

# The Constitutionality of Consumer Privacy Regulation

*Felix T. Wu<sup>†</sup>*

The increasing collection, aggregation, and use of consumer data for commercial purposes have become sources of significant concern among privacy scholars and advocates.<sup>1</sup> Tracking companies, data brokers, and advertising networks collect information about users' online activities and then package and sell this information for use in targeted advertising.<sup>2</sup> Mobile phone apps can collect and disseminate location information or contact lists stored on the phone.<sup>3</sup> Retailers mine transaction data looking for the customers who are most likely to be open to marketing pitches—those who are newly pregnant, for example.<sup>4</sup> Pharmaceutical companies collect and use information about doctors' drug prescriptions and their patients' medical histories in order to better market drugs to those doctors.<sup>5</sup>

The companies involved in this consumer data ecosystem say that they are only trying to serve consumer needs better and that much of what they do should raise no privacy concerns at all because the data is attached to faceless numbers, not real people.<sup>6</sup> Many scholars, consumers, and regulators have been

---

<sup>†</sup> Associate Professor, Benjamin N. Cardozo School of Law. Thank you to the staff of the Legal Forum for organizing an excellent symposium and for helpful editing suggestions, and to Randy Picker for thought-provoking comments as moderator of the panel.

<sup>1</sup> See generally Daniel J. Solove, *The Digital Person: Technology and Privacy in the Information Age* (NYU 2006).

<sup>2</sup> See Julia Angwin, *The Web's New Gold Mine: Your Secrets*, Wall St J W1 (July 30, 2010).

<sup>3</sup> See Scott Thurm and Yukari Iwatani Kane, *Your Apps Are Watching You*, Wall St J C1 (Dec 18, 2010).

<sup>4</sup> See Charles Duhigg, *Pssst, You in Aisle 5*, NY Times Magazine 30, 33 (Feb 19, 2012).

<sup>5</sup> See Katie Thomas, *Data Trove on Doctors Guides Drug Company Pitches*, NY Times B1 (May 17, 2013).

<sup>6</sup> See, for example, Angwin, *The Web's New Gold Mine: Your Secrets*, Wall St J at

significantly less sanguine about these practices. Scholars have argued that the consumer data trade threatens to undermine individuals' control over their own data and thus undermine individuals' ability to function in a world in which choices are increasingly determined by data.<sup>7</sup> Other scholars have argued that these practices threaten the construction of selfhood,<sup>8</sup> may chill intellectual exploration,<sup>9</sup> or may lead to blackmail, harassment, and other more concrete harms.<sup>10</sup> Consumers themselves appear to be uneasy with practices such as online tracking and targeted advertising.<sup>11</sup> One study found that 66 percent of those surveyed did not want to receive any advertising tailored to them, and a further 18 percent objected to having their advertising tailored on the basis of their activities on websites other than the one they were visiting.<sup>12</sup> Perhaps in response to such scholarly warnings and consumer sentiment, both the Administration and the Federal Trade Commission (FTC) have recently focused attention on protecting consumer privacy and have explicitly recognized its importance.<sup>13</sup>

---

W1 (cited in note 2).

<sup>7</sup> See Solove, *The Digital Person* at 38–41 (cited in note 1).

<sup>8</sup> See Julie E. Cohen, *Configuring the Networked Self: Law, Code, and the Play of Everyday Practice* 127–52 (Yale 2012); Julie E. Cohen, *What Privacy Is For*, 126 Harv L Rev 1904, 1910–11 (2013).

<sup>9</sup> See Neil M. Richards, *The Dangers of Surveillance*, 126 Harv L Rev 1934, 1945–52 (2013).

<sup>10</sup> See Paul Ohm, *Broken Promises of Privacy: Responding to the Surprising Failure of Anonymization*, 57 UCLA L Rev 1701, 1748 (2010) (expressing concern about “a hypothetical database of ruin,” containing harmful information about every person, which has “until now [been] splintered across dozens of databases on computers around the world,” but which is increasingly coming “together into one, giant, database-in-the-sky”). Moreover, depending on how one conceptualizes the privacy harms that these data practices cause, the practices may cause privacy problems even if particular pieces of data cannot be connected to specific, identified individuals. See generally Felix T. Wu, *Defining Privacy and Utility in Data Sets*, 84 U Colo L Rev (forthcoming 2013).

<sup>11</sup> See Joseph Turow, et al, *Americans Reject Tailored Advertising and Three Activities That Enable It* (Social Science Research Network Working Paper, Sept 2009), online at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1478214](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1478214) (visited Sept 15, 2013).

<sup>12</sup> Id at 15.

<sup>13</sup> See The White House, *Consumer Data Privacy in a Networked World: A Framework for Protecting Privacy and Promoting Innovation in the Global Digital Economy* 1 (Feb 2012), online at <http://www.whitehouse.gov/sites/default/files/privacy-final.pdf> (visited Sept 15, 2013) (“Strong consumer data privacy protections are essential to maintaining consumers’ trust in the technologies and companies that drive the digital economy.”); Federal Trade Commission, *Protecting Consumer Privacy in an Era of Rapid Change: Recommendations for Businesses and Policymakers* 7–8 (Mar 2012), online at

The existing approaches to addressing consumer privacy concerns have largely revolved around the principle of “notice-and-choice,” that is, giving consumers notice of what information will be collected and how it will be used and allowing consumers to choose whether to proceed with the transaction.<sup>14</sup> Notice-and-choice, however, has been heavily criticized, with many pointing out the deficiencies of notice, the difficulty of exercising real choice, or both.<sup>15</sup> Privacy policies are the standard form of notice, but it would take an unreasonable amount of time for the average consumer simply to skim the privacy policies of the websites he or she visits, let alone comprehend or weigh them.<sup>16</sup> Even if consumers could know perfectly what will happen to their data in an immediate transaction, it is virtually impossible for them to assess the long-term effects of that transaction on their privacy.<sup>17</sup> Online services may also exhibit network effects or otherwise have characteristics that make it more difficult for consumers unhappy with a company’s privacy policies to move to a competitor.<sup>18</sup>

Critics of the notice-and-choice status quo have pushed for something stronger, with proposals generally falling into one of two categories. First, some scholars have focused on improving the notice given to consumers, pushing for forms of notice that would in fact be more likely to be noticed.<sup>19</sup> Going beyond traditional forms of notice, these “super-notices” potentially leverage the same cognitive features of consumers that undermine traditional notice. Second, others have advocated at least supplementing the notice-and-choice model with

---

<http://www.ftc.gov/os/2012/03/120326privacyreport.pdf> (visited Sept 15, 2013) (“There was broad consensus among commenters that consumers need basic privacy protections for their personal information.”).

<sup>14</sup> See Paul Ohm, *Branding Privacy*, 97 Minn L Rev 907, 929 (2013).

<sup>15</sup> See, for example, Daniel J. Solove, *Introduction: Privacy Self-Management and the Consent Dilemma*, 126 Harv L Rev 1880, 1883–93 (2013); Solon Barocas and Helen Nissenbaum, *On Notice: The Trouble with Notice and Consent* (unpublished paper, 2006), online at [http://www.nyu.edu/projects/nissenbaum/papers/ED\\_SII\\_On\\_Note.pdf](http://www.nyu.edu/projects/nissenbaum/papers/ED_SII_On_Note.pdf) (visited June 4, 2013). See also Ohm, 97 Minn L Rev at 930–31 (cited in note 14).

