

# ***SORRELL V. IMS HEALTH: DETAILS, DETAILING, AND THE DEATH OF PRIVACY***

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## INTRODUCTION

In *Sorrell v. IMS Health Inc.*, the Supreme Court struck down a Vermont statute that banned the sale or disclosure by pharmacies of information regarding the prescribing habits of physicians, if that information was going to be used for the purposes of marketing by pharmaceutical manufacturers.<sup>1</sup> The majority's application of the commercial speech doctrine in *Sorrell* confirms the modern vigor of that doctrine, and some of the language used by the majority may portend a further strengthening of constitutional protections for commercial speech in the future. If the Court does move in this direction, this might have profound implications for a host of modern regulatory schemes from regulation of prescription drugs to securities regulation. In short, *Sorrell* is an important commercial speech case, and it may turn out to be an extraordinarily important one.

I, however, do not intend to focus on the commercial speech aspects of the *Sorrell* decision in this Article. My thesis is that an even more significant First Amendment issue lurks within this case: the proper analysis of laws that limit the disclosure of information in order to protect privacy. While protecting privacy was not the only, or even the primary, policy underlying the Vermont legislation, it was undoubtedly one factor that contributed to the passage of the legislation (and was invoked by the State as a justification for the statute during litigation).<sup>2</sup> The Court, however, managed to largely avoid specifically addressing the larger issues regarding disclosures and privacy that might have been raised in this case by focusing on the fact that Vermont prohibited disclosure here only for the purposes of marketing—i.e., that Vermont targeted commercial speech. The broader, fundamental question touched on, but ultimately avoided by the Court, is whether a flat restriction on data disclosure constitutes an abridgement of free speech, raising serious First Amendment issues. Though it did not decide this question, the Court was not entirely silent on

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

2. *Id.* at 2668–69.

the subject; the majority opinion contains broad hints regarding the Court's views.

I will argue that the Court's hints in this regard have dramatic, and extremely troubling, implications for a broad range of existing and proposed rules that seek to control disclosure of personal information in order to protect privacy. My purpose here is to explore whether the Court's hints have a basis in current law (they do), what the implications of those views are (as I said, dramatic and troubling), and how the Court might consider escaping from the doctrinal box in which it finds itself.

Part I describes the facts and holding of the *Sorrell* case. Part II describes the two potential speech issues posed by the case, and describes how the Court treated the broader disclosure issue. Part III then analyzes how disclosure regulations should be analyzed under the Court's extant First Amendment doctrine. Part IV considers the implications of the analysis in Part III for privacy regulation, both in the context of prescriber information and more generally. Finally, Part V proposes a potential solution to the problems exposed by the earlier discussion.

#### I. *SORRELL V. IMS HEALTH INC.*

The *Sorrell* case arose in the context of an industry, the marketing of prescription drugs by pharmaceutical manufacturers, with a complex structure and a unique, even peculiar, nomenclature. Under federal law, prescription drugs can only be sold if authorized by a licensed, prescribing physician.<sup>3</sup> As a consequence, physicians have ultimate decisionmaking power over what drugs will be used by patients, despite the fact that patients (or their insurers) pay for the drugs. Pharmaceutical manufacturers, therefore, have a strong financial incentive to promote their products to physicians to try and convince them to select their drugs. This is especially so because the profit margins (and prices) for branded drugs still under patent protection dwarf profits available from generic drugs.<sup>4</sup> The process of trying to convince doctors to prescribe particular branded drugs, generally through office visits by pharmaceutical representatives, is called "detailing." Pharmaceutical representatives are aptly called "detailers."<sup>5</sup> Detailers find that having information about target physicians' prescribing habits can assist them in creating more effective sales pitches.<sup>6</sup> Pharmacies, of course, have such information in their possession, since they are required

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3. 21 U.S.C. § 353(b) (2006); *Sorrell*, 131 S. Ct. at 2676.

4. *Sorrell*, 131 S. Ct. at 2660.

5. *Id.* at 2659.

6. *Id.* at 2659–60.

to record the identity of prescribing doctors every time they fill a prescription.<sup>7</sup> Many pharmacies sell this “prescriber-identifying information” to data-mining companies, who analyze the raw data and sell the resulting analyses to pharmaceutical manufacturers for use in detailing.<sup>8</sup>

In 2007, Vermont enacted legislation to regulate this practice of selling prescriber-identifying information.<sup>9</sup> The statute contained three provisions: one barring the sale of prescriber-identifying information, one prohibiting the disclosure of such information for marketing purposes, and finally, a prohibition on pharmaceutical manufacturers and marketers using prescriber-identifying information for marketing purposes (all three provisions contained exceptions for information where the prescriber consented to its use).<sup>10</sup> Pharmaceutical manufacturers and data miners brought suit challenging these provisions. The district court upheld the law.<sup>11</sup> On appeal, the U.S. Court of Appeals for the Second Circuit reversed, finding the Vermont statute unconstitutional.<sup>12</sup> Because this decision conflicted with two decisions of the First Circuit,<sup>13</sup> the Supreme Court granted certiorari.<sup>14</sup> By a vote of 6-3, the Court affirmed the Second Circuit’s holding striking down the statute.<sup>15</sup>

The majority opinion, authored by Justice Anthony M. Kennedy, begins its analysis by noting that the challenged Vermont statute “enacts content—and speaker—based restrictions” and “burdens disfavored speech by disfavored speakers.”<sup>16</sup> Indeed, the Court concluded that the law was not just content-based, but viewpoint-based.<sup>17</sup> As a consequence, the Court stated, the law must survive “heightened judicial scrutiny,” and proceeded to cite a number of cases applying strict scrutiny to content-based restrictions on fully protected speech.<sup>18</sup> The Court made it clear that the speech burdened by Vermont’s statute was marketing by detailers, because

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7. *Id.* at 2660.

8. *Id.*

9. Vermont was not the only state to do so. In *IMS Health Inc. v. Ayotte*, 550 F.3d 42, 64 (1st Cir. 2008) and *IMS Health Inc. v. Mills*, 616 F.3d 7, 32 (1st Cir. 2010) the First Circuit upheld similar New Hampshire and Maine statutes.

10. *Sorrell*, 131 S. Ct. at 2660.

11. *IMS Health Inc. v. Sorrell*, 631 F. Supp. 2d 434, 464 (D. Vt. 2009).

12. *IMS Health Inc. v. Sorrell*, 630 F.3d 263, 267 (2d Cir. 2010).

13. *See Ayotte*, 550 F.3d at 64 (holding that a statute regulating conduct did not violate the First Amendment); *Mills*, 616 F.3d at 32 (holding that an amended statute regulating conduct did not violate the First Amendment).

14. *Sorrell*, 630 F.3d at 263, *cert. granted*, 131 S. Ct. 857 (2011).

15. *Sorrell*, 131 S. Ct. at 2672.

16. *Id.* at 2663.

