achieving that interest.[71] Thus, a less than compelling interest can allow a law that actually does advance that interest without restricting too much speech.[72]

Ultimately, then, strict scrutiny applies to any regulation that targets pure speech or expressive conduct, as well as any content or viewpoint discriminatory regulation.[73] Intermediate scrutiny applies to commercial speech and time, place, and manner restrictions.[74] This Note does not argue for a change in this basic framework, but rather

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65 *See* Sorrell v. IMS Health Inc., 564 U.S. 552, 557–58 (2011).

66 *See* Nat'l Broad. Co. v. United States, 319 U.S. 190, 227 (1943) ("The right of free speech does not include, however, the right to use the facilities of radio without a license.").

67 Cap. Broad. Co. v. Mitchell, 333 F. Supp. 582, 584 (D.D.C. 1971) ("The unique characteristics of electronic communication make it especially subject to regulation in the public interest."), *aff'd sub nom.* Cap. Broad. Co. v. Kleindienst, 405 U.S. 1000 (1972).

68 *See* Dunn v. Blumstein, 405 U.S. 330, 337 (1972) (describing strict scrutiny as an exacting test used to preserve fundamental constitutional rights).

69 Reed v. Town of Gilbert, 576 U.S. 155, 171 (2015).

70 Williams-Yulee v. Fla. Bar, 575 U.S. 433, 444 (2015).

71 Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n. of N.Y., 447 U.S. 557, 564 (1980).

72 *See id.*

73 *See supra* notes 43–44, 52 and accompanying text.

74 *See supra* notes 47–51 and accompanying text.

for a more specialized application of it to cases involving online data transfers.

This Note argues that data transfers are commercial speech. The next Section, therefore, explores in detail the development and standards of the doctrine of commercial speech—what it is and how legislation or regulations targeting it are reviewed by the Court.

B. *What it Means to Say Speech Is Commercial*

Commercial speech is speech that, by examining "the nature of the speech taken as a whole,"[75] appears to be "related solely to the economic interests of the speaker and its audience."[76] Though this sounds simple, the development of the doctrine underscores just how uncertain any clear-cut definition really is. This Section examines that development to explain why commercial speech is the most appropriate way to categorize transfers of personal data, even as it explores the difficulties of applying the commercial speech framework to those transfers.

The modern doctrine of commercial speech traces its origination to *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*[77] In that case, the Court examined a Virginia law entirely banning pharmacists from advertising to the public challenged by consumer rights groups and consumers.[78] The Court held for the consumers and struck down the Virginia regulation.[79] The Court began by defining commercial speech, as speech that "propose[s] a commercial

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75 Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 796 (1988).

76 *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 561.

77 425 U.S. 748 (1976); *see* Nat Stern, *In Defense of the Imprecise Definition of Commercial Speech*, 58 MD. L. REV. 55, 58–59 (1999).

78 *Va. State Bd. of Pharmacy*, 425 U.S. at 749–50. This case represented a drastic shift in the realm of commercial speech, as it overturned *Valentine v. Chrestensen*, 316 U.S. 52 (1942), a case that announced what had been the general understanding of commercial speech regulations, and which remained good law for decades. *See id.*; *Va. State Bd. of Pharmacy*, 425 U.S. at 758–61. *Valentine* involved advertisement leaflets distributed in New York City with a political message written on the reverse of the advertisement. 316 U.S. at 55. The Court held these leaflets were not entitled to First Amendment protections, even though they did contain some political messaging, because "the Constitution imposes no such restraint on government as respects purely commercial advertising," and if attaching a political advertisement to such commercial speech were enough to immunize it, "every merchant . . . need only append a civic appeal . . . to achieve immunity from the law's command." *Id.* at 54–55.

79 *See Va. State Bd. of Pharmacy*, 425 U.S. at 770 ("[T]he justifications Virginia has offered . . . , far from persuading us that the flow is not protected by the First Amendment, have reinforced our view that it is.").

transaction."[80] It examined the value of commercial advertising speech in a general sense, focusing on its ability to transfer information to allow individuals to make informed economic choices.[81] The Court held that "commercial speech, like other varieties, is protected" because the First Amendment protects the free flow of lawful and truthful information.[82] Additionally, the information could help people make informed purchasing choices; "people will perceive their own best interests if only they are well enough informed, and . . . the best means to that end is to open the channels of communication rather than to close them."[83] The Court did not, however, decide that such speech was entitled to the same degree of protection as political speech, which is at the core of the First Amendment.[84] Although Virginia's justifications were unconvincing, the Court nevertheless found "commonsense differences between speech that does 'no more than propose a commercial transaction,' and other varieties."[85] The Court thus believed that a state could legitimately regulate false advertisements, misleading advertisements, and advertisements for services or transactions that were in themselves illegal.[86] This holding was limited to print advertising directed to consumers.[87]

Even with its limitations, *Virginia Pharmacy Board* set the baseline test for commercial speech as one that balanced the proffered justification for the regulation against the extent the regulation limited speech, discounted by the value of the speech.[88] This test was elaborated in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.[89] There, the public utility commission of New York banned all advertising by the electric company, purportedly to

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80 *Id.* at 762 (quoting Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rels., 413 U.S. 376, 385 (1973)).

81 *Id.* at 765 ("Advertising . . . is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. . . . [T]he allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.").

82 *Id.* at 770.

83 *Id.*

84 *Id.*

85 *Id.* at 771 n.24 (citation omitted) (quoting *Pittsburgh Press Co.*, 413 U.S. at 385).

86 *See id.* at 771–73. The court explained the permissibility of these regulations because, although commercial speech has value, "a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired." *Id.* at 772 n.24.

87 *See id.* at 773.

88 *See id.* at 762–70.