<sup>16</sup> See Aleecia M. McDonald and Lorrie Faith Cranor, *The Cost of Reading Privacy Policies*, 4 I/S J L & Pol 543, 563 (2008) (estimating that it would take the average individual 154 hours/year to skim the privacy policies of the websites he or she visits).

<sup>17</sup> See Solove, 126 Harv L Rev at 1889–91 (cited in note 15).

<sup>18</sup> See Oren Bracha and Frank A. Pasquale III, *Federal Search Commission? Access, Fairness, and Accountability in the Law of Search*, 93 Cornell L Rev 1149, 1180–83 (2008).

<sup>19</sup> See Part I.A.

substantive restrictions on the collection and/or sharing of consumer data.<sup>20</sup>

Both types of proposals face potential arguments that they run afoul of the First Amendment guarantee of freedom of speech.<sup>21</sup> Substantive restrictions on the sharing of consumer data seem to be restrictions on the ability of one willing speaker—one data collector or broker—to speak to a willing listener.<sup>22</sup> Such restrictions might be problematic even if they could be overcome with the consent of the consumer.<sup>23</sup> Mandating particular forms of notice to be given to consumers who provide data might be a form of impermissibly compelled speech.<sup>24</sup>

Although at first glance First Amendment scrutiny would seem to apply to these types of privacy regulations, that superficially straightforward view should be rejected. What the straightforward view misses is the fact that the relevant “speakers,” and sometimes “listeners,” in the consumer data ecosystem are commercial entities. That crucial fact distinguishes super-notice requirements imposed on those entities or restrictions on data brokerage among those entities from cases involving similar restrictions imposed on individuals. Super-notice requirements imposed on commercial entities do not infringe any speech interests because they implicate neither the freedom of conscience interests that lie at the heart of the compelled speech cases, nor the listener interests that lie at the heart of the commercial speech cases. Similarly, restrictions on data processing and sharing among commercial entities do not infringe any speech interests because none of the parties to

---

<sup>20</sup> See Solove, 126 Harv L Rev at 1903 (cited in note 15); Barocas and Nissenbaum, *On Notice: The Trouble with Notice and Consent* at 6 (cited in note 15).

<sup>21</sup> Of course, the First Amendment would only apply to laws mandating particular disclosures or restricting particular information flows, rather than guidelines published to encourage companies to adopt either disclosures or restrictions as best practices. See, for example, Federal Trade Commission, *Protecting Consumer Privacy in an Era of Rapid Change* at iii (cited in note 13) (“To the extent the framework goes beyond existing legal requirements, the framework is not intended to serve as a template for law enforcement actions or regulations under laws currently enforced by the FTC.”). The focus of this Article is on the First Amendment implications of mandatory regimes.

<sup>22</sup> See *Sorrell v IMS Health Inc*, 131 S Ct 2653, 2667 (2011) (“This Court has held that the creation and dissemination of information are speech within the meaning of the First Amendment.”).

<sup>23</sup> See id at 2668–69.

<sup>24</sup> See M. Ryan Calo, *Against Notice Skepticism in Privacy (and Elsewhere)*, 87 Notre Dame L Rev 1027, 1068–71 (2012).

those transactions should be regarded as having relevant First Amendment interests. These particular distinctions remain valid even if one were to believe that in other contexts corporate or commercial speech should be fully protected under the First Amendment.<sup>25</sup>

Part I below elaborates on why imposing a super-notice requirement on a commercial data collector should not trigger First Amendment scrutiny under the compelled speech line of cases. Part II explains why restricting data transfers among commercial entities also should not trigger First Amendment scrutiny. Part III briefly summarizes and concludes.

### I. PRIVACY “SUPER-NOTICES” AND THE PROBLEM OF COMPELLED SPEECH

Scholars and regulators have been interested recently in finding ways to improve the privacy notices that consumers receive. Mandating improved notice, however, has the potential to trigger First Amendment scrutiny as a form of compelled speech, especially when the mandate takes a form that can be characterized as steering consumers toward greater privacy protection. Such scrutiny is not in fact warranted, as consumer privacy mandates are directed at commercial entities, which do not experience the same violation of freedom of conscience that individuals do when compelled to speak.

#### A. Crafting Better Privacy Notices

The principle of notice-and-choice has been the primary mode of consumer privacy protection in the United States.<sup>26</sup> The idea is that companies that collect and use consumer data will tell consumers about the companies’ data practices, and consumers can then make an informed choice about whether to transact with these companies or to forgo such transactions and

---

<sup>25</sup> For an example of the view that corporate and commercial speech should be fully protected under the First Amendment, see Martin H. Redish, *Commercial Speech, First Amendment Intuitionism and the Twilight Zone of Viewpoint Discrimination*, 41 Loyola LA L Rev 67, 73 (2007) (“[E]ach of the categorical bases for reducing or rejecting First Amendment protection for commercial speech is, in one way or another, appropriately characterized as a form of invidious and constitutionally impermissible viewpoint discrimination.”); id at 86–87 (rejecting First Amendment distinctions based on the “corporate nature of the speaker”).

<sup>26</sup> See Ohm, 97 Minn L Rev at 929 (cited in note 14).

perhaps seek out other companies instead. In some sectors, such as financial services, the law mandates certain privacy disclosures.<sup>27</sup> In other areas, where affirmative disclosures are not always required, the focus, through FTC enforcement, has instead been on ensuring that whatever disclosures are made are truthful,<sup>28</sup> or sometimes on ensuring that consumers receive notice of data practices that would violate their expectations.<sup>29</sup>

The effectiveness of notice-and-choice has been criticized on a number of fronts. Some scholars have pointed out the lack of real choice.<sup>30</sup> Many others have focused on the inadequacy of notice.<sup>31</sup> Traditional privacy policies are almost uniformly regarded as too long, too complex, and too confusing to consumers.<sup>32</sup>

Despite its flaws though, notice-and-choice appears strongly entrenched in American law. It has remained a core feature of the FTC's reports on consumer privacy.<sup>33</sup> It has also been the

---

<sup>27</sup> See Gramm-Leach-Bliley Act, Pub L No 106-102, 113 Stat 1338 (1999), codified at 15 USC § 6803. Similarly, the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule requires most covered entities to provide notice to individuals of the uses and disclosures that the entity may make of the individual's protected health information. See Health Insurance Portability and Accountability Act, Pub L No 104-191, 110 Stat 1936 (1996), codified in various sections of Title 18, 26, 29, and 42.

<sup>28</sup> See Andrew Serwin, *The Federal Trade Commission and Privacy: Defining Enforcement and Encouraging the Adoption of Best Practices*, 48 San Diego L Rev 809, 815–16 (2011).

<sup>29</sup> See, for example, Complaint, *In re Sears Holdings Management Corp*, Doc No C-4264, \*5 (FTC filed Aug 31, 2009), online at <http://www.ftc.gov/os/caselist/0823099/090604searscomplaint.pdf> (visited Sept 15, 2013).

<sup>30</sup> See notes 17–18 and accompanying text.

<sup>31</sup> See Ohm, 97 Minn L Rev at 930 (cited in note 14).