17. *Id.*

18. *Id.* at 2664 (citing *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 813 (2000); *Simon & Schuster, Inc. v. Members of N.Y. State Victims Bd.*, 502 U.S. 105, 118 (1991)).

the state prohibited the use of prescriber-identifying information for marketing, but no other purposes.<sup>19</sup> The majority also rejected the State's argument that the Vermont statute merely regulated commercial conduct, because it concluded that the law's burden on speech was not incidental, but direct.<sup>20</sup>

Ultimately, the Court subjected the Vermont statute to the intermediate scrutiny test for regulations of commercial speech enunciated in *Central Hudson Gas & Electric Corp. v. Public Service Commission*<sup>21</sup> and *Board of Trustees of State University of New York v. Fox*,<sup>22</sup> and found that the test was not satisfied.<sup>23</sup> In particular, the Court concluded that Vermont's asserted interest in protecting physicians' privacy could not justify this statute, because the statute permitted disclosure of prescriber-identifying information for a myriad purposes, just not for marketing, and so the law did not truly advance the goal of protecting privacy.<sup>24</sup> The Court also flatly rejected the State's second primary claim—that the law advanced the State's goal of reducing the cost of medical service by pushing doctors to prescribe more generic drugs—as based on a paternalistic effort to shield listeners from truthful, non-misleading information (here, information provided by detailers regarding brand-name drugs).<sup>25</sup> Accordingly, the Court found Vermont's statute inconsistent with basic First Amendment values.<sup>26</sup>

Several points stand out in the Court's analysis. First, the Court blurred the distinction between strict and intermediate scrutiny; a blurring that suggests a willingness (at least among the six Justices in the majority) to reconsider the treatment of commercial speech as a category of lower-value, less-protected speech. Second, the Court stringently applied the *Central Hudson* intermediate scrutiny test, an approach consistent with other recent decisions.<sup>27</sup> Finally, the majority opinion repeatedly emphasized that Vermont's error in this case was to target speech for regulation, as opposed

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19. *Id.* at 2663.

20. *Id.* at 2665.

21. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 556 (1980).

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

23. *Sorrell*, 131 S. Ct. at 2667–72.

24. *Id.* at 2668. The Court also rejected as baseless arguments defending the law based on doctors' complaints about harassing behavior by detailers, and concerns that use of prescriber information might interfere with the doctor-patient relationship. *Id.* at 2669–70.

25. *Id.* at 2670–72.

26. *Id.*

27. *See, e.g.*, *Thompson v. W. States Med. Ctr.*, 535 U.S. 357 (2002) (applying *Central Hudson* to a statute prohibiting solicitation of prescriptions and advertisement of compounded drugs to determine an alleged First Amendment violation); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554–55 (2001) (“*Central Hudson* . . . provides an adequate basis for decision.”).

to directly targeting conduct.<sup>28</sup> All of these points, however, relate to one form of speech: marketing by detailers. As noted above, the Court concluded that Vermont had burdened this speech by permitting the use of prescriber-identifying information for many purposes but not marketing.<sup>29</sup>

But there was another form of speech and another potential free speech claim lurking in the case: Vermont's restriction on the sale or disclosure of the prescriber data itself. The Court (in response to an argument made by Vermont) acknowledged the possibility of such a claim and even briefly discussed its merits, but ultimately concluded that it need not address the issue because of Vermont's targeting of marketing.<sup>30</sup> Despite failing to resolve the disclosure issue, the Court did provide some hints about its views on the merits. These hints, if followed up on in a later case, have enormous implications for a wide variety of laws and policy initiatives and the potential, I will argue, to upend an enormous swath of modern policy. There is great value, therefore, to examining the Court's hints carefully, and to determining if they are justified under current law. It is to that task that we now turn.

## II. THE DOG THAT DID NOT BARK<sup>31</sup>

As discussed above, the Vermont statute challenged in *Sorrell* restricted speech in two ways: first, it restricted the sale or disclosure of prescriber-identifying information;<sup>32</sup> and second, it restricted the use of such information for the purposes of marketing by pharmaceutical manufacturers.<sup>33</sup> The Court's analysis focused primarily on the second restriction, striking it down as a content- and speaker-based restriction on commercial speech.<sup>34</sup> The Court did not, however, entirely ignore the disclosure restriction. Vermont made an argument that the sale or disclosure of prescriber-identifying information is conduct, not speech, thus not subject to serious First Amendment scrutiny.<sup>35</sup> In response, the Court noted that the First Circuit (in parallel litigation challenging a New Hampshire statute regulating prescriber-identifying information) had accepted a similar

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28. *Sorrell*, 131 S. Ct. at 2665, 2668, 2669–70, 2672.

29. *Id.* at 2663.

30. *Id.* at 2666–67.

31. ARTHUR CONAN DOYLE, *Silver Blaze*, in *THE MEMOIRS OF SHERLOCK HOLMES* 1, 26 (1892). In this story, Sherlock Holmes discovers that a dog guarding a racehorse did not bark on the night the horse disappeared. Based on this clue, Holmes reasoned that the guard dog knew who stole the horse.

32. *Sorrell*, 131 S. Ct. at 2660.

33. *Id.* at 2659.

34. *Id.* at 2663.

35. *Id.* at 2666.

argument, analogizing the sale of such information to the sale of “beef jerky,”<sup>36</sup> but that the lower courts in *Sorrell* had rejected the argument, treating the sale of information instead as fully protected speech.<sup>37</sup> The Court was squarely confronted with the questions of whether restrictions on the sale or disclosure of private information constituted protected speech and if so what level of scrutiny was due to such restrictions. Ultimately, however, the Court chose to avoid the question, because the case could be resolved on the basis of the commercial speech claim alone. It should be noted that this avoidance was contingent on the specific language of the Vermont statute at issue in the case. What if, as the Court suggested it might do,<sup>38</sup> Vermont had adopted a statute broadly restricting the disclosure of prescriber-identifying information, rather than restricting such disclosure only for marketing purposes? Then, the Court’s reliance on the commercial speech doctrine would have been obviated, and it would have had to directly confront the underlying issues of informational speech and privacy.

In *Sorrell*, the Court of course did not have to resolve these more difficult questions. But it was not entirely silent regarding them either. The majority had the following to say on the question of the First Amendment status of information disclosure:

This Court has held that the creation and dissemination of information are speech within the meaning of the First Amendment. . . . Facts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs. There is thus a strong argument that prescriber-identifying information is speech for First Amendment purposes.<sup>39</sup>

The Court went on to conclude that it need not respond to the State’s request for an exception “to the *rule* that information is speech.”<sup>40</sup> These passages do not communicate doubt. Instead, they evince some quite clear views on the subject of the proper treatment of information: Information and facts are speech (indeed, that is the “rule”),<sup>41</sup> and so they presumptively fall within the protections of the First Amendment. Nor is there a hint in the opinion that information disclosure constitutes “low-value” speech, such as

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36. *Id.* (quoting *IMS Health Inc. v. Ayotte*, 550 F.3d 42, 52–53 (1st Cir. 2008)).

37. *Id.* at 2666–67.

38. *Id.* at 2672 (“If Vermont’s statute provided that prescriber-identifying information could not be sold or disclosed except in narrow circumstances then the State might have a stronger position.”).

39. *Id.* at 2667 (citations omitted).

40. *Id.* (emphasis added).