89 447 U.S. 557 (1980).

improve energy efficiency.[90] In holding that the commission's advertising prohibition violated the First Amendment, the Court identified the intermediate scrutiny test that should be applied to all commercial speech cases. "The State must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest. The limitation on expression must be designed carefully to achieve the State's goal."[91] The Court stated that before commercial speech could attain the protections it had just announced, that speech must be both truthful and related to a legal activity.[92] Ultimately, the *Central Hudson* test holds that a restriction must fall unless that restriction *actually* advances a substantial state interest and that interest could not be equally well advanced with a less restrictive law.[93]

The test laid out in *Central Hudson* has become the standard inquiry for commercial speech cases.[94] On its face, however, the decision is about advertising and much of the logic used in *Central Hudson* derives from *Virginia Pharmacy Board*.[95] The language in *Central Hudson* appears to be premised on the idea that commercial speech and advertising are coextensive categories: "The First Amendment's concern for commercial speech is based on the informational function of advertising."[96] Although this is the only instance where the Court explicitly states commercial speech is protected specifically to protect advertising, there are many other examples where the Court's discussion appears to presume advertising and commercial speech are interchangeable terms.[97] On the other hand, there are signals that

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90 *Id.* at 558–59.

91 *Id.* at 564.

92 *See id.* at 563–64.

93 *Id.* at 564. In the words of the Court, a regulation "must directly advance the state interest," and that the state must not be able to achieve that interest with "a more limited restriction." *Id.*

94 *See, e.g.*, El Día, Inc., v. P.R. Dep't of Consumer Affs., 413 F.3d 110, 113 (1st Cir. 2005).

95 *Compare Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 561–62 ("Commercial expression . . . assists consumers and furthers the societal interest in the fullest possible dissemination of information."), *with* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976) ("That alternative [to banning advertising] is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.").

96 *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 563.

97 *See supra* note 78. Additional examples abound. "For commercial speech to come within [the First Amendment], it at least must concern lawful activity and not be misleading." *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 566. "Consequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive

protected commercial speech encompasses more than just advertising as well: "The [public utility] Commission's order restricts only commercial speech, that is, expression related solely to the economic interests of the speaker and its audience."[98]

This ambiguity over whether the commercial speech doctrine applies only to advertisements, or to speech "related solely to the economic interests of the speaker and its audience,"[99] might have been resolved by the Court in *Board of Trustees of the State University of New York v. Fox*,[100] when the Court declared, "speech that *proposes* a commercial transaction . . . is what defines commercial speech."[101] Indeed, the Court had, on multiple occasions, suggested (but not outright stated) the need to limit commercial speech to that which proposed a transaction, lest regulations restricting ostensibly commercial speech inadvertently reach core First Amendment speech.[102] However, despite the pronouncement in *Fox* that only advertising is commercial speech, the Court has also found commercial speech with no advertising—when the purpose of the speech was not proposing a commercial transaction, but where the commercial nature of the speech was apparent.[103] This uncertainty has led some courts to struggle with determining what speech, outside advertising, is commercial, especially given the Court's guidance that the determination must be made based on "the nature of the speech taken as a whole."[104]

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the public than to inform it, or commercial speech related to illegal activity." *Id.* at 563–64 (citations omitted).

98 *Id.* at 561.

99 *Id.*

100 492 U.S. 469 (1989).

101 *Id*. at 482.

102 *See, e.g.*, Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976) ("[W]e may assume that the advertiser's interest is a purely economic one. That hardly disqualifies him from protection under the First Amendment. The interests of the contestants in a labor dispute are primarily economic, but it has long been settled that both the employee and the employer are protected by the First Amendment when they express themselves on the merits of the dispute in order to influence its outcome."); Commodity Futures Trading Comm'n v. Vartuli, 228 F.3d 94, 110 n.8 (2d Cir. 2000) ("Use of the *Central Hudson* description as a definition of commercial speech might, for example, permit lessened First Amendment protection and increased governmental regulation for most financial journalism and much consumer journalism simply because they are economically motivated.").

103 *See, e.g.*, Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 796 n.9 (1988) (noting the purely commercial nature of securities disclosures).

104 *Id.* at 796.

Two decisions help shed some light on the definition of commercial speech in the data transfer realm—*Sorrell*[105] and *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*[106]

Although neither definitively held that transfers of data are commercial speech, they both strongly imply it. *Dun & Bradstreet* involved a libel action against a credit reporting company based on its sending a false credit report to five other parties who paid for a subscription to receive credit reports.[107] Although this was not a challenge to a law or regulation, the Court repeatedly referenced the line of cases that dealt with commercial speech to find "the speech here, like advertising, is hardy and unlikely to be deterred by incidental state regulation." [108] The Court, citing to both *Virginia Pharmacy Board* and *Central Hudson*, listed some of the factors previously used to distinguish commercial speech, stating the speech at issue was "solely in the individual interest of the speaker and its specific business audience,"[109] and that the speech did not involve "strong interest in the free flow of commercial information."[110] The Court also noted the "reduced constitutional value of speech involving no matters of public concern."[111] In *Sorrell*, the Court assumed that the law at issue was a regulation on commercial speech, although it did not decide as much because the law failed under any standard of review.[112] Now, many lower courts have relied on *Dun & Bradstreet*, along with *Sorrell*, to mean that, based on the general nature of the speech,[113] data transfers are commercial speech.[114] This understanding, however, is directly at odds with the Supreme Court's most recent direct pronouncement that what "de-

105 Sorrell v. IMS Health Inc., 564 U.S. 552, 563 (2011). This Note will discuss *Sorrell* in much greater detail in Section I.C, *infra*.

106 472 U.S. 749, 761–62 (1985) (plurality opinion).

107 *Id.* at 751.

108 *Id.* at 762.

109 *Id.* (citing Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 561 (1980)).