<sup>32</sup> See id at 930–31; Federal Trade Commission, *Protecting Consumer Privacy in an Era of Rapid Change* at 61 (cited in note 13) (“The preliminary staff report highlighted the consensus among roundtable participants that most privacy policies are generally ineffective for informing consumers about a company's data practices because they are too long, are difficult to comprehend, and lack uniformity.”). See also McDonald and Cranor, 4 I/S J L & Pol at 565 (cited in note 16) (“Nationally, if Americans were to read online privacy policies word-for-word, we estimate the value of time lost as about \$781 billion annually.”); Joseph Turow, et al, *The Federal Trade Commission and Consumer Privacy in the Coming Decade*, 3 I/S J L & Pol 723, 725–26 (2007–08) (concluding that “[w]ithout a baseline set of information practices, the term 'privacy policy' is confusing to the consumer,” and that “[t]he lack of common disclosure language undermines consumers' ability to 'shop for privacy'”).

<sup>33</sup> See Federal Trade Commission, *Protecting Consumer Privacy in an Era of Rapid Change* at vii–viii (cited in note 13) (endorsing as two of the baseline principles of its consumer privacy framework that companies processing consumer data “should increase the transparency of their data practices” and that they “should simplify consumer choice”). See also Federal Trade Commission, *Mobile Privacy Disclosures: Building Trust Through Transparency* 6 (Feb 2013), online at <http://www.ftc.gov/os/2013/02/mobileprivacydisclosures.pdf>

focus of California law and enforcement actions by the California Attorney General.<sup>34</sup> It is also normatively attractive because it avoids a one-size-fits-all approach to privacy and potentially opens the space for companies to serve consumers' heterogeneous privacy preferences differently.<sup>35</sup>

Recently, a number of privacy scholars have tried to resuscitate some form of notice-and-choice by seeking to improve the notice that consumers receive. Ryan Calo has argued that "visceral notice"—notice that is more experiential than textual—may succeed where traditional textual notice has failed.<sup>36</sup> Calo describes three different enhanced notice strategies. One is to leverage existing consumer knowledge in order to convey information more efficiently: a shutter sound, for example, effectively warns bystanders that a digital picture is being taken.<sup>37</sup> Another is to build on widely shared psychological responses: user interfaces with anthropomorphic features or that are more formal induce more caution on the part of users disclosing personal information.<sup>38</sup> A third is to personalize the information that each individual receives: this is the concept behind privacy "dashboards," which show how an individual's information is being used.<sup>39</sup>

In this volume, Bill McGeveran argues that an appropriate level of "friction" should be introduced in sharing, so that it is not "easier to 'share' an action online than to do it."<sup>40</sup> For example, rather than allowing users' general acknowledgement of a privacy policy to constitute consent to sharing their media playlists, McGeveran advocates consent on a per-action basis, such as by having a "Play and Share" button alongside each

---

130201mobileprivacyreport.pdf (visited June 9, 2013) (summarizing "three core principles" from its March 2012 Privacy Report: "Privacy by Design," "Simplified Consumer Choice," and "Greater Transparency," and reaffirming that "all three of these principles apply to mobile companies").

<sup>34</sup> See California Online Privacy Protection Act, Cal Bus & Prof Code §§ 22575–79; Office of Attorney General of California, *Attorney General Kamala D. Harris Notifies Mobile App Developers of Non-Compliance with California Privacy Law* (Oct 30, 2012), online at <http://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-notifies-mobile-app-developers-non-compliance> (visited June 4, 2013).

<sup>35</sup> See Calo, 87 *Notre Dame L Rev* at 1048–49 (cited in note 24).

<sup>36</sup> See id at 1057–58.

<sup>37</sup> See id at 1035–37.

<sup>38</sup> See id at 1038–39.

<sup>39</sup> See Calo, 87 *Notre Dame L Rev* at 1041–44 (cited in note 24).

<sup>40</sup> See William McGeveran, #####, 2013 *U Chi Legal F* ####.

“Play” button.<sup>41</sup> Such a strategy ensures a kind of additional notice at each moment of sharing.

Paul Ohm goes further, arguing that companies should be required to tie their trademarks to core privacy commitments, so that if a company wants to renege on one of those commitments, it would also have to change its trademark.<sup>42</sup> As Ohm conceives of his proposal, the goal is to use the trademark change as a strong signal of a privacy “lurch,”<sup>43</sup> alerting consumers to a significant shift in privacy policies in a way that is uniquely powerful.<sup>44</sup> In this scheme, trademarks are the ultimate form of notice, capable of “convey[ing] meaning in an efficient and compact form,” and so prominent that “no consumer will fail to notice when a trademark changes.”<sup>45</sup>

Regulators have also been thinking about how to improve the effectiveness of notice. For example, in January 2013, the Office of the Attorney General of California issued a report on mobile privacy.<sup>46</sup> Among the report’s recommendations was that app developers use “enhanced measures,” including “special notices,” in order to supplement a general privacy policy and better alert users to potentially unexpected or sensitive data collection.<sup>47</sup> While the California report was not particularly specific on how to design special notices,<sup>48</sup> it does evidence a growing recognition that real disclosure may require something more than statements in a privacy policy. The FTC has also shown an interest in measuring and enhancing the effectiveness

---

<sup>41</sup> Id at ###.

<sup>42</sup> See Ohm, 97 Minn L Rev at 911–13 (cited in note 14).

<sup>43</sup> Ohm’s proposal focuses on “the sudden privacy shift, which some have called the ‘privacy lurch.’” Id at 909, quoting James Grimmelmann, *Saving Facebook*, 94 Iowa L Rev 1137, 1200–01 (2009).

<sup>44</sup> See Ohm, 97 Minn L Rev at 950 (“On the Internet, the trademark itself . . . sits perhaps on the only place where an effective warning label can appear. No other place on a website is as likely to be seen and noticed.”).

<sup>45</sup> Id at 939–40.

<sup>46</sup> Office of the Attorney General of California, *Privacy on the Go: Recommendations for the Mobile Ecosystem* 1 (Jan 2013), online at [http://oag.ca.gov/sites/all/files/pdfs/privacy/privacy\\_on\\_the\\_go.pdf](http://oag.ca.gov/sites/all/files/pdfs/privacy/privacy_on_the_go.pdf) (visited June 4, 2013).

<sup>47</sup> See id at 12.

<sup>48</sup> See id (explaining that app developers should “[d]eliver special notices in context, in many cases just before the specific data are to be collected,” should “[e]xplain the intended uses and any third parties to whom user data would be disclosed,” should “[p]rovide an easy way for users to choose whether or not to allow the collection or use of the data,” and should “[i]nclude a link to the general privacy policy, if feasible”).

of notice.<sup>49</sup> The guidelines proposed by regulators have thus far not been nearly as radical as some of the academic proposals, and they have not been mandatory, but regulators have signaled a willingness to look to the academic literature for future guidance.<sup>50</sup>

What ties all of these strategies together is their emphasis on the form of the notice, and not just its content. These strategies are designed to take ostensibly the same information—that a company will process particular data in a particular way—and convey the information in a manner that will induce consumers to take notice, or to convey it at a time when consumers will be more likely to act upon the information. The strategies “breathe a little life back into notice-and-choice”<sup>51</sup> by amping up the notice into a kind of “super-notice,” one that not only makes the information available, but makes it stand out.

### B. First Amendment Objections to Super-Notice

The move from notices to super-notices, however, has the potential to trigger heightened scrutiny under the First Amendment. Many laws and regulatory schemes—from mandatory ingredient lists on food and drug packaging to corporate disclosure laws—compel the disclosure of factual information without attracting First Amendment comment, much less First Amendment scrutiny.<sup>52</sup> By mandating the form of the disclosure, however, and not just its content, super-notices, particularly of the form advocated by some academics, could be challenged as inevitably conveying a normative viewpoint and going beyond the purely factual disclosures that have previously resisted First Amendment challenges.