41. *Id.*

commercial speech, subject to greater regulation than usual. To the contrary, the Court extolls the value of information in the marketplace of ideas, suggesting that such speech must lie at the core of the speech protected by the First Amendment.<sup>42</sup>

Notably, Justice Breyer's dissent largely fails to even acknowledge this issue, much less respond to the majority's specific arguments regarding information. The closest he came to addressing the restrictions on information sales and disclosure imposed by the Vermont statute (as opposed to the burden on commercial speech by detailers) is the dissent's comment that "Vermont's statute is directed toward information that exists only by virtue of government regulation."<sup>43</sup> In particular, the dissent referred to the federal law prohibiting the dispensing of certain drugs without a doctor's prescription, and Vermont rules requiring pharmacies to keep records tracking the identities of prescribing doctors.<sup>44</sup> Breyer then followed this up by arguing that "this Court has *never* found that the *First Amendment* prohibits the government from restricting the use of information gathered pursuant to a regulatory mandate—whether the information rests in government files or has remained in the hands of the private firms that gathered it."<sup>45</sup> But even these comments were in the context of the dissent's argument that only economic regulation, or at most commercial speech, was at issue in this case, negating a need for heightened scrutiny. It is thus not clear that Breyer was attempting to respond directly to the majority's argument regarding information disclosure, even though he seemingly was obliged to respond to this argument, as well as the commercial speech argument, if he wished to uphold the Vermont statute. Also, Breyer failed to explain why the fact that information is originally generated pursuant to a government mandate makes the later disclosure of that information anything less than speech. And most significantly, as I will discuss further,<sup>46</sup> this argument is limited to the specific regulatory context of the *Sorrell* case, and fails completely to address the myriad other contexts in which the treatment of information sales as speech is likely to pose extremely difficult First Amendment issues. In short, the dissent's arguments on this issue lacked coherence and were extremely narrow.

We are thus left with a strong hint from the Court on an important doctrinal question, with no real countervailing arguments from the dissent. In the rest of this paper, I explore the questions of whether the sale or

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42. *Id.*

43. *Id.* at 2676 (Breyer, J., dissenting).

44. *Id.* at 2676.

45. *Id.* at 2677.

46. *See infra* Part IV.

disclosure of information qualifies as “speech” for the purposes of the First Amendment, and what the implications are for regulation, and privacy law, if information is speech.

### III. FACTS AS SPEECH

Does the sale or disclosure of specific, personal information, such as the prescriber-identifying information at issue in *Sorrell*, constitute speech for the purposes of the First Amendment? I begin by noting that this question falls within the rubric of a broader constitutional puzzle concerning the proper treatment under the First Amendment of true, factual speech. Such questions can arise in the context of disputes over privacy, as in *Sorrell*, but also in myriad other contexts including crime facilitation, national security, and technological conflicts.<sup>47</sup> I have explored the broader problem of detailed factual speech elsewhere<sup>48</sup> and do not intend to revisit those broader issues. Instead, I will focus on personal information and privacy.

A beginning point for our analysis is that the majority was surely correct to argue that the weight of precedent vastly supports the proposition that information disclosure is speech. The majority itself cites a number of previous Supreme Court decisions holding that the disclosure of information is speech.<sup>49</sup> Similarly, the Second Circuit opinion in this case also reached the unambiguous conclusion that “[t]he First Amendment protects ‘[e]ven dry information, devoid of advocacy, political relevance, or artistic expression.’”<sup>50</sup> A number of other courts have reached similar conclusions. The *Corley* case quoted by the Second Circuit is a prominent example.<sup>51</sup> There, the Second Circuit considered a claim that the First Amendment prohibited an injunction preventing an individual from posting to his website particular computer code, called DeCSS, which permitted users to freely copy encrypted DVDs.<sup>52</sup> The court ultimately rejected the

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47. Ashutosh Bhagwat, *Details: Specific Facts and the First Amendment*, 86 S. CAL. L. REV. (forthcoming Nov. 2012) [hereinafter Bhagwat, *Details*] (manuscript at 8–39) (on file with author).

48. *Id.*

49. See *Sorrell*, 131 S. Ct. at 2667 (citing *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001) (“[I]f the acts of ‘disclosing’ and ‘publishing’ information do not constitute speech, it is hard to imagine what does fall within that category, as distinct from the category of expressive conduct.”)); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 481 (1995) (holding that “information on beer labels constitutes commercial speech”); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759 (1985) (plurality opinion) (holding that a credit report is speech)).

50. *IMS Health Inc. v. Sorrell*, 630 F.3d 263, 271–72 (2d Cir. 2010) (quoting *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 446 (2d Cir. 2001)).

51. *Corley*, 273 F.3d at 446.

52. *Id.* at 436–37.



First Amendment defense, but it began its analysis by acknowledging that facts and other scientific expression, including computer code, constitute speech.<sup>53</sup> Similarly, in *DVD Copy Control Ass'n v. Bunner*,<sup>54</sup> the California Supreme Court, while also upholding an injunction against posting DeCSS, acknowledged that the dissemination of information is protected speech.<sup>55</sup> Other cases reaching similar results include the Ninth Circuit's decision in *United States v. Edler Industries*,<sup>56</sup> involving the disclosure of technical data related to munitions, and the district court decision in *Bernstein v. U.S. Department of State*,<sup>57</sup> involving an academic paper and computer source code disclosing an encryption algorithm developed by the author.

Also noteworthy is the lack of support for the countervailing proposition that information is not speech. Even with respect to the narrower proposition that restrictions on information generated pursuant to a regulatory mandate do not raise serious First Amendment issues, Justice Breyer's dissent in *Sorrell* cited only one case<sup>58</sup>—*Los Angeles Police Department v. United Reporting Publishing Corp.*<sup>59</sup> But that case is clearly not on point, as the majority pointed out,<sup>60</sup> both because the information at issue in that case was in the government's possession, not in private hands, and because the only issue actually addressed by the Court was the availability of a facial challenge.<sup>61</sup> Similarly, when in the parallel New Hampshire litigation the First Circuit analogized the regulation of information to the regulation of beef jerky,<sup>62</sup> it could cite no cases supporting this rather startling proposition. Moreover, much of the First Circuit's analysis on this topic is highly suspect. One argument it provided for denying First Amendment protection to prescriber-identifying information is that this is "low-value" speech, as a matter of categorical balancing.<sup>63</sup> As the Second Circuit correctly pointed out, however, in recent years the Supreme Court has explicitly repudiated categorical balancing as a

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53. *Id.* at 449–50, 459–60.

54. *DVD Copy Control Ass'n v. Bunner*, 75 P.3d 1 (Cal. 2003).

55. *Id.* at 6.

56. *United States v. Edler Indus., Inc.*, 579 F.2d 516, 520–21 (9th Cir. 1978).

57. *Bernstein v. U.S. Dep't of State*, 922 F. Supp. 1426 (N.D. Cal. 1996).

58. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2677 (Breyer, J., dissenting).

59. *L.A. Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32 (1999).

60. *Sorrell*, 131 S. Ct. at 2665–66.

61. *Id.*

62. *IMS Health Inc. v. Ayotte*, 550 F.3d 42, 53 (1st Cir. 2008).