110 *Id.* (quoting Va. Pharmacy Bd. v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 764 (1976)).

111 *Id.* at 761.

112 *See infra* note 121 and accompanying text.

113 *See* Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 796 (1988); *supra* note 75 and accompanying text.

114 *See, e.g.*, Boelter v. Advance Mag. Publishers Inc., 210 F. Supp. 3d 579, 597 (S.D.N.Y. 2016). Because the Supreme Court's last decision directly on point is over thirty years old, those lower courts have relied on the dicta in *Sorrell* to reach their conclusion. *See* Sorrell v. IMS Health Inc., 564 U.S. 552, 563–64 (2011).

fines commercial speech" is the proposal of a commercial transaction.[115]

C. Is Data, or Its Transfer, Speech?

In *Sorrell*, the Court was called upon to determine the constitutionality of a Vermont law that placed "restrictions on the sale, disclosure, and use of prescriber-identifying information" gathered by data miners from pharmacies that collected information on what medications various doctors prescribed.[116] The restrictions were on the sale of information to "detailers"—marketing professionals employed by the pharmaceutical manufacturers whose job was to market new drugs directly to doctors and who used that prescriber-identifying information to target specific doctors who might have use for their employers' products.[117] The Court ultimately held that the law in question violated the First Amendment because it impermissibly discriminated based on the content and the speaker.[118] Of note, this protected expression was *not* the sale or transfer by pharmacies of the prescriber-identifying information to the detailers.[119] Instead, the protected expression impermissibly burdened was the marketing communication of the detailers to the doctors.[120] Although the decision to strike down the law rested on the (certainly) protected speech of the marketers to doctors, the Court also strongly suggested that the sale of information from the pharmacies to the detailers is speech [121] and that "[t]here is thus a strong argument that prescriber-identifying information is speech for First Amendment purposes." [122]

Lower courts have wholeheartedly adopted the view expressed by the Court in *Sorrell* that the sale or transfer of personal or private

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115 Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 482 (1989).

116 *See Sorrell*, 564 U.S. at 563–64.

117 *Id.* at 557–58.

118 *Id.* at 564–65.

119 *Id.*

120 *Id.* at 557–58. The law allowed pharmacies to sell prescriber-identifying information to private or academic researchers, which encouraged "educational communications," but not to pharmaceutical manufacturers. *Id.* at 564. Citing the legislative record, the Court noted that this specific restriction was based on the expectation that the manufacturers would use this information for marketing purposes. *Id.* at 564–65. Yet marketing is a form of speech, therefore the law impermissibly favored one form of speech over another and could not withstand strict scrutiny. *Id.* at 580.

121 *Id.* at 568 ("An 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." (quoting Seattle Times Co. v. Rhinehart, 467 U.S. 20, 32 (1984))).

122 *Id.* at 570.

information is speech.[123] Those courts mostly consider this transfer under the framework of commercial speech and so are more amenable to government regulation.[124] Although the lower courts have not embraced the proposition that the information is speech without regard to its transfer,[125] some have suggested transfers of information come within the First Amendment even if the transfer occurs entirely *within* a single entity.[126] Additionally, then-Judge Kavanaugh argued that even the data collected and websites provided by internet service providers in the process of providing access to various websites is protected speech under the First Amendment.[127] He argued for more expansive First Amendment protections for this data than those that attach to commercial speech, instead suggesting that this type of data came within the core of the First Amendment.[128]

Whether or not personal information is speech per se, the willingness of courts to apply a First Amendment analysis to restrictions on the transfer of that information demonstrates the need for would-be privacy regulators and enforcers to remain cognizant of the constitutional standards implicated. The scope of personal information collected each day, however, complicates the matter. It both increases the difficulty in determining the government interests at stake and draws into question whether the commercial speech analytical framework is appropriate at all. The following Part examines these issues.

II. The Landscape of Data and Privacy Extends Far Beyond What the Courts Can Handle

The scope of today's data collection and the difficulties of determining a user's—or the government's—interest in preserving privacy has gone well beyond what courts are able to predictably handle. First, this Part analyzes the scope of the data collection at issue when regulating online user data collectors. Second, it examines the difficulty of

123 *See, e.g.*, Trans Union Corp. v. FTC, 245 F.3d 809, 818 (D.C. Cir. 2001); U.S. W., Inc. v. FCC, 182 F.3d 1224, 1232 (10th Cir. 1999); Boelter v. Advance Mag. Publishers Inc., 210 F. Supp. 3d 579, 597 (S.D.N.Y. 2016).

124 *See supra* Section I.B.

125 For additional commentary on why the argument that data is speech, even without transfer, is "foolish," see Neil M. Richards, *Why Data Privacy Law Is (Mostly) Constitutional*, 56 Wm. & Mary L. Rev. 1501, 1524 (2015).

126 *See U.S. W., Inc.*, 182 F.3d at 1233 n.4 ("[T]he intra-carrier speech is properly categorized as commercial speech.").

127 U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 428 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from the denial of rehearing en banc) ("Internet service providers enjoy First Amendment protection of their rights to speak and exercise editorial discretion . . . .").

128 *Id.*

determining the weight of the government's interest in protecting user privacy when so much data is available online, much of it provided by the user themselves. Finally, this Part puts the two together to demonstrate why current jurisprudence is insufficient to clearly and predictably resolve cases when the government tries to regulate the transfer of user data.