Consider the DC Circuit’s ruling in *R.J. Reynolds Tobacco Co v Food and Drug Administration*,<sup>53</sup> in which the court struck down new visual “warnings” that the Food and Drug

---

<sup>49</sup> See Federal Trade Commission, *Mobile Privacy Disclosures* at 1 (cited in note 33).

<sup>50</sup> See id at 27–28.

<sup>51</sup> See Ohm, 97 Minn L Rev at 911 (cited in note 14).

<sup>52</sup> See, for example, Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 Harv L Rev 1765, 1778–79 (2004) (describing federal securities regulation as “residing almost imperceptibly outside the First Amendment’s boundaries,” including with respect to “compelled speech”).

<sup>53</sup> 696 F3d 1205 (DC Cir 2012).

Administration (FDA) mandated for cigarette packages.<sup>54</sup> The FDA had determined that the existing warnings were inadequate because “(1) [t]hey have not changed in more than 25 years, (2) they often go unnoticed, and (3) they fail to convey relevant information in an effective manner.”<sup>55</sup> As a result, the agency decided to mandate the use of new “larger, graphic warnings” that would “communicate the health risks of smoking more effectively.”<sup>56</sup> The agency’s final rule “require[d] each cigarette package and advertisement to bear one of nine new textual warning statements” and also “specifie[d] the color graphic images that must accompany each of the nine new textual warning statements.”<sup>57</sup>

The cigarette companies did not challenge the textual statements but did challenge the graphics that went with them. The DC Circuit ultimately held that the part of the FDA rule mandating the graphics violated the First Amendment because it compelled commercial speech and failed intermediate scrutiny.<sup>58</sup> The court rejected the application of the less stringent *Zauderer* standard, under which “purely factual and uncontroversial” disclosures are permissible if they are ‘reasonably related to the State’s interest in preventing deception of consumers,’ provided the requirements are not ‘unjustified or unduly burdensome.’<sup>59</sup> The court emphasized that “the graphic warnings do not constitute the type of ‘purely factual and uncontroversial’ information, or ‘accurate statement[s],’ to which the *Zauderer* standard may be applied.”<sup>60</sup> The court reasoned that because the FDA was trying to “evoke an emotional response, or, at most, shock the viewer into retaining the information in the text warning,” the images fell outside the realm of “purely factual” information.<sup>61</sup>

Privacy super-notices could be regarded as closely analogous in this way to the graphical cigarette warnings struck down in

---

<sup>54</sup> *Id* at 1217.

<sup>55</sup> Food and Drug Administration, Required Warnings for Cigarette Packages and Advertisements, 76 Fed Reg 36628, 36631 (June 22, 2011) (amending 21 CFR Part 1141).

<sup>56</sup> *Id* at 36631.

<sup>57</sup> *Id* at 36628.

<sup>58</sup> See *R.J. Reynolds*, 696 F3d at 1222.

<sup>59</sup> *Id* at 1212, quoting *Zauderer v Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 US 626, 651 (1985).

<sup>60</sup> *R.J. Reynolds*, 696 F3d at 1216, quoting *Zauderer*, 471 US at 651.

<sup>61</sup> *R.J. Reynolds*, 696 F3d at 1216–17.

*R.J. Reynolds.* Visceral forms of privacy notice, such as anthropomorphic interfaces, “draw [ ] upon consumer psychology to achieve greater salience,” just as the FDA was trying to do with its graphical warnings.<sup>62</sup> If Congress were to require that “each advertising network on the Internet had an avatar that ran onto the bottom of the screen to denote the fact that the network was following the user,”<sup>63</sup> such a requirement could also be characterized as designed to “evoke an emotional response” in order to make the fact of tracking more salient, and perhaps to make the tracking seem more undesirable to the consumer.

The cigarette warning case cannot be distinguished as a case of impermissible persuasion. Perhaps it is true that the FDA was “straying too far from the central goal of notice, which is better information,” and was instead trying “to frighten current and potential smokers.”<sup>64</sup> If so, though, the difference between mandating graphical cigarette warnings and mandating privacy super-notice is one of degree and not of kind. True, none of the proposed privacy super-notices is nearly as gruesome as the cigarette warnings, and in that sense, privacy super-notices are not exactly frightening. But while the *R.J. Reynolds* court did characterize the images as “inflammatory,”<sup>65</sup> it seems ultimately to have based its reasoning on the graphical warnings conveying “the state’s subjective—and perhaps even ideological—view,”<sup>66</sup> rather than being “an unbiased source of information.”<sup>67</sup> The problem with the graphical warnings was that they conveyed the one-sided message that cigarette smoking is bad.

Just as with cigarette warnings, privacy super-notices are also inevitably one-sided. They are designed to make consumers take notice and consider whether to avoid or drop an information service that they would otherwise use. The trademark modification that Ohm advocates, for example, is supposed to “alert [ ] the consumer to the *heightened risk* to privacy” from a privacy lurch.<sup>68</sup> It applies when a company

---

<sup>62</sup> Calo, 87 Notre Dame L Rev at 1070 (cited in note 24).

<sup>63</sup> Id at 1040.

<sup>64</sup> Id at 1070.

<sup>65</sup> *R.J. Reynolds*, 696 F3d at 1216.

<sup>66</sup> Id at 1212.

<sup>67</sup> Id at 1216.

<sup>68</sup> Ohm, 97 Minn L Rev at 950 (cited in note 14) (emphasis added).

wants to eliminate a core privacy promise, not when it wants to enhance its customers' privacy.<sup>69</sup> To the extent to which super-notice is about trying "to ensure consumers have the correct mental model of the product or service,"<sup>70</sup> its efforts are aimed at only one side of the equation, namely the privacy risks of the service in question, rather than its potential benefits. Indeed, the one-sidedness might be even more problematic for privacy super-notices than for cigarette warnings, given that the benefits of data sharing might be both real and not entirely obvious to the user.

Even a relatively innocuous mandate about the timing of notice, such as a requirement to have a "Play and Share" button,<sup>71</sup> can be characterized as a form of normative speech. Intentionally or not, mandating disclosures that highlight a consumer's privacy choices conveys the message that "this information" and "this choice" are important. One of the key reasons to deploy super-notice is precisely to call attention to privacy choices that will otherwise not receive enough attention.<sup>72</sup> Doing so signals that the privacy choice is important, or at least more important than the user may have previously thought it to be. Moreover, against a status quo in which most information is collected and used without enhanced notice, selecting particular privacy moments for special treatment can signal the importance of the particular moments chosen.

None of this is to suggest that privacy super-notices and cigarette warnings are completely indistinguishable, or that super-notices are as ends driven as the graphical cigarette warnings perhaps were.<sup>73</sup> Perhaps the *R.J. Reynolds* case will turn out to be an outlier, one driven by the FDA's failure more consistently to characterize its strategy as a notice strategy and

---

<sup>69</sup> Id at 944.

<sup>70</sup> Calo, 87 Notre Dame L Rev at 1070 (cited in note 24).

<sup>71</sup> See note 41 and accompanying text.

<sup>72</sup> See McGeeveran, 2013 U Chi Legal F at #### (cited in note 40) (arguing that a benefit of introducing friction into the act of sharing is that it adds an "instant of extra thought" that is "necessary to secure genuine consent").