63. *See id.* at 52 (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (explaining that the First Amendment does not apply to fighting words because they are "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality"))).

form of constitutional analysis.<sup>64</sup> The First Circuit also argued that the First Amendment was not implicated here because the laws at issue prohibited information disclosure only for detailing purposes, not for other uses.<sup>65</sup> However, this rationale fails to explain why a narrower restriction on speech results in *no* First Amendment scrutiny. In short, the First Circuit's denial of constitutional protection to information disclosure was supported by neither precedent nor reasoning. Furthermore, as a matter of logic and current First Amendment law, Justice Kennedy's basic position that information constitutes speech must be correct. When the *New York Times* prints the names of American soldiers killed in action, it is disclosing information. Furthermore, since one must pay to read the *Times*, it is in fact selling information. Yet surely that information constitutes protected speech. Indeed, there are entire industries—most notably the news media, but also credit-reporting agencies,<sup>66</sup> databases (including legal databases such as LexisNexis and Westlaw), and others—who are primarily, if not exclusively, in the business of selling information. Sometimes the information is “raw,” as in the prescriber-identifying information sold by pharmacies to data miners in *Sorrell*, and sometimes it is “processed” (i.e., analyzed), as is the case with legal databases, credit-reporting agencies, and the information sold by data miners to pharmacies.<sup>67</sup> In either case the information takes the form of words (whether oral, written, or stored and transmitted as bytes) with expressive content. Of course, the nature of the information being disclosed varies from context to context, but as a preliminary matter the disclosure of pure information must be speech. If it is not, many news media reports would be unprotected, the disclosure of scientific data would be unprotected, and so on. Such a result has no basis in the law, as noted above, and would create an absurdly large and dangerous hole in the protections granted by the First Amendment.

The primary counterargument to this position, advanced by the First Circuit, is that the disclosure of information is “conduct” not speech.<sup>68</sup> The

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64. *IMS Health Inc. v. Sorrell*, 630 F.3d 263, 272 (2d Cir. 2010) (quoting *United States v. Stevens*, 130 S. Ct. 1577 (2010)); see also *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2734 (2011) (adopting the *Stevens* holding).

65. *Ayotte*, 550 F.3d at 53.

66. *Cf. Trans Union, LLC v. FTC*, 536 U.S. 915, 915–16 (2002) (Kennedy, J., dissenting from denial of certiorari) (dealing with credit report agencies' creation of target-marketing lists).

67. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2660 (2011).

68. *Ayotte*, 550 F.3d at 52–53. This is not the only decision that seeks to avoid difficult First Amendment questions by recharacterizing factual speech as conduct. See, e.g., *Haig v. Agee*, 453 U.S. 280, 304, 308–309 (1981) (characterizing the revocation of a passport as inhibiting action); *Rice v. Paladin Enters.*, 128 F.3d 233, 243 (4th Cir. 1997) (“[S]peech which . . . is tantamount to legitimately proscribable nonexpressive conduct may itself be legitimately proscribed, punished, or regulated incidentally to the constitutional enforcement of generally applicable statutes.”); *United States v. Edler*

court reached this conclusion by leaping from the premises that the New Hampshire statute only banned disclosures of prescriber-identifying information for the purposes of detailing, and that detailing is conduct, to the conclusion that the disclosure itself is conduct.<sup>69</sup> Leaving aside the point that detailing is not conduct, it is commercial speech (an issue the First Circuit did not have to reach because there were no detailers or pharmaceutical firms involved in that case), the leap is still unsupported. If I sell a book explaining how to cook gumbo, and then a reader uses my recipe to cook gumbo, it is true that the cooking is conduct, but surely the book remains speech. And similarly with information that is then used to engage in conduct—its ultimate use cannot determine whether the disclosure of information itself constitutes speech. The conduct analogy is thus just as unsound as the First Circuit’s theory that information constitutes unprotected speech under categorical balancing.

Not only is the disclosure of information speech, under current doctrine it is speech that receives full First Amendment protection. First of all, the disclosure of prescriber-identifying information does not constitute commercial speech. The Supreme Court has generally defined commercial speech narrowly as speech “that does no more than propose a commercial transaction.”<sup>70</sup> Alternatively, in *Central Hudson* the Court defined commercial speech as “expression related solely to the economic interests of the speaker and its audience.”<sup>71</sup> Under either definition, prescriber-identifying information does not qualify as commercial speech. First of all, under the narrower “no more than propose” definition announced in the Court’s seminal *Virginia Pharmacy* case,<sup>72</sup> which remains the primary definition employed by the Court, it is obvious that prescriber-identifying information is not commercial speech since it does not propose a commercial transaction. Of course, the information has commercial uses, but so do many forms of technical information such as speech describing production methods or management techniques. Yet no one would classify such speech as commercial.

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Indus., Inc. 579 F.2d 516, 521 (9th Cir. 1978) (holding that a statute and related regulations do not interfere with protected speech but rather “control the conduct of assisting foreign enterprises to obtain military equipment and related technical expertise”).

69. *Ayotte*, 550 F.3d at 52–53.

70. *United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001) (citing *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976)).

71. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 561 (1980).

72. *Va. Pharmacy*, 425 U.S. at 762 (quoting *Pittsburgh Press Co. v. Human Relations Comm’n*, 413 U.S. 376, 385 (1973)).

Even under the broader definition of *Central Hudson*,<sup>73</sup> prescriber-identifying information is not commercial speech, since such information is relevant to many things other than the economic interests of pharmacies and data miners, including (as the Vermont statute implicitly recognizes) such obviously non-commercial activities as medical research and enforcement regulation.<sup>74</sup> Finally, the fact that pharmacies were selling the data is clearly not sufficient to convert the speech into commercial speech. The Court explicitly so held in *Virginia Pharmacy*,<sup>75</sup> and this holding must be correct, or every sale of a book or newspaper would convert the underlying speech into less-protected commercial speech.

In the Vermont litigation, the Supreme Court was able to avoid resolving the constitutional status of information disclosure. The Second Circuit did reach the issue, but it assumed, without deciding (though it expressed doubt), that sales of information did constitute commercial speech, because it concluded the Vermont statute could not even survive the intermediate scrutiny applicable to commercial speech restrictions.<sup>76</sup> However, the First Circuit, in earlier litigation involving the parallel New Hampshire statute, did conclude that the sale of prescriber-identifying information constituted commercial speech.<sup>77</sup> This conclusion, however, was based on two analytic missteps. First, the court adopted the broader *Central Hudson* definition of commercial speech rather than the narrower *Virginia Pharmacy* definition, despite the fact that the Supreme Court's own decisions overwhelmingly prefer the narrower definition.<sup>78</sup> Second, the First Circuit then jumped to the conclusion that the speech here fits within the broader *Central Hudson* definition simply because in this instance the information was going to be used for commercial purposes.<sup>79</sup> But that cannot be right. The definition of commercial speech turns on the content of the speech being regulated, not the use that the listener plans to make of the information conveyed. If a newspaper publishes an article about the Arab

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73. *Central Hudson*, 447 U.S. at 562–63.

74. See *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2660 (2011) (quoting Vermont statutory language permitting disclosure of such information for research and compliance purposes).

75. *Va. Pharmacy*, 425 U.S. at 761.

76. *IMS Health Inc. v. Sorrell*, 630 F.3d 263, 274–75 (2d Cir. 2010).