A. The Massive Scope of What, and How, Data Is Collected

Data collection occurs at many points throughout the user's online experience.[129] At the most obvious level, information the user willingly displays—such as a Facebook post, a Tweet, or a dating profile—is collected by the site that information is entered into.[130] Information entered into a website willingly, but not displayed (e.g. credit card data entered to make a purchase) is similarly collected and stored.[131] One commentator has described the foregoing two types of data collection as "voluntary," which, at least for the moment, is an apt descriptor.[132]

"Involuntary"[133] data collection poses the greater problem, partly because of the ways data is collected and partly because of the vast quantities of data collected.[134] Data is collected involuntarily, in the first instance, by internet service providers ("ISPs")—entities that

129 *See generally* Louise Matsakis, *The WIRED Guide to Your Personal Data (and Who Is Using It)*, WIRED (Feb. 15, 2019, 7:00 AM), https://www.wired.com/story/wired-guide-personal-data-collection/ [https://perma.cc/2XPN-23Q8] (broadly discussing historical and current data collection practices).

130 *See, e.g.*, *Data Policy*, FACEBOOK, https://www.facebook.com/policy.php [https://perma.cc/S4S3-P2MP] ("We collect the content, communications and other information you provide when you use our Products, including when you sign up for an account, create or share content, and message or communicate with others.").

131 *See, e.g.*, *Amazon Privacy Notice*, AMAZON, https://www.amazon.com/gp/help/customer/display.html?nodeId=201909010#GUID-1B2BDAD4-7ACF-4D7A-8608-CBA6EA897FD3__SECTION_87C837F9CCD84769B4AE2BEB14AF4F01 [https://perma.cc/YDB7-B6SZ] ("[Y]ou might supply us with such information as: identifying information such as your name, address, and phone numbers; payment information; [and] your age . . . .").

132 Barbara Sandfuchs & Andreas Kapsner, *Coercing Online Privacy*, 12 I/S: J.L. & POL'Y FOR INFO. SOC'Y 185, 186–88 (2016).

133 *Id.* at 188. Dr. Barbara Sandfuchs and Dr. Andreas Kapsner provide examples of when disclosure is involuntary, that is, when they are physically forced, when they lack legal capacity to understand the decision, and when they lack freedom of decision because of an imbalance in bargaining power or a great need for a service. *Id.* It is the third of these that is most relevant here.

134 *See* Frederike Kaltheuner, *I Asked an Online Tracking Company for All of My Data and Here's What I Found*, PRIVACY INT'L (Nov. 7, 2018), https://privacyinternational.org/long-read/2433/i-asked-online-tracking-company-all-my-data-and-heres-what-i-found [https://perma.cc/X4KS-GP8J].

provide access to the internet, like Comcast or Verizon.[135] They collect information like physical locations, IP addresses, the type of device used to access the internet (phone, laptop, or desktop), and device specifications.[136] Beyond ISPs, web browsers can collect information on searches and sites visited, known as browser history.[137] Websites themselves collect information through programs called cookies.[138]

Cookies collect a vast amount of information.[139] They frequently report user data to the owner of the website they are placed on and allow for a site to save information like user preferences or logon information.[140] In addition, they may not only track what websites a user visits after the page the cookie was downloaded from, but also determine what page the user came from.[141] These collection tools can track how long a user was on any site, what they hovered their mouse over, and whether they scrolled past a video or took the time to watch it.[142]

Using this data, the collector who receives the data can know a vast quantity of information about the user.[143] Some data collectors even advertise that subscribers to their services can purchase information about users including, but not limited to, age, name, gender, ethnicity, household size, net worth, occupation, major purchases, whether the user had a recent marriage or divorce, what their preferred sports team is, what they like to do for fun, whether they have

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135 *See* Crump, *supra* note 35, at 192–93.

136 Mehmood Hanif, *What Data is Collected About You Online and How to Stop It*, GLOBALSIGN: BLOG (June 15, 2018), https://www.globalsign.com/en/blog/what-data-is-collected-about-you-online/ [https://perma.cc/4KCQ-VUGZ].

137 *See, e.g.*, *Google Privacy & Terms*, GOOGLE, https://policies.google.com/privacy?hl=en-US [https://perma.cc/7XHL-JEVU] ("[I]nformation we collect may include: [t]erms you search for[, v]ideos you watch[, v]iews and interactions with content and ads[,] . . . [and c]hrome browsing history . . . .").

138 *E.g.*, *What Are Cookies?*, NORTONLIFELOCK, https://us.norton.com/internetsecurity-how-to-what-are-cookies.html [https://perma.cc/C8FE-2CKH].

139 *See* Michal Wlosik & Michael Sweeney, *What's the Difference Between First-Party and Third-Party Cookies?*, CLEARCODE (Nov. 10, 2020), https://clearcode.cc/blog/difference-between-first-party-third-party-cookies/ [https://perma.cc/YVK3-3QG7]. Cookies come in two varieties: those placed on a website by someone not the owner of that website are called third-party cookies, while those placed on a website by its owner are called first-party cookies. *See id.* The distinction, though relevant in many contexts, does not matter for the purposes of this Note.

140 *See* Hanif, *supra* note 136.

141 *See* Kaltheuner, *supra* note 134.

142 *See Understand Your Visitors by Seeing Where They Click, Hover, Type and Scroll, and Replay Their Actions in a Video*, MATOMO (May 18, 2017, 8:00 AM), https://matomo.org/blog/2017/05/understand-visitors-seeing-click-hover-type-scroll-replay-actions-video/ [https://perma.cc/856G-5F5E] (mouse hover tracking); *Video & Audio Analytics*, MATOMO, https://matomo.org/faq/media-analytics/ [https://perma.cc/K5VH-8LXY] (video and related analytics).