<sup>73</sup> See Calo, 87 Notre Dame L Rev at 1070 (cited in note 24) ("[T]he FDA justified its new rules not by reference to what the consumer would understand about the risks of smoking, but by reference to the impact the images had on cigarette consumption in other jurisdictions where graphic warnings were already in place.").

perhaps to cabin its approach accordingly.<sup>74</sup> In any event, courts will need to make some distinction between graphical cigarette warnings and traditional consumer product warnings if they intend to save the latter from scrutiny. If the *R.J. Reynolds* case, however, signals that the key distinction in determining the level of scrutiny to apply to a compelled speech requirement is between normative speech and purely factual information, privacy super-notices may end up falling on the heightened scrutiny side of that line.

One might attempt to justify privacy super-notice by conceding that it is subject to heightened scrutiny, but arguing that it meets such scrutiny. Having to satisfy heightened scrutiny, however, places a serious burden on the state to justify the privacy interests at stake. For example, in the case of *International Dairy Foods Association v Amestoy*,<sup>75</sup> the Second Circuit overturned a Vermont law mandating the disclosure of the use of bovine growth hormones (rBST) in dairy cows, finding that the state failed to establish a substantial interest in the disclosure and thus that the law failed intermediate scrutiny.<sup>76</sup> In that case, the court rejected as a substantial interest “the demand of [Vermont’s] citizenry for such information,” and while the court was “sympathetic to the Vermont consumers who wish to know which products may derive from rBST-treated herds,” it found such a desire “insufficient” to justify the compelled speech.<sup>77</sup> What Vermont failed to do was to show scientific evidence of health or safety concerns with rBST-treated cows.<sup>78</sup>

If the same reasoning were applied to privacy super-notice, the government would presumably need to show real evidence of privacy harm from the data practices at issue. Consumers’ subjective concerns and their desire to protect their own privacy would presumably be regarded as insufficient. Of course, the companies collecting, sharing, and using consumer data deny that their practices cause any objective privacy harms.<sup>79</sup> Moreover, in the context of data breaches, some courts have

---

<sup>74</sup> See *R.J. Reynolds*, 696 F3d at 1216 (noting that “many of the images do not convey *any* warning information at all,” such as “the images of a woman crying, a small child, and the man wearing a T-shirt emblazoned with the words ‘I QUIT’”).

<sup>75</sup> 92 F3d 67 (2d Cir 1996).

<sup>76</sup> Id at 73.

<sup>77</sup> Id at 73–74.

<sup>78</sup> Id at 73.

<sup>79</sup> See note 6 and accompanying text.

found that plaintiffs whose data was breached, but not further misused (such as for identity theft), did not suffer an injury sufficient to confer Article III standing.<sup>80</sup> Cases such as these suggest the potential difficulty of demonstrating that the consumer data trade causes objective harms in the absence of disclosures to criminals. They consequently suggest that the government may not be able to meet a heightened burden to justify mandatory super-notice. While the *International Dairy Foods* ruling may well have been a narrow one driven by the state's failure to provide better evidence of its legitimate interests,<sup>81</sup> the case nevertheless demonstrates the difference that heightened scrutiny can make to the outcome.

### C. Answering the First Amendment Objections

Privacy regulators may be able to successfully walk the fine line between compelling the disclosure of factual information and compelling normative speech. In the context of compelling commercial entities to more effectively highlight privacy choices, however, they should not be required to do so. The key distinction is not between the factual and the normative, but between commercial and noncommercial entities. Because the rationales for scrutinizing compelled speech are generally only applicable to individuals, the government should have far greater leeway to compel speech from commercial entities consistent with the First Amendment.

The Supreme Court's decision in *Zauderer v Office of Disciplinary Counsel of the Supreme Court of Ohio*<sup>82</sup> supports the view that commerciality is crucial in determining the level of scrutiny to apply to a compelled speech requirement.<sup>83</sup> In *Zauderer*, an attorney challenged a disciplinary action against him that was based, among other things, on an advertisement in which he stated that he took cases on a contingency fee basis and that if the client did not recover, she would owe "no legal

---

<sup>80</sup> See, for example, *Reilly v Ceridian Corp*, 664 F3d 38, 42 (3d Cir 2011).

<sup>81</sup> See *National Electrical Manufacturers Association v Sorrell*, 272 F3d 104, 115 n 6 (2d Cir 2001) (noting that the decision in *International Dairy Foods* "was expressly limited to cases in which a state disclosure requirement is supported by no interest other than the gratification of 'consumer curiosity'").

<sup>82</sup> 471 US 626 (1985).

<sup>83</sup> See id at 651.

fees.”<sup>84</sup> The ad failed to disclose that the client would still be liable for costs.<sup>85</sup> In rejecting heightened scrutiny of the disclosure requirement, the Court relied on the rationale that “the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides.”<sup>86</sup> Disclosure requirements advance the goal of disseminating valuable information, rather than inhibiting it. Thus, the Court characterized the attorney’s “interest in *not* providing any particular factual information in his advertising” as “minimal.”<sup>87</sup>

It is true that the Court in *Zauderer* also appeared to place weight on the fact that the speech being compelled was “purely factual and uncontroversial.”<sup>88</sup> Nothing about the Court’s rationale for permitting greater leeway for compelled speech in the commercial context, however, relied on that characterization of the speech at issue. If the goal is disseminating information of “value to consumers,” that goal can also be advanced by disseminating information that is not “purely factual.”

Moreover, the caveat of limiting its explicit holding to “purely factual” information can be explained by the way that the Court characterized the First Amendment interest in the case. While the Court rejected the view that “disclosure requirements do not implicate the advertiser’s First Amendment rights at all,” it did so as part of “recogniz[ing] that unjustified or unduly burdensome disclosure requirements might offend the First Amendment by *chilling* protected commercial speech.”<sup>89</sup> In other words, the compelled speech itself was not the problem. The problem was that the compulsion was a condition of other speech, in this case attorney advertising, and that other speech might be burdened or chilled by such a condition.<sup>90</sup> If a commercial speaker decides to remain silent in order to avoid

---

<sup>84</sup> *Id* at 631.

<sup>85</sup> *Id* at 633.

<sup>86</sup> *Zauderer*, 471 US at 651.

<sup>87</sup> *Id*.

<sup>88</sup> *Id*.

<sup>89</sup> *Id* (emphasis added).

<sup>90</sup> See *Zauderer*, 471 US at 650 (“In requiring attorneys who advertise their willingness to represent clients on a contingent-fee basis to state that the client may have to bear certain expenses even if he loses, Ohio has not attempted to prevent attorneys from conveying information to the public; it has only required them to provide somewhat more information than they might otherwise be inclined to present.”).

particular compelled speech, then listeners have been denied the value of that speech and the disclosure requirement may indeed warrant greater scrutiny. In the context of determining whether compelled speech might burden other speech upon which it is conditioned, it may well make sense to distinguish between compelling factual and normative speech; speakers who are required to espouse a normative view they disagree with as a condition of speaking may be more readily silenced than speakers who are required to disclose true factual information.

Unlike a regulation of advertising, privacy super-notice requirements are not likely to be framed in ways that burden other expression, because any requirement to speak arises not as a condition of other speech, but as a condition of commercial conduct. A requirement to deploy privacy super-notices would presumably attach to the provision of particular data services, not the advertising of those services or other similar speech. Thus, the concern in *Zauderer* of “chilling protected commercial speech” would not apply, which supports expanding the class of speech to which only minimal scrutiny applies in such cases beyond the “purely factual.”<sup>91</sup>

Courts that have applied heightened scrutiny to commercial compelled speech have tended to assume that heightened scrutiny is the baseline to which *Zauderer* is an exception.<sup>92</sup> That baseline is the result of a simple syllogism: (1) the First Amendment applies some level of heightened scrutiny to commercial speech; (2) the First Amendment applies equally to restricting or compelling speech; and (3) therefore, the First Amendment scrutiny that applies to restricting commercial speech must also apply to compelling it.