77. *IMS Health Inc. v. Ayotte*, 550 F.3d 42, 54–55 (1st Cir. 2008).

78. *Id.* at 55; see also *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 367 (2002) (quoting *Edenfield v. Fane*, 507 U.S. 761, 767 (1993) (restating the *Virginia Pharmacy* test)); *United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001) (stating that commercial speech is “usually defined as speech that does no more than propose a commercial transaction”); *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 473–74 (1989) (describing the *Virginia Pharmacy* formulation as “the test for identifying commercial speech”); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983) (quoting the *Virginia Pharmacy* definition of commercial speech).

79. See *Ayotte*, 550 F.3d at 55.

Spring, and one reader uses the information solely to decide how to restructure her business activities in the Middle East, that does not convert the sale of the newspaper into commercial speech. Similarly, prescriber-identifying information has many non-commercial uses.

Thus the prescriber-identifying information regulated by Vermont is not commercial speech. Nor does it fall into any other category of “low-value” speech. None of the traditional categories, such as obscenity,<sup>80</sup> incitement,<sup>81</sup> threats,<sup>82</sup> or libel,<sup>83</sup> are even peripherally implicated by such information. And as noted earlier, in recent years the Supreme Court has explicitly rejected the view that courts can create new categories of unprotected speech through a balancing analysis, unless there is some historical basis for believing that such speech was not accorded full constitutional protection.<sup>84</sup> There does not seem to be any historical evidence that sales of factual information were treated as unprotected, and indeed, as discussed earlier, decisions of both the Supreme Court and lower courts almost always have assumed that factual speech receives full First Amendment protection.<sup>85</sup>

The implication of the above analysis seems clear. Under current law, the sale of specific information, including prescriber-identifying information, constitutes speech fully protected by the First Amendment. Furthermore, when regulations are imposed restricting the sale of specific types of information, they constitute content-based restrictions on speech, since such regulations inevitably describe the restricted information based on its informational content. Under long-standing Supreme Court doctrine, content-based restrictions on fully protected speech must survive strict scrutiny to be upheld against a First Amendment challenge.<sup>86</sup> Therefore, for a restriction on the disclosure of data to survive a constitutional challenge, it must survive strict scrutiny—i.e., the government must be able to prove that the law “is justified by a compelling government interest and is narrowly

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80. *See* *Miller v. California*, 413 U.S. 15 (1973) (holding that obscene material may be subjected to state regulation).

81. *See* *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (condemning a statute that punished advocacy and assembly).

82. *See* *Virginia v. Black*, 538 U.S. 343 (2003) (holding that a Virginia statute banning cross burning with intent to intimidate did not violate the First Amendment).

83. *See* *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (holding that the First Amendment extends to the press unless libel is established by actual malice).

84. *See supra* note 64 and accompanying text; *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2734 (2011).

85. *See supra* note 49 and accompanying text.

86. *Brown*, 131 S. Ct. at 2738.

drawn to serve that interest.”<sup>87</sup> We now turn to the profound implications of this seemingly straightforward conclusion.

#### IV. THE DEATH OF PRIVACY

To understand the practical significance of the legal analysis set forth in the previous part, it is worth considering the range of existing and potential regulations implicated by it. The starting point is to recognize that the above analysis is not limited to restrictions on prescriber-identifying information; it governs all information disclosure. In other words, all sales or disclosures of information in the possession of the speaker constitute fully protected speech under the First Amendment.

This category includes: personal medical information in the possession of health care providers; financial information in the possession of financial institutions; purchasing histories in the possession of retailers, including online retailers such as Amazon.com; search information in the possession of search engines such as Google; viewing information in the possession of firms such as Comcast and Netflix; and any number of other forms of personal data that individuals voluntarily share with private-sector firms. All of these forms of data fall within the analysis set forth in Part III, and therefore sales and disclosures of such data by their possessors constitute protected speech.

Tellingly, in the *Sorrell* litigation, the only real response provided by the dissent to this analysis was to argue that the prescriber-identifying data at issue was not protected because it was data generated pursuant to a regulatory mandate. Thus, the prescriber-identifying data was in essence (even if not literally) information belonging to the government, or at least information fairly subject to extensive governmental control.<sup>88</sup>

There are two problems with this argument. First, there are real reasons to question Justice Breyer’s leap equating data in the government’s possession with data created pursuant to government regulations. It is true, as Breyer argued, that prescription data exists only because the federal government requires physicians’ prescriptions for certain drugs, but to say, therefore, that the resulting information is the government’s property seems a big step with troubling implications. Does this mean that scientific data produced to comply with, say, FDA requirements of drug testing are also the government’s property, with little or no First Amendment protections?

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87. *Id.*

88. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2677 (2011) (Breyer, J., dissenting) (citing *L.A. Police Dep’t v. United Reporting Publ’g Corp.*, 528 U.S. 32, 40 (1999)).

The implications of this approach for free speech in heavily regulated industries seem quite significant.

Second, Justice Breyer's call for deferential constitutional review in *Sorrell* seems to be premised on a broader argument that when a regulation of speech is situated within a broader, and more extensive, framework of economic regulation, the speech regulation should be analyzed deferentially as essentially a species of economic regulation.<sup>89</sup> In fact, however, Justice Breyer advanced essentially the same argument almost ten years ago in *Thompson v. Western States Medical Center*, a case also involving speech in the pharmaceutical industry.<sup>90</sup> There the majority rejected this position, holding instead that the First Amendment requires the government to avoid speech restrictions as a means to achieve its regulatory goals, unless there are no effective alternatives.<sup>91</sup> And more generally, there seems to be more than an element of circularity in Justice Breyer's reasoning, which appears to permit the government to bootstrap an existing level of regulation into more regulation, even when it intrudes on constitutionally sensitive areas like free speech. For all of these reasons, the majority appears to have the better argument when it tentatively concludes that the First Amendment applies in full force to regulations restricting data disclosure such as the prescriber-identifying data at issue in *Sorrell*.

However, even if we accept Justice Breyer's premise that the existence of extensive economic regulation transforms a regulation of data disclosure (or of all speech?) into mere economic regulation, this argument is relevant only to a few, heavily regulated contexts such as prescription drugs. When Google tracks our searches, Amazon records our purchases, Netflix tracks our viewing habits, banks store our financial transactions, private websites track our clicks, and so forth, none of this is pursuant to a regulatory mandate. To the contrary, all of these instances involve private companies recording and maintaining data based on information that members of the public have voluntarily shared with them. And so even under the Breyer approach, such data is presumably entitled to full First Amendment protection. Thus, even accepting the dissent's broadest arguments in *Sorrell*, the majority's general approach towards data disclosure has broad and significant implications.

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89. *Id.* at 2675–76.

90. *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 389 (2002) (Breyer, J. dissenting).

91. *Id.* at 371–72 (majority opinion).