143 *See* Kaltheuner, *supra* note 134.

pets, where they like to travel, and what political issues or causes they care about.[144] Perhaps the greatest concern with these third-party cookies is that a number of users may not know these third parties have access to the user's system. While it may be obvious to a user that information they post on Facebook will be collected, it is far less likely that any given user will know the extent of information a third-party cookie might collect.[145] In all, both the quality and quantity of data collected goes well beyond anything courts have addressed in their limited previous decisions on personal information privacy, and the broad array of types of information collected seriously complicates an easy categorization of these transfers of data as purely commercial speech.[146]

B. *What About the User's Privacy?*

All this collection may be largely meaningless to users in itself. It only matters once the data is transferred—what does it matter what someone knows about you unless they tell others? These collectors do, however, transfer that data.[147] What a user knows is being collected impacts their expectations of privacy. The degree to which a person's privacy is protected depends to a large extent on their expectation of privacy in any given situation.[148] The Court's rationale about privacy expectations in the context of search and seizure under the Fourth Amendment can cogently be extended to the context of speech: that a person reasonably expects to remain private "what he seeks to preserve as private, even in an area accessible to the public."[149] What a person, in the normal course of their life, expects will remain private "may be constitutionally protected."[150] On the other hand, "[w]hat a person knowingly exposes to the public, even in his own home or office, is not . . . protect[ed]," because there is no expec-

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144 *See, e.g.*, *Acxiom Infobase*, ACXIOM, https://www.acxiom.com/what-we-do/infobase/ [https://perma.cc/HX65-MVH8].

145 *See* Kaltheuner, *supra* note 134.

146 *See, e.g.*, U.S. W., Inc. v. FCC, 182 F.3d 1224, 1232–33 (10th Cir. 1999); *see also* Sandfuchs & Kapsner, *supra* note 132, at 187 (explaining one potential categorization of data, and the complications with it).

147 *See, e.g.*, *Acxiom Infobase*, *supra* note 144.

148 *Cf.* Katz v. United States, 389 U.S. 347, 351 (1967) (holding that Fourth Amendment protections turn not on whether a person is located in a "constitutionally protected area" alone, but on whether a person sought to protect something as private).

149 *See id.* at 351, 353 ("[T]he reach of [the Fourth] Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.").

150 *See id.* at 351–52.

tation that it will remain private.[151] Thus, regardless of *where* some piece of information is, if a person exposes it willingly, then it is not private. But if they expect the information to remain private and act reasonably to keep it so, that information should be protected from exposure to the government or other entities.

Under the *Central Hudson* test, a court is asked to examine the state's interest in regulating speech and balance it against the level of restriction imposed.[152] A user's expectation of privacy bears on how a court will evaluate the importance of a state's interest in protecting the information.[153] Beyond the importance of the state's interest, a person's expectation of privacy in their information can determine what effect, if any, transfer of that information may have on chilling speech, which is crucial in evaluating the limits of a restriction on speech.[154] If individuals sense information is being collected on subjects not openly revealed, they may be less likely to engage in those subjects.[155] In addition to chilling potentially core political speech, this lack of privacy can also prevent people from seeking information that may be relevant to their needs.[156] Because of these concerns, the two proposed categories of data collection, voluntary and involuntary,[157] are insufficient to capture the varying privacy interests at stake in online data collection.[158]

Therefore, we are left with three broad categories of data collection. First, voluntary and public collection acquires information given willingly,[159] and because it is willingly exposed, there is no reasonable

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151 *See id.*

152 Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 564 (1980).

153 *Cf. Katz*, 389 U.S. at 351; Boelter v. Advance Mag. Publishers Inc., 210 F. Supp. 3d 579, 597 (S.D.N.Y. 2016) (noting in case arising under a State privacy statute, individual's privacy interests weighed in favor of treating the speech in question as the less-protected commercial speech rather than speech deserving the full protection of the First Amendment).

154 *See* Note, *supra* note 35, at 1466 ("Privacy understood in this special sense—as control of information about oneself—is prerequisite to the operation of the free expression . . . .").

155 *Id.* at 1466–67; *cf.* Smith v. California, 361 U.S. 147, 153–54 (1959) (explaining how chilling speech works in the context of criminal sanctions on the contents of books). The Court's statement, "[t]he bookseller's . . . timidity . . . would tend to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly," though about criminal liability, conceptually applies equally well to timidity caused by public revelations of information wished to be kept private. *Id.*

156 *See* Kaltheuner, *supra* note 134 ("[A]n advertising company from Massachusetts in the US targeted 'abortion-minded women' with anti-abortion messages while there [sic] were in hospital.").

157 Sandfuchs & Kapsner, *supra* note 132, at 186–88.

158 *See* Katz v. United States, 389 U.S. 347, 351–52 (1967).

159 Sandfuchs & Kapsner, *supra* note 132, at 186–87.

expectation of privacy.[160] Second, voluntary and private collection takes information given willingly, but with an expectation that it will remain private to parties outside of the transaction where it was given.[161] Finally, involuntary collection takes information unknowingly given or information that is given knowingly but without real choice in whether to give that information.[162] This category carries a strong expectation of privacy, not just as to the universe of third parties, but even as to the collectors of the data.[163]

C. *The Inadequacies of the Current Jurisprudence*

As legislators consider and pass new legislation to protect users' privacy online, current First Amendment jurisprudence is ill-equipped to deal with the First Amendment implications of data transfers of this magnitude. As an example, California passed legislation that went into effect on January 1, 2020, the California Consumer Privacy Act ("CCPA"),[164] which imposes regulations on data collectors' use of user information.[165] It contains a provision that a data collector need not comply to the extent compliance would prevent it from exercising free speech.[166] Under current jurisprudence, if an enforcement action were brought, but the data collector claimed it were exercising its speech rights, a court would begin undertaking a full First Amendment analysis.[167]

Generally, courts will first need to determine whether the sale or transfer of data is actually speech at all within the meaning of the First Amendment.[168] Although some commentators have argued for an approach that takes the sale of data outside the realm of speech,[169] the practice of courts that have examined this issue is to apply the same

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160 *See Katz*, 389 U.S. at 351.

161 *See id.* at 351–52.