The flaw in the syllogism is in failing to recognize how the cases and rationales that support the first point intersect, or fail to intersect, with the cases and rationales that support the second point. As described in *Zauderer*, heightened scrutiny for commercial speech is focused on protecting the listeners’ interests.<sup>93</sup> The prohibition on compelled speech, however, derives from cases like *West Virginia State Board of Education v*

---

<sup>91</sup> *Id* at 651.

<sup>92</sup> See, for example, *R.J. Reynolds*, 696 F3d at 1212 (“Courts have recognized a handful of ‘narrow and well-understood exceptions’ to the general rule that content-based speech regulations—including compelled speech—are subject to strict scrutiny.”).

<sup>93</sup> See note 86 and accompanying text.

*Barnette*,<sup>94</sup> and *Wooley v Maynard*.<sup>95</sup> These cases dealt with compulsions against individuals and focused on the “individual freedom of mind” and the right of individuals not to speak, rather than on any interests of the listeners.<sup>96</sup> Thus, while commercial speech restrictions are scrutinized to protect listeners, compelled speech requirements are scrutinized to protect speakers, and neither rationale seems to apply in the context of commercial compelled speech.

There are a handful of Supreme Court cases involving compelled speech in the commercial context that are regularly cited for the proposition that heightened scrutiny applies to such speech.<sup>97</sup> In reality, however, these cases provide scant support for heightened scrutiny and they fail to establish a general equivalence between noncommercial and commercial compelled speech.

In *Pacific Gas & Electric Co v Public Utilities Commission of California*,<sup>98</sup> the Court held that a privately owned utility company could not be compelled to include materials from another organization in its billing envelopes.<sup>99</sup> No opinion in that case commanded a majority of the Court, and the pivotal fifth vote was provided by Justice Marshall, who, concurring only in the judgment, emphasized that the compulsion in that case came “at the expense of [the utility’s] ability to use the property in question as a forum for the exercise of its own First Amendment rights.”<sup>100</sup> That is, during the four months in which the other organization was given access, the utility could only disseminate its own views by paying additional postage.<sup>101</sup> Justice Marshall characterized this as the State’s “appropriating, four times a year, the space in appellant’s envelope that appellant would otherwise use for its own speech,” thereby “necessarily curtail[ing] appellant’s use of its own

<sup>94</sup> 319 US 624 (1943).

<sup>95</sup> 430 US 705 (1977).

<sup>96</sup> *Barnette*, 319 US at 637; *Wooley*, 430 US at 714.

<sup>97</sup> See, for example, *R.J. Reynolds*, 696 F3d at 1211, citing *Pacific Gas & Electric Co v Public Utilities Commission of California*, 475 US 1, 16 (1986) and *United States v United Foods, Inc*, 533 US 405, 410–11 (2001).

<sup>98</sup> 475 US 1 (1986).

<sup>99</sup> See *id* at 4, 7 (plurality). See also *id* at 21–26 (Marshall concurring in the judgment).

<sup>100</sup> *Id* at 23–24 (Marshall concurring in the judgment).

<sup>101</sup> See *id* at 6 (plurality).

forum.”<sup>102</sup> Thus, it was again the potential effect of the regulation in restricting the corporation’s own speech, rather than the regulation’s compelling speech, that formed the basis for the Court’s decision in the case.

Moreover, as in *Zauderer*, even after concluding that there was a valid speech interest in this case, Justice Marshall did not apply anything like intermediate or strict scrutiny to the regulation at issue. Characterizing the “interference with appellant’s speech” as “very slight,” Justice Marshall held that the State had failed to justify “even that minor burden” and that its asserted interest in exposing utility customers to a variety of views was simply illegitimate.<sup>103</sup> Together with the three dissenters then,<sup>104</sup> Justice Marshall declined to apply the scrutiny that would otherwise apply to compelling individuals to speak.<sup>105</sup> The *PG&E* case thus cannot be read to have established heightened scrutiny for commercial compelled speech.<sup>106</sup>

The case of *United States v United Foods, Inc.*,<sup>107</sup> is similarly insufficient to support the view that commercial compelled speech is subject to heightened scrutiny.<sup>108</sup> In that case, the Court struck down a scheme whereby mushroom producers were required to fund generic mushroom advertising.<sup>109</sup> The Court did so, however, primarily on the basis of a line of cases involving compelled association and the permissible uses of compelled contributions to those associations.<sup>110</sup> What the Court seems to

---

<sup>102</sup> *Pacific Gas & Electric Co*, 475 US at 24 (Marshall concurring in the judgment).

<sup>103</sup> *Id* at 24–25 (Marshall concurring in the judgment).

<sup>104</sup> See *id* at 26 (Rehnquist dissenting) (“Nor do I believe that negative free speech rights, applicable to individuals and perhaps the print media, should be extended to corporations generally.”).

<sup>105</sup> See *id* at 25 (Marshall concurring in the judgment) (“I do not mean to suggest that I would hold, contrary to our precedents, that the corporation’s First Amendment rights are coextensive with those of individuals.”).

<sup>106</sup> Four members of the Court joined the plurality opinion. *Pacific Gas & Electric Co*, 475 US at 4. Justice Blackmun did not participate in the case. *Id* at 21.

<sup>107</sup> 533 US 405 (2001).

<sup>108</sup> *Id* at 408.

<sup>109</sup> *Id* at 408–09.

<sup>110</sup> See *id* at 413. The Court stated:

It is true that the party who protests the assessment here is required simply to support speech by others, not to utter the speech itself. We conclude, however, that the mandated support is contrary to the First Amendment principles set forth in cases involving expression by groups which include persons who object

have found objectionable was compelling mushroom producers to associate with each other for the sole purpose of advertising.<sup>111</sup> If the compelled association had been otherwise justifiable, the Court suggested the compelled contributions for advertising would have been as well.<sup>112</sup> Thus, it is difficult to read *United Foods* as applying outside the realm of compelled associations.

More importantly, the later case of *Johanns v Livestock Marketing Association*,<sup>113</sup> has severely undercut the precedential value of *United Foods*.<sup>114</sup> *Livestock Marketing* upheld a regulatory scheme virtually identical to the one at issue in *United Foods* under the theory that the advertising at issue was government speech, for which compelled subsidies do not attract heightened scrutiny.<sup>115</sup> That argument had been unavailable in *United Foods* only because the government had waived it by failing to argue it in the court below.<sup>116</sup> Had the government argued that point in *United Foods*, the result likely would have been the same as in *Livestock Marketing*: compelled subsidization of this type of generic product advertising raises no significant First Amendment concerns.<sup>117</sup> *United Foods* thus does not support heightened scrutiny of commercial compelled speech.

Finally, cases involving the corporate media also do not necessarily support extending similar protections to commercial entities generally. In *Miami Herald Publishing Co v Tornillo*,<sup>118</sup> for example, the Court struck down a Florida statute that required newspapers to print a reply from any political

---

to the speech, but who, nevertheless, must remain members of the group by law or necessity.