The question is then squarely posed: Can laws restricting the disclosure or sale of personal data in the possession of private firms<sup>92</sup> survive the strict scrutiny standard that current doctrine requires? Before turning to specific analysis, some preliminary facts must be taken into account. First, and perhaps most important, as of this date I am aware of only one valid Supreme Court precedent in which a majority of the Court has upheld a content-based regulation of speech under strict scrutiny: *Holder v. Humanitarian Law Project*.<sup>93</sup> *Holder*, moreover, involved circumstances quite distinguishable from data disclosure. There the Court upheld a federal statute banning the provision of “material support” to foreign terrorist organizations, as applied to assistance in the form of speech advising and training designated terrorist organizations on nonviolent methods of conflict resolution and other non-violent skills.<sup>94</sup> Although the Court applied “demanding” (presumably, though not explicitly, strict) scrutiny in the case,<sup>95</sup> the Court also deferred to the factual findings of the Executive and Congress because of the national security and foreign affairs context of the litigation.<sup>96</sup> Thus, the standard of review employed was clearly not traditional strict scrutiny.<sup>97</sup> In the data-disclosure context, however, presumably no such deference would apply.

Second, in a series of cases where the Court *has* adjudicated privacy issues, it has consistently held that the First Amendment generally invalidates laws that restrict the disclosure of truthful information on privacy grounds.<sup>98</sup> The Court has reached this conclusion even in cases

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92. This may include restrictions on prescriber-identifying information, restrictions on health or financial information, or hypothetically, future restrictions on information collected on the Internet such as search histories, purchasing histories, or the like.

93. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2724 (2010). In *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), the majority did uphold a restriction on campaign expenditures using corporate or union treasury funds under strict scrutiny, but that decision was overruled in *Citizens United v. Federal Elections Commission*, 130 S. Ct. 876, 913 (2010). Also, in *Burson v. Freeman*, 504 U.S. 191, 191 (1992), a plurality of the Court upheld a restriction on electioneering speech in the vicinity of a polling place after applying strict scrutiny, but this position did not secure majority support.

94. *Holder*, 130 S. Ct. at 2731 (considering assistance in the form of training designated terrorist organizations on non-violent methods of conflict resolution and other non-violent skills).

95. *Id.* at 2724.

96. *Id.* at 2727.

97. *Cf. Grutter v. Bollinger*, 539 U.S. 306 (2003) (deferring to the government in a case applying strict scrutiny in the equal protection context).

98. *See Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 496–97 (1975) (holding that the State of Georgia may not prohibit the publication of information obtained from publicly available judicial records); *Okla. Publ'g Co. v. Dist. Court*, 430 U.S. 308, 309 (1977) (striking down a pretrial order that enjoined the news media from publishing the name or picture of a child); *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 845 (1978) (invalidating a Virginia statute that imposed criminal punishment of persons for publishing truthful information about confidential proceedings); *Fla. Star v. B.J.F.*, 491 U.S.



where the information at issue was *highly* personal, such as the identities of rape victims<sup>99</sup> and juvenile defendants,<sup>100</sup> and the contents of personal cell phone conversations that were illegally intercepted.<sup>101</sup> Thus, historically the Court has not been very receptive to privacy claims in First Amendment litigation.

Given this background, and regular statements by the Supreme Court that content-based regulations of speech rarely survive strict scrutiny,<sup>102</sup> as a preliminary matter the odds certainly seem stacked against data-disclosure restrictions under current law. A closer examination of the details of the strict scrutiny test tends to confirm this sense. In order to survive strict scrutiny, as noted earlier, a law must advance a compelling governmental interest and be narrowly tailored.<sup>103</sup> Presumably, the general compelling interest that will be advanced to defend non-disclosure laws will be personal privacy. In some cases there may be ancillary interests at stake as well—in *Sorrell*, for example, the government’s interest in reducing health care costs.<sup>104</sup> However, such ancillary interests often will turn out after further consideration, as in *Sorrell*, to be nothing more than efforts to suppress speech because of its potentially persuasive effect; an interest the Court has repeatedly labeled illegitimate.<sup>105</sup> Privacy interests have the benefit of not falling into the trap of what the Court calls “this highly paternalistic approach,”<sup>106</sup> since they are not triggered by a concern that suppressed information will convince anyone. Privacy interests are thus clearly legitimate. But are they compelling?

In some instances, the answer is surely yes. It seems beyond peradventure that individuals’ interests in maintaining the secrecy of their financial transactions, or their personal health history, qualify as

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524, 526 (1989) (finding a Florida statute that imposed sanctions for publishing the name of a sex-crime victim unconstitutional under the First Amendment); *Bartnicki v. Vopper*, 532 U.S. 514, 518 (2001) (holding that disclosures by an illegally intercepted communication are protected under the First Amendment).

99. *Cox Broad.*, 420 U.S. 471; *Fla. Star*, 491 U.S. at 526.

100. *Okla. Publ’g*, 430 U.S. at 308; *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 98 (1979).

101. *Bartnicki*, 532 U.S. at 517–18.

102. *See Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2738 (“It is rare that a regulation restricting speech because of its content will ever be permissible.” (quoting *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 818 (2000))).

103. *See supra* notes 86–87 and accompanying text.

104. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2670 (2011).

105. *Id.* at 2670–72 (quoting *Edenfield v. Fane*, 507 U.S. 761, 767 (1993)); *see also Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 374–75 (2002) (holding that the potential persuasive impact of drug advertisements upon the pharmacist-customer relationship is not a legitimate governmental interest justifying a speech restriction).

106. *Thompson*, 535 U.S. at 375 (quoting *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 770 (1976)).

compelling, whatever the exact meaning of that term.<sup>107</sup> Even with respect to individuals, however, there are serious reasons to doubt whether there is a compelling interest in maintaining the privacy of *all* data regarding their personal habits. This is especially so when individuals have freely shared the relevant information with strangers other than tightly regulated professionals such as doctors and banks. For example, do individuals truly have a *compelling* interest in maintaining the privacy of their browsing habits, since they share those habits freely with myriad websites, and few individuals take steps to prevent those websites from tracking their clicks? Similarly, one might question the strength of individuals' privacy interests in purchasing habits, when individuals permit a vast array of websites (or for that matter brick-and-mortar stores, especially through the use of "club cards" and the like) to record and retain that information. Even when information is shared with a single entity, such as searches with Google and viewing habits with Netflix, given that individual customers freely permit companies to obtain, record, and use that information (in ways which benefit customers as well as the relevant company), there are serious reasons to doubt whether the privacy interests at stake rise to the level of compelling governmental interests.

Doubts about the strength of privacy interests become even more serious when one leaves the area of individual privacy. Consider, for example, the prescriber-identifying information at issue in *Sorrell*. The specific information at issue was what drugs individual doctors were in the habit of prescribing as part of their professional activities.<sup>108</sup> This information is not truly personal, as that term is generally understood; it is purely professional. It also cannot be considered fully private information, since the information is clearly relevant to research, professional regulation, and myriad other purposes. Finally, the information is freely shared not only with pharmacies, but also with regulators and researchers who have a legitimate use for the information. In that context, the idea of a strong privacy interest as traditionally understood appears dubious. Indeed, there are reasons to doubt whether privacy concerns are *ever* truly "compelling" outside of situations involving sensitive, personal information about individuals.<sup>109</sup>

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107. For a discussion of the commentary noting the Supreme Court's failure to articulate a coherent theory regarding the nature of "compelling" governmental interests, see Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CALIF. L. REV. 297, 307–08, 318–19 (1997).