162 This framing encompasses Dr. Sandfuchs and Dr. Kapsner's concerns about imbalance of power, and is a recognition that, at least in the digital world of today, there is no real "exit" from the internet. *See* Sandfuchs & Kaspner, *supra* note 132, at 186–89.

163 For a general understanding of the degree to which people expect privacy in this context, one needs to do no more than search in any search engine "how to protect my online privacy" to find articles listing dozens of tips to minimize the ability for data collectors to access information.

164 CAL CIV. CODE §§ 1798.100–.199 (West 2018) (effective Jan. 1, 2020).

165 *Id.*

166 *Id.* § 1798.105(d)(4).

167 *See supra* Section I.A.

168 *See supra* Section I.C.

169 *See generally* Richards, *supra* note 125, at 1501–07 (arguing that data should not be considered "speech" under the First Amendment and thus regulation of commercial data is entirely constitutional).

interpretation as *Dun & Bradstreet* and *Sorrell* and consider this sale "speech" within the meaning of the First Amendment.[170] Presuming the law does regulate speech, the next question is whether the law impermissibly discriminates on the basis of content or viewpoint.[171] Although the Supreme Court has noted "[i]t is rare that a regulation restricting speech because of its content will ever be permissible," the Court left open the possibility that the rare carefully crafted law might pass this hurdle.[172]

Assuming a court decides speech is regulated, and the regulation is content neutral and viewpoint neutral, the next challenge for the court is to determine what sort of speech is regulated—commercial or noncommercial.[173] The standard the Court announced for deciding which of those categories is implicated in regulations of data transfers is not entirely clear. Of the courts that have addressed the sale of data collected online, most have found the speech to be commercial, but those courts were examining the speech under laws regulating very narrow categories.[174] These laws, which were mostly passed before the rise of online data collection, target the sale or transfer of data almost exclusively falling into the voluntary and private category—laws like the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"),[175] the Family Educational Rights and Privacy Act ("FERPA"),[176] or Video Privacy Protection Act ("VPPA").[177] These laws target sales that do generally fit into the broadly understood rule that speech is commercial when, examined on the whole, it is about economic interests or proposes a transaction.[178] However, sales of data collected by cookies that contain information about movie choices, gender and ethnicity, or involvement in various causes[179] are harder to square with that definition, especially when that data may be sold to

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170 *See supra* note 123 and accompanying text.

171 *Supra* Section I.A.

172 United States v. Playboy Ent. Grp., 529 U.S. 803, 818 (2000).

173 *See* Sorrell v. IMS Health Inc., 564 U.S. 552, 578–79 (2011).

174 *See, e.g.*, *id.* at 568 (considering a law that targeted transfers from pharmacies, though not ultimately decided on commercial speech grounds); Boelter v. Advance Mag. Publishers Inc., 210 F. Supp. 3d 579, 597 (S.D.N.Y. 2016) (data transfers between magazine and information collectors of subscriber information challenged under the Michigan Preservation of Personal Privacy Act ("PPPA"), Mich. Comp. Laws §§ 445.1711–.1715 (2020), the Michigan broader counterpart to the federal Video Privacy Protection Act ("VPPA"), 18 U.S.C. § 2710).

175 Pub. L. No. 104–191, 110 Stat. 1936.

176 20 U.S.C. § 1232g.

177 18 U.S.C. § 2710 (prohibiting the sale or disclosure of certain information by video tape sellers and renters to various third parties).

178 *See supra* note 102 and accompanying text.

179 *See Acxiom Infobase*, *supra* note 144.

political campaigns or advocacy groups who use it for expressly political speech.[180] On the other hand, those transfers *are* sales, and the speaker is making the transfer of data for economic reasons.[181] In many contexts, speech that has an effect on political or social issues remains regulatable commercial speech largely based on this feature.[182] Permitting a court to invalidate legislation protecting privacy because the data protected may contain information on politics and eventually be used by a political entity has also raised for many the specter of the digital rebirth of the *Lochner* era.[183]

Although the specific facts of some cases may lead a reviewing court to conclude the speech is political, in most instances the court would probably conclude, based on "the nature of the speech taken as a whole," that the speech is commercial.[184] The court must then apply the appropriate test for regulations of speech of their chosen type—strict scrutiny for noncommercial speech or intermediate scrutiny for commercial speech.[185] In either case, the court balances the interest of the government against the restriction it imposes on speech.[186] Evaluating the importance of the government interest raises the next major concern in the regulation of online data collectors. Although the government certainly has an interest in protecting the privacy of its citizens online, the importance of that interest is not easily determined.[187] Courts frequently simply assert the importance of the issue in question, rather than explaining why the issue is important, compelling, or merely legitimate. But in the instances where courts have examined

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180 *See* Chang, *supra* note 10.

181 *See Acxiom Infobase*, *supra* note 144 (*selling* a service).

182 *See, e.g.*, Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 Nw. U. L. Rev. 1212, 1228–30 (1983) (describing the regulation of commercial speech where speech has a mixed commercial/non-commercial impact).

183 *See* Richards, *supra* note 125, at 1529–30; Neil M. Richards, *Reconciling Data Privacy and the First Amendment*, 52 UCLA L. Rev. 1149, 1210 (2005).

184 Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 796 (1988).

185 *See supra* notes 41, 47–48 and accompanying text.