*Id.*

<sup>111</sup> See *United Foods, Inc*, 533 US at 415 (“[T]he compelled contributions for advertising are not part of some broader regulatory scheme. The only program the Government contends the compelled contributions serve is the very advertising scheme in question.”).

<sup>112</sup> See *id* at 414–15 (distinguishing the case of *Glickman v Wileman Brothers & Elliott, Inc*, 521 US 457 (1997), as a case in which “producers were bound together in the common venture,” thereby justifying “the imposition upon their First Amendment rights caused by using compelled contributions for germane advertising”).

<sup>113</sup> 544 US 550 (2005).

<sup>114</sup> See generally *id.*

<sup>115</sup> *Id* at 559.

<sup>116</sup> See *United Foods*, 533 US at 416–17.

<sup>117</sup> See *Livestock Marketing*, 544 US at 560 (finding the advertising at issue to be the type of government speech that is “not susceptible to First Amendment challenge”).

<sup>118</sup> 418 US 241 (1974).

candidate criticized by a newspaper editorial.<sup>119</sup> The Court's decision, however, was driven at least in part by the concern that the Florida mandate would chill the newspaper's own speech, because the paper might tend to avoid criticisms that would potentially trigger the right of reply.<sup>120</sup> Because media companies are in the business of selling fully-protected speech, compelling such companies to speak almost inevitably has the potential to chill or burden speech, and thus is more akin to a compulsion conditioned on speech than a compulsion conditioned on commercial conduct.<sup>121</sup> Cases involving media companies cannot be generalized to other commercial entities.

Thus, none of the cases usually relied upon to establish an interest at stake in commercial compelled speech in fact show that there is anything like the interests at stake when individuals are compelled to speak or when commercial speech is restricted. Privacy super-notices, as a form of commercial compelled speech, should receive little First Amendment scrutiny because they involve a type of speech that implicates neither the listener interests at stake in commercial speech restrictions nor the speaker interests at stake in compelling individuals to speak.

Even if one assumes that at the extreme, government compulsion of an overtly normative message is problematic with respect to commercial as well as noncommercial speakers, one might still want to distinguish between implicitly and overtly normative compulsions. Consider the analogy to the exclusion of false and misleading commercial speech from the protection of the First Amendment. Rebecca Tushnet has pointed out that the exclusion of not just "false" but also "misleading" commercial speech from First Amendment scrutiny is integral to consumer protection goals because of the difficulty in drawing a bright line between the two.<sup>122</sup> Similarly here, the difficulty in strictly separating purely factual compelled commercial speech from

---

<sup>119</sup> *Id* at 258.

<sup>120</sup> See *id* at 257 ("Faced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right-of-access statute, editors might well conclude that the safe course is to avoid controversy. Therefore, under the operation of the Florida statute, political and electoral coverage would be blunted or reduced.").

<sup>121</sup> See text accompanying note 91.

<sup>122</sup> See Rebecca Tushnet, *It Depends on What the Meaning of "False" Is: Falsity and Misleadingness in Commercial Speech Doctrine*, 41 Loyola LA L Rev 227, 248–54 (2007).

implicitly normative compelled commercial speech means that policing the line between the two may undermine legitimate consumer protection interests.<sup>123</sup> By analogy to the line between misleading and truthful commercial speech then, we might distinguish between direct government advocacy of a normative viewpoint, which could be subject to heightened scrutiny, and normative viewpoints that are implicit in governmentally compelled factual disclosure, which should not be subject to heightened scrutiny.<sup>124</sup> Such a view would continue to place almost any conceivable privacy super-notice, which is far less likely than a cigarette label to involve any overtly normative claims, beyond the reach of the First Amendment.

## II. DATA PROCESSING AND THE PROBLEM OF SPEECH AMONG COMMERCIAL ENTITIES

Even perfect notice may be at best a partial solution to the consumer privacy problem. There are deeper issues with notice-and-choice, such as the impossibility of conveying the full complexity of information flows, cognitive biases that make it difficult for consumers to weigh the long-term effects of their choices, and the failure of individual choices to account for overall social impacts.<sup>125</sup> As a result, beyond improved notice, some scholars have also called for some role for “[m]ore substantive rules about data collection, use, and disclosure,” which “could consist of hard boundaries that block particularly troublesome practices as well as softer default rules that can be bargained around.”<sup>126</sup>

Such rules, however, could be challenged on First Amendment grounds, particularly following the Supreme Court’s decision in *Sorrell v IMS Health Inc.*<sup>127</sup> In *Sorrell*, the Supreme Court struck down a Vermont statute that prohibited the sale, transfer, or use of information about individual physicians’ prescriptions for marketing purposes without the

---

<sup>123</sup> See Part I.B.

<sup>124</sup> The dissenting judge in *R.J. Reynolds* seems to have taken this perspective, distinguishing between the permissible use of graphic images to reinforce the textual warnings and the potentially impermissible use of the phone number 1-800-QUIT-NOW. See *R.J. Reynolds*, 696 F3d at 1234 (Rogers dissenting).

<sup>125</sup> See Solove, 126 Harv L Rev at 1885–93 (cited in note 15).

<sup>126</sup> Id at 1903.

<sup>127</sup> 131 S Ct 2653 (2011).

prescriber's consent.<sup>128</sup> In its decision, the Court broadly suggested, albeit in dictum, that it was prepared to impose heightened scrutiny on any restriction on "the creation and dissemination of information," such as the restrictions on the "sales, transfer, and use of prescriber-identifying information" at issue in the case.<sup>129</sup> Although the Court ultimately resolved the case on different First Amendment grounds,<sup>130</sup> some have read this language in *Sorrell* to suggest that the Court would subject all privacy laws—which, after all, restrict "the creation and dissemination of information"—to heightened scrutiny, perhaps even strict scrutiny, under the First Amendment.<sup>131</sup>

Whatever the implications of *Sorrell* for privacy law generally, restrictions on consumer data processing by commercial entities should generally fall outside of First Amendment heightened scrutiny. Again, the key fact is that such restrictions are imposed on transactions among commercial entities. That commerciality distinguishes such a restriction from a similar one imposed on individuals. The paradigmatic form of commercial speech, the commercial advertisement, is protected under the First Amendment in order to protect the interests of the consumers, the noncommercial listeners.<sup>132</sup> When one commercial data collector or broker transmits consumer data to another, there is no such noncommercial listener to protect, and the basis for including such a transaction within the ambit of the First Amendment is absent.

Language from the Supreme Court's commercial speech cases supports the view that the Court had noncommercial listeners in mind in protecting commercial speech under the First Amendment. For example, in *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council, Inc.*,<sup>133</sup> the Court framed the question as follows: "What is at issue is

---

<sup>128</sup> Id at 2659–60. This information is called "prescriber-identifying information." Id.

<sup>129</sup> Id at 2666–67.

<sup>130</sup> The Court held that the Vermont statute impermissibly disfavored certain speakers, namely, the detailers who market brand-name drugs to physicians, by withholding from only those speakers the prescription data at issue. Id at 2667.

<sup>131</sup> See Ashutosh Bhagwat, *Sorrell v. IMS Health: Details, Detailing, and the Death of Privacy*, 36 *Vt L Rev* 855, 868–74 (2012). See also Agatha M. Cole, *Internet Advertising After Sorrell v. IMS Health: A Discussion on Data Privacy & the First Amendment*, 30 *Cardozo Arts & Enter L J* 283, 304–05 (2012) (describing commentators who "hypothesiz[ed] that the [Sorrell] ruling would preempt forthcoming privacy legislation").