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

109. *Cf. FCC v. AT&T*, 131 S. Ct. 1177, 1185 (2011) (holding that corporations do not enjoy "personal privacy" rights under the Freedom of Information Act).

The truth is that in the modern world of pervasive governmental regulation and disclosure requirements, few, if any, impersonal entities such as corporations or other business entities are likely to be in a position to claim privacy interests that are strong enough to satisfy the extremely stringent strict scrutiny test. This is not to say that the government will never have a compelling interest in preventing data disclosure other than to protect personal privacy. Certainly such a compelling interest exists with regard to military information, such as details on the design of a hydrogen bomb,<sup>110</sup> and perhaps such an interest even exists with respect to technical information about how to circumvent methods of protecting intellectual property.<sup>111</sup> But those interests are likely to be few and are unrelated to pure privacy concerns.

The inevitable conclusion from the previous analysis is that few laws preventing data disclosure to protect privacy are likely to survive the “compelling interest” requirement of the traditional strict scrutiny test. Even if a compelling interest can be found, to prevail the government must also demonstrate that the law at issue is “narrowly tailored.” That is to say it must demonstrate that there is no less restrictive alternative—no regulatory option which restricts less speech—available to accomplish the government’s objectives.<sup>112</sup> This requirement has proved almost inevitably fatal in modern First Amendment law, because it is almost always possible to envision *some* less restrictive alternative to the challenged statute. In the context of disclosure statutes, for example, any broad ban on disclosure is likely to be challenged with the argument that a narrower prohibition, or a restriction on the use of the data rather than a flat ban on disclosure, will suffice (though as the *Sorrell* case illustrates, such narrower restrictions may run into their own constitutional problems).

Moreover, as a normative matter, one might be concerned that if the Court were to water down the narrow-tailoring requirement of strict scrutiny for privacy statutes, such doctrinal tinkering will bleed over into other areas of law, especially in the lower courts. Therefore, even if one supports outcomes upholding privacy laws against First Amendment challenges, one might pause before advocating the position that privacy

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110. *Cf.* *United States v. Progressive, Inc.*, 467 F. Supp. 990, 997 (W.D. Wis. 1979) (granting an injunction to prevent publication of an article describing how to construct a hydrogen bomb).

111. *Cf.* *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 459–60 (2d Cir. 2001) (affirming an injunction against an Internet posting of “DeCSS” computer code for decrypting encrypted DVDs).

112. *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 813–15 (2000). Eugene Volokh has convincingly argued that sometimes strict scrutiny is not satisfied even when no less restrictive alternative exists. *See* Eugene Volokh, *Freedom of Speech, Shielding Children, and Transcending Balancing*, 1997 SUP. CT. REV. 141, 148–49, 165–66 (1997). However, even if we assume that the test is as the Court states it, as discussed in the text, it is an almost insurmountable barrier.

laws—which certainly protect important interests, but hardly ones fundamental to national well-being or social stability—satisfy the traditionally extremely speech-protective strict scrutiny standard.

Indeed, if one takes a step back, one realizes that the problem is more fundamental. Again, as a normative matter, is it truly convincing that laws restricting the disclosure of personal data always raise constitutional concerns of the same magnitude as content-based restrictions on political or literary speech? And concomitantly, is it really true that the First Amendment creates a strong, almost insurmountable presumption against such laws? This result is hard to accept as a matter of simple common sense. Yet that is where the Court's current free speech jurisprudence seems to lead us. What is needed is an escape from this doctrinal box.

#### V. RETHINKING FACTS AS SPEECH

In looking for a solution to the doctrinal conundrum described in this Article, a starting point might be found in the Supreme Court's cases dealing with the clash between personal privacy and the right of the press to report truthful news. As discussed earlier,<sup>113</sup> in a series of cases spanning almost thirty years, the Court has consistently rejected state efforts to punish (by criminal prosecution or tort liability) the disclosure of personal information in order to protect privacy. In these cases, however, the Court never adopted a blanket position rejecting all efforts to protect privacy.<sup>114</sup> Instead, it emphasized that the facts disclosed implicated a "matter of public significance," or "matters of public concern," and so the right to disclose them trumped any privacy concerns.<sup>115</sup> These decisions thus at least imply that there is some constitutionally relevant distinction between facts relevant to public affairs and purely private facts.

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113. See *supra* note 98 and accompanying text.

114. See *Fla. Star v. B.J.F.*, 491 U.S. 524, 533 (1989) (limiting the holding to "the appropriate context of the instant case"); *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 838 (1978) (rejecting plaintiff's claim "that truthful reporting about public officials in connection with their public duties is always insulated" from First Amendment claims); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491 (1975) (restricting the holding to the specific facts of the case and not privacy in general).

115. See *Fla. Star*, 491 U.S. at 533, 536–37 (finding that the prohibited media "involved a matter of paramount public import"); *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 103 (1979) (holding that when newspapers obtain information regarding a "matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order"); *Landmark Commc'ns*, 435 U.S. at 839 (stating that the Virginia Commission "is a matter of public interest, necessarily engaging the attention of the news media"); *Cox Broad.*, 420 U.S. at 491–92 (noting that the state may not impose sanctions on the publication of public legal documents because "the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice").

Nor are the privacy cases the only context in which the Court has drawn such a distinction. In its cases analyzing First Amendment limits on libel and defamation actions, the Court has explicitly drawn a similar distinction, clarifying that the speech-protective “actual malice” standard of *New York Times Co. v. Sullivan*<sup>116</sup> does not apply when the alleged libel did not involve a matter of public concern.<sup>117</sup> Similarly, in *Snyder v. Phelps* the Court relied on the “public or private concern” distinction to overturn a verdict for intentional infliction of emotional distress, finding that the speech at issue, though undoubtedly outrageous, was protected because it addressed public issues.<sup>118</sup> The “matter of public concern” limitation has also played an important role in the adjudication of government employees’ First Amendment rights because the Court has held that government employees enjoy rights under the free speech and petition clauses only when their speech or petitions involve matters of public concern.<sup>119</sup>

These cases would seem to suggest that the Court has drawn a sharp distinction in its First Amendment jurisprudence between speech on matters of public concern and private speech. However, the truth is rather more complex. While it is true that in certain, specific circumstances the Court has relied upon this distinction in adjusting the level of protection it provides to speech, this is not a universal principle. To the contrary, the Court has explicitly stated that speech concerning matters not of public concern is entitled to constitutional protection and does not constitute “low-value” speech.<sup>120</sup> Indeed, just this past Term the Court invoked its highest level of scrutiny to strike down a California statute banning the sale of violent video games to minors—speech that surely in most instances does not touch upon “matters of public concern.”<sup>121</sup> Instead, the Court’s attention to whether speech touches on issues of public interest seems reserved for situations where the public value of the speech is often limited, and the harm caused by the speech—and so the regulatory interests of the government—unusually powerful.

At least to date, the courts have not recognized factual speech—including the disclosure of personal data—to be such a category, where reduced protection should be provided to speech unrelated to matters of public concern. However, I have argued extensively elsewhere that the

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116. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

117. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 760–61 (1985) (plurality opinion); *id.* at 764 (Burger, C.J., concurring); *id.* at 774 (White, J., concurring).