186 The narrowness of the restriction is entirely within the realm of the legislature's choice and presents no particular difficulties in the context of online user data collectors, so this Note does not address issues that may arise therein. It is sufficient to say that the rule for strict scrutiny is that the law must be the "least-restrictive-means," while for intermediate scrutiny, the law must be "no more expansive than 'necessary.'" Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 476 (1989). *Fox* provides a reasonably clear explanation of the difference between those standards. *Id.*

187 *See* U.S. W., Inc. v. FCC, 182 F.3d 1224, 1235 (10th Cir. 1999) ("[P]rivacy may only constitute a substantial state interest if the government specifically articulates and properly justifies it.").

the importance of protecting users' privacy, the importance of that interest was dependent on the users' expectation of privacy.[188]

The discussion of the different expectations of privacy based on how the information was collected highlights the difficulties of assessing the government's interest in protecting privacy.[189] When sales of data contain both information gathered from public posts and data gathered from an essentially hidden third-party cookie, how is a court supposed to evaluate the privacy interests at stake? Is a court supposed to consider the interest important, compelling, or neither? These questions do not have obvious answers and they have not yet been considered fully by courts.

III. Two Changes to Clarify the Legal Landscape of Privacy and the First Amendment

Two main areas reveal deep confusion and uncertainty in the First Amendment analysis—the issue of defining speech and the issue of deciding the importance of the state's interest in protecting privacy. The two-pronged solution addresses both analytical deficits in turn. First, courts should adopt a categorical rule that user data transfers from data collectors to any other party (e.g., another data collector or a data user) are commercial speech. Second, they should assign a presumption of the importance of the government interest in protecting privacy based on the method of data collection employed.

A. A Categorical Approach to Data Transfers as Speech

The first step of the solution is that courts explicitly embrace what many have assumed since *Sorrell*[190]—that sales and transfers of personal information by online data collectors are constitutionally protected commercial speech. Transfers and sales of online data being categorically protected as commercial speech follows the assumptions of the Supreme Court, the assumptions and decisions of lower courts, and the understanding of regulators.[191] As this is the natural assumption for industry and legislators, it is a small step to make it official. The information transferred is not clearly of such low value that it

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188 *Id.* ("[A] speech restriction imposed to protect privacy . . . must show that the dissemination of the information desired to be kept private would inflict specific and significant harm on individuals . . . . A general level of discomfort from knowing that people can readily access information about us does not necessarily rise to the level of a substantial state interest under *Central Hudson*.").

189 *See supra* Section II.B.

190 Sorrell v. IMS Health Inc., 564 U.S. 552, 565 (2011).

191 *See supra* Section I.C.

should fall outside the protections of the First Amendment,[192] and even from a purely pragmatic point of view, adopting this understanding poses a very low risk to disruption of the current data landscape.[193]

Additionally, although the Court's definition of commercial speech is not entirely clear,[194] the "nature of the speech taken as a whole"[195] of the sale or transfer of data from data collectors to others is, at bottom, an activity engaged in for the "economic interests of the speaker."[196] It is one of those "commonsense differences"[197] between speech engaged in for commercial purposes and speech for other purposes that is recognized here. This small change, making explicit what has been merely assumed, would have the added benefit of clarifying the commercial speech doctrine for the sort of speech most likely to come within it.

B. *Creating Different Presumptions of Importance for Challenges to Privacy Regulations*

The major reform of this proposal is the implementation of a series of presumptions based on the type of data collection used for courts to adopt when a challenge to privacy regulation comes before them. With the previous change, all nondiscriminatory regulations of data transfers will come under the category of commercial speech, and therefore be subject to the *Central Hudson* test.[198] As discussed in Section II.C, deciding whether the government's interest in protecting the privacy of its citizens is substantial creates significant difficulty without some way to discern the citizen's privacy interest.[199] Using the citizen's expectation of privacy, based on how the data was collected, as a proxy for the weight of the government's interest provides a rational way to ultimately determine if the government's interest is substantial.

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192 *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976) (asking if speech "is so removed from any 'exposition of ideas,' and from '"truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government,"' that it lacks all protection." (citations omitted) (first quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942); and then quoting Roth v. United States, 354 U.S. 476, 484 (1957))).

193 *See* Richards, *supra* note 125, at 1506–07 (explaining current practice).

194 *See supra* notes 102–03 and accompanying text.

195 Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 796 (1988).

196 Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 561 (1980).

197 *Va. State Bd. of Pharmacy*, 425 U.S. at 771 n.24.

198 *See* Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 475 (1989).

199 *See supra* Section II.C.

One of the primary concerns with categorizing the speech regulated based on how it was collected is the potential for content or viewpoint discrimination. Each time the Court has had a case where the definition of commercial speech was contested, it has been able to rule without reaching that question.[200] Content, viewpoint, or speaker discrimination have always provided a grounds for decision that would apply whether the speech is commercial or not, as was the case in *Sorrell*.[201] This concern is understandable. It is true that a law that wholly embraced this Note's view, imposing different restrictions depending on how data were collected, would require examining the content of that transfer. The mere act of examining content, however, is not content discrimination—indeed, every legitimate law that restricts commercial speech must examine the content to the extent needed to determine the speech is commercial.[202]

If data is collected through a voluntary and public method, the citizen has almost no privacy interest in that information.[203] A strong presumption against the government's interest in regulating the transfer or sale of that data being substantial would attach, and it would be the government's burden to rebut it.[204] If the data is collected through a voluntary and private method, the citizen has a reduced privacy interest but still an interest in keeping that information restricted to the universe of parties to which it has been voluntarily disclosed. Therefore, a presumption that the government's interest *is* substantial would attach, and the constitutionality of the regulation would turn on whether the regulation is necessary to achieve that purpose.[205] This is the exact sort of analysis courts have been doing in litigation over pri-

200 For instance, in *Matal v. Tam*, 137 S. Ct. 1744 (2017), although the Court was equally divided on the underlying reasoning on the merits, both the plurality and the concurrence agreed the question could be resolved without deciding whether trademarks were commercial speech. *Compare id.* at 1764 (plurality opinion) ("We need not resolve this debate between the parties because the disparagement clause cannot withstand even *Central Hudson* review."), *with id.* at 1767 (Kennedy, J., concurring) ("The parties dispute whether trademarks are commercial speech . . . . However that issue is resolved, the viewpoint based discrimination at issue here necessarily invokes heightened scrutiny.").