<sup>132</sup> See note 86 and accompanying text.

<sup>133</sup> 425 US 748 (1976).

whether a State may completely suppress the dissemination of concededly truthful information about entirely lawful activity, *fearful of that information's effect upon its disseminators and its recipients.*<sup>134</sup> Such an anti-paternalism rationale presumes an intrinsic value in letting “people . . . perceive their own best interests if only they are well enough informed,”<sup>135</sup> a value that would seem to attach only to people, not commercial entities. Similarly, *Central Hudson Gas & Electric Corp v Public Service Commission of New York*<sup>136</sup> characterized the value of commercial speech as that it “accurately inform[s] the public,”<sup>137</sup> again suggesting that it is the public at large that the Court envisioned as the recipients of protected commercial speech. Commercial data brokerage may inform, but such transactions do not inform “people” or “the public,” and thus fall outside the transactions envisioned in the commercial speech cases.

Neil Richards has previously argued that regulation of data processing should be regarded as regulation of commercial activity outside of the purview of the First Amendment.<sup>138</sup> In particular, Richards finds “trade in personal data” to be “far removed from the core speech protected by the First Amendment” and “much more like the ‘speech’ outside the boundaries of heightened review.”<sup>139</sup> Richards points out the wide variety of “speech” restrictions that have long existed without any First Amendment scrutiny, such as laws prohibiting “an insider trading tip, a false statement in a proxy statement, an offer to create a monopoly in restraint of trade, or a breach of the attorney-client privilege.”<sup>140</sup> Many of those examples, however, might be distinguished from data processing as involving performative speech, false speech, or speech within a special relationship, none of which characterizes data processing. Focusing on the commercial status of the entities involved helps more fully to explain why the view of commercial

---

<sup>134</sup> *Id* at 773 (emphasis added).

<sup>135</sup> *Id* at 770.

<sup>136</sup> 447 US 557 (1980).

<sup>137</sup> *Id* at 563.

<sup>138</sup> See generally Neil M. Richards, *Reconciling Data Privacy and the First Amendment*, 52 UCLA L Rev 1149 (2005).

<sup>139</sup> *Id* at 1206.

<sup>140</sup> *Id* at 1172–73.

data processing as mere commercial activity is correct, and why it can be regulated without satisfying heightened scrutiny.

The *Sorrell* Court cited three cases in support of its claim that “the creation and dissemination of information are speech within the meaning of the First Amendment,” but none of them support the view that transactions among commercial entities deserve First Amendment protection.<sup>141</sup> One such case involved the disclosure of an illegally intercepted cell phone conversation by the person who intercepted the call to other individuals and to the media, and the subsequent broadcasts of the recording by the media to the public at large.<sup>142</sup> Another cited case involved “information on beer labels” on cans of beer sold to the public.<sup>143</sup> Both of those cases involved individuals as listeners.

Only the third case cited by the *Sorrell* Court potentially involved a transaction among commercial entities. That case, *Dun & Bradstreet, Inc v Greenmoss Builders, Inc*,<sup>144</sup> concerned whether a credit reporting agency could be liable in a libel action for presumed and punitive damages in the absence of actual malice.<sup>145</sup> It is not clear who received the particular defamatory credit report at issue in the case,<sup>146</sup> but the recipients were “usually creditors of the reported enterprises”<sup>147</sup> and thus arguably commercial entities.<sup>148</sup> Nevertheless, any member of the public likely could have paid for access to this information, so it was at least theoretically possible that there would be noncommercial listeners.<sup>149</sup>

---

<sup>141</sup> *Sorrell*, 131 S Ct at 2667, citing *Bartnicki v Vopper*, 532 US 514, 527 (2001), *Rubin v Coors Brewing Co*, 514 US 476, 481 (1995), and *Dun & Bradstreet, Inc v Greenmoss Builders, Inc*, 472 US 749, 759 (1985) (plurality opinion).

<sup>142</sup> See *Bartnicki*, 532 US at 525. Both the individual and media defendants in this case “played no part in the illegal interception” and “their access to the information on the tapes was obtained lawfully.” *Id.*

<sup>143</sup> See *Rubin*, 514 US at 481.

<sup>144</sup> 472 US 749 (1985).

<sup>145</sup> *Id* at 752–53 (plurality opinion).

<sup>146</sup> See *id* at 751–52 (noting that the credit reporting agency refused to divulge this information).

<sup>147</sup> *Greenmoss Builders, Inc v Dun & Bradstreet, Inc*, 461 A2d 414, 416 (Vt 1983).

<sup>148</sup> See *Dun & Bradstreet*, 472 US at 762 (“[The credit report] was speech solely in the individual interest of the speaker and *its specific business audience*.”) (emphasis added).

<sup>149</sup> See *id* at 782 n 6 (Brennan dissenting) (“Like an account of judicial proceedings in a newspaper, magazine, or news broadcast, a statement in petitioner’s reports that a particular company has filed for bankruptcy is a report of a timely news event conveyed to members of the public by a business organized to collect and disseminate such

More importantly, the fractured Court ultimately decided that the First Amendment imposed no impediment to the forms of liability at issue in the case.<sup>150</sup> Along the way, the plurality opinion did not merely find that a First Amendment interest was outweighed; it found that interest to be quite weak.<sup>151</sup> The plurality opinion also applied a balancing test that bears little resemblance even to intermediate scrutiny, let alone strict scrutiny.<sup>152</sup> That the opinion recognized any First Amendment interest at all may have been because it framed the issue as one of the weight to be given to “speech on matters of purely private concern.”<sup>153</sup> Since such matters can also be communicated privately among individuals, the Court could hardly have found such communications to be entirely without First Amendment value. In any event, *Dun & Bradstreet* fails to support a broad claim of First Amendment value in the dissemination of data among commercial entities. Transactions among commercial entities do not raise the interests that are protected by heightened scrutiny of commercial speech restrictions, and thus, such scrutiny should not apply to regulation of data processing among commercial entities.

### III. CONCLUSION

Some privacy super-notice strategies or restrictions on data processing might be more wise or effective than others. Perhaps it will be impossible to ever make privacy notices as concrete and attention-grabbing as graphical cigarette warnings.<sup>154</sup> Perhaps new forms of notice will quickly become routine and lose their impact. Perhaps it would be ultimately detrimental to society if substantive restrictions on data processing undermined the business models that support many online services.<sup>155</sup>

---

information.”).

<sup>150</sup> See id at 763 (plurality opinion); id at 764 (Burger concurring in the judgment); id at 774 (White concurring in the judgment).

<sup>151</sup> See id at 759 (plurality) (“[T]he role of the Constitution in regulating state libel law is far more limited when the concerns that activated *New York Times* and *Gertz* are absent.”).

<sup>152</sup> See *Dun & Bradstreet*, 472 US at 757 (plurality opinion).

<sup>153</sup> Id at 759.

<sup>154</sup> See Solove, 126 Harv L Rev at 1885 (cited in note 15).

<sup>155</sup> Id at 1896.

Even if these types of privacy regulations might fail, they should be given the opportunity to do so. Because they either compel speech from commercial entities or regulate transactions among commercial entities, they do not raise the First Amendment concerns that are raised by similar rules imposed on individuals or by restrictions on commercial advertising. They should therefore not be subject to heightened scrutiny. The problems of privacy regulation are difficult enough without throwing unwarranted constitutional constraints into the mix.