201 *See* Sorrell v. IMS Health Inc., 564 U.S. 552, 565 (2011) (applying heightened judicial scrutiny because law was designed to impose a "specific, content-based burden on protected expression").

202 *See supra* notes 56–58 and accompanying text.

203 For a discussion on the meaning of the different classifications, see *supra* Section II.B.

204 *Cf.* United States v. Playboy Ent. Grp., 529 U.S. 803, 816 (2000) (stating it is the government's burden to show a substantial interest under strict scrutiny).

205 *See* Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 476 (1989).

vacy interests for decades, and they are well equipped to accomplish it.[206]

Finally, if user data is collected via an involuntary method, then the user's privacy interest is very strong, and the secondary First Amendment issue of potentially chilling noncommercial speech arises.[207] This strong interest on the part of the user translates into a strong presumption of a substantial, or even compelling, government interest in regulations. Given the weight of the interest, this would not only justify regulation, but likely weigh in favor of giving the government a wider latitude in determining what is necessary.[208]

This categorization would not require any discrimination between content—speech about politics, relationships, finances, or about any other topic would not be differentiated. The differentiation would occur between methods of collection instead. For similar reasons, a regulation conforming to this proposal would not discriminate on viewpoint. It would not distinguish between advocacy of any particular position, just on how information was collected. This categorization further does not allow discrimination based on the viewpoint or identity of the speaker (the data transferrer). It treats identically the data collected by any commercial entity, for any purpose, distinguishing only the fashion of collection. A regulation designed to conform to this proposal would treat the data transfer the same whether the transfer is to a political, commercial, or any other entity, thus avoiding the core issue in *Sorrell*.[209]

Under this proposal, the constitutionality of the application of a law that, like the CCPA,[210] excuses noncompliance to the extent compliance would prevent it from exercising free speech would be far simpler to adjudicate.[211] Assuming the regulation does not discriminate,

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206 *See, e.g.*, Trans Union Corp. v. FTC, 245 F.3d 809, 818 (D.C. Cir. 2001) (analyzing the narrowness and restrictiveness of congressional regulations of disclosure of credit agency's consumer lists on the government's interest in protecting privacy of citizen's information); U.S. W., Inc. v. FCC, 182 F.3d 1224, 1238–39 (10th Cir. 1999) (analyzing importance of the government's interest in protecting privacy of consumer's information gathered by telecommunications company in the course of providing service); Boelter v. Advance Mag. Publishers Inc., 210 F. Supp. 3d 579, 602 (S.D.N.Y. 2016) (analyzing government's interest in protecting privacy of consumer's subscription information from sale by magazine company).

207 *See* Note, *supra* note 35, at 1466.

208 *See Fox*, 492 U.S. at 480 (noting the government regulation must be a "fit that is . . . reasonable; . . . one whose scope is 'in proportion to the interest served'" (quoting *In re* R.M.J., 455 U.S. 191, 203 (1982))).

209 *See* Sorrell v. IMS Heath Inc., 564 U.S. 552, 565 (2011).

210 CAL CIV. CODE § 1798.105(d)(4) (West 2020).

211 *See id.*

an enforcement agency deciding whether to bring an action, or a regulated data collector defending against an enforcement action, would be in a much better position to determine whether a court would find the law interfered with free speech. A court would no longer have to undertake a complex analysis of whether the speech qualifies as commercial—instead, any regulation that governs the transfer of personal information from a data collector is immediately brought into the commercial speech framework. The constitutionality of the law would turn on the factual matter of how the information was collected: voluntarily and publicly, voluntarily but privately, or involuntarily.

If the enforcement agency were looking at the transfer of data without user consent, but that data was collected voluntarily and publicly, from Facebook posts or from answers to a quiz, they would know not to bring an enforcement action. If they did, a court's inquiry would end almost as soon as it began, and the enforcement would be invalidated. Given the strong presumption against the government having a substantial interest, basically any restriction would fail the intermediate scrutiny test laid out in *Central Hudson*.[212]

If the enforcer considered bringing an action to charge a data collector with the transfer of data without user consent and that data had been collected involuntarily—like location data or websites that user visited which could ultimately determine information ranging from income to occupation to political causes—they would know the enforcement action would likely succeed. Any challenge to the enforcement would be dismissed rapidly in favor of the legitimacy of the regulation. A strong presumption that the government's interest is not just substantial, but even compelling, would attach, and unless the regulation went so clearly beyond what was necessary to protect people's privacy—for instance, by regulating information collected voluntarily and publicly as well—it would be upheld under intermediate scrutiny.

Finally, if the enforcing agency were considering action against a transfer of data collected voluntarily but privately—like a user's address (either email or physical) entered to receive shipments or updates—they could rely on the decisions of courts over the last thirty years deciding these types of cases under existing case law to determine if the enforcement would succeed.

212 Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n. of N.Y., 447 U.S. 557, 564 (1980).

Conclusion

This Note's proposal fits comfortably within the tradition of what came before—it would not require the overturning of longstanding precedent; allow content, viewpoint, or speaker discrimination; or permit bans on political speech engaged in by either the ultimate recipients of such data or by the data collectors. It would, however, create a framework under which each legislator, court, and data collector would be able to understand what is a permissible privacy regulation and what is not. Stability and predictability are virtues in the law and in business, and this new framework for evaluating data captured online speaks to those virtues. A regulation that governs the sale or distribution of voluntary and publicly gathered data would be presumptively unconstitutional. One that regulates the sale or distribution of involuntarily gathered data would be presumptively constitutional, and one that regulates the sale or distribution of voluntary and privately gathered data would face the same balancing test the courts have been using for decades in commercial speech cases.