118. *Snyder v. Phelps*, 131 S. Ct. 1207, 1215–16 (2011).

119. *Connick v. Myers*, 461 U.S. 138, 154 (1983); *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2491–92 (2011).

120. *Dun & Bradstreet*, 472 U.S. at 760; *Connick*, 461 U.S. at 147.

121. *Brown v. Entm’t Merchs. Ass’n.*, 131 S. Ct. 2729, 2738 (2011).

Court should reconsider its stance, and instead accord full First Amendment protection to specific, detailed facts only when the speech contributes meaningfully to the democratic process of self-governance.<sup>122</sup> Self-governance, it is important to emphasize, includes not just electoral politics, but myriad other forms of activities in which citizens gather, develop their values and ideas, and communicate those ideas amongst themselves and to public officials.<sup>123</sup> I do not mean to reiterate those general arguments here but instead use them as a starting point and explore their implications in the specific context of data disclosure.

The disclosure of personal data seems an area clearly and especially ripe for analysis under this modulated approach. The disclosure of large amounts of data, especially personal data, generally has no real connection to self-governance no matter how broadly that concept is defined. The purchasing habits, the viewing habits, the web-surfing habits, and personal financial and medical details of specific individuals surely do not implicate the democratic process in any meaningful way. This is true even if *aggregate* figures derived from such information may well be highly relevant to public policy. For that matter, the prescriber-specific information at issue in *Sorrell* also seems completely unrelated to public policy or the democratic process even though aggregated data may well have significant public policy implications, such as whether current policy inappropriately discourages the use of generic drugs.

At the same time, disclosure of data, especially personal data, threatens great social harm. That personal privacy is an important value, worthy of legal protection, is an idea that has been widely accepted in our society since at least the 1890 publication of Brandeis and Warren's classic article on the right to privacy.<sup>124</sup> Moreover, the risks posed to privacy have mushroomed in the modern era, especially with the development of powerful computing and data-mining technology and the explosion of the Internet. Whereas once data disclosure might have threatened most (except for the few people whose private lives were deemed worthy of discussion in the media) individuals' privacy only in the rare situations where someone would bother to sift through the data, today such disclosures can lead to many private lives being exposed to the world. Add to this the modern phenomenon of identity theft, and the strong interest in maintaining privacy is obvious.

Finally, and critically, it seems clear that the government's reasons for regulating the disclosure of personal data generally are not in conflict with,

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122. Bhagwat, *Details*, *supra* note 47, at 41–53.

123. *Id.* at 43–44.

124. Louis Brandeis & Samuel Warren, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

and pose no threat to, the process of democratic self-governance. The reason why we protect personal data is not because the disclosure of such data threatens the government, or in some way leads citizens to come to believe in things that the government disapproves. Rather, it is to protect citizens against specific and tangible harms.

The argument in favor of adopting a measured approach in granting constitutional protection to the disclosure of personal data is thus, as a theoretical matter, quite powerful. Nor is this argument entirely without support in the case law. Arguably, the Court's invocation of the "matters of public concern" test in its privacy cases<sup>125</sup> constitutes an implicit recognition that at least this form of factual speech—disclosure of intensely personal details—is analogous to the speech of government employees. Both types of speech deserve the highest level of constitutional protection only when contributing to self-governance. Similarly, the First Circuit's decision in *IMS Health Inc. v. Ayotte*<sup>126</sup> upholding the New Hampshire statute regulating prescriber-identifying information, while doctrinally incoherent, seemed to rest upon an underlying, legitimate insight: that disclosures of factual data differ meaningfully from the sorts of political and artistic speech that historically have been the primary recipient of First Amendment protections. Indeed, as I have recounted elsewhere, there is broad evidence that courts in many cases have implicitly acknowledged that factual speech requires a distinct analytic approach different from the traditional protections provided to cultural, political, and more generally idea-focused speech.<sup>127</sup>

This is not to say that personal details that do not contribute substantially to self-governance should receive *no* constitutional protection. That seems an excessively stingy stance with respect to what is unquestionably speech; and in any event, as noted earlier, the modern Court has made clear its rejection of the methodology which would completely deny categories of speech constitutional protection.<sup>128</sup> Rather, such speech should be entitled to some lower form of protection—perhaps some form of intermediate scrutiny<sup>129</sup>—which would permit restrictions on data

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125. See *supra* note 98 and accompanying text.

126. *IMS Health Inc. v. Ayotte*, 550 F.3d 42, 64 (1st Cir. 2008); see *supra* notes 62–65 and accompanying text.

127. See Bhagwat, *Details*, *supra* note 47, at 59–60 (noting that courts have recently struggled with the application of modern First Amendment jurisprudence in cases where the speech at issue contains factual details).

128. See *supra* notes 63, 83 and accompanying text.

129. See Bhagwat, *Details*, *supra* note 47, at 68 (stating that "[i]ntermediate scrutiny, and an element of balancing, will enter the picture only after a determination has been made that the regulated speech" does not relate to self-governance).

disclosure, but only when the government can demonstrate strong regulatory interests that courts conclude outweigh the value of the speech.

With respect to personal data that discloses private facts about individuals, however, there seems little doubt that such strong regulatory interests do exist, for all of the reasons already discussed. Moreover, usually such disclosures make no meaningful contribution to self-governance, and so privacy regulation normally should survive intermediate scrutiny. Whether or not regulations designed to prevent disclosure of professional data, or data regarding corporations, would survive intermediate scrutiny is less clear given the reduced privacy interests in this context,<sup>130</sup> and is likely to vary depending on the circumstances.

On the specific issue of prescriber-identifying information, however, doctors' interests in maintaining the general confidentiality of their professional prescribing habits, even if that information is used for regulatory purposes, seem legitimate and substantial.<sup>131</sup> At the same time, the contribution made to self-governance by the disclosure of such information is clearly trivial or non-existent. As such, restrictions on the disclosure of such information probably should survive a reduced form of scrutiny. The Supreme Court majority's conclusion to the contrary in *Sorrell* was in part a product of the peculiar nature of the Vermont statute, which did not generally regulate disclosure, but only banned its use for marketing. However, it was also in part a product of the majority's failure to lighten its scrutiny in light of the lack of connection between the speech at issue and processes of democratic self-governance.

Finally, it should be emphasized that under my proposed approach, not all personal data would receive reduced constitutional protection. As discussed earlier, even if specific facts about individuals are unlikely in most instances to garner much protection, certainly aggregate data can be highly relevant to public debate and policymaking and should receive the highest level of protection. In addition, private facts regarding political and social leaders, including personal data that such leaders are not likely to want public, often will be relevant to self-governance since they provide an important tool for assessing the credibility of such figures.<sup>132</sup> And there may

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130. See *supra* note 107 and accompanying text.

131. See *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2683 (Breyer, J., dissenting) (discussing doctors' privacy interests).

132. Of course, to say that disclosure of such data is entitled to constitutional protection does *not* mean that either the public or the press is entitled to have access to such data in the first place, or that entities contractually bound to hold such data confidential can disclose it without fear of liability. *Cf.* *Cohen v. Cowles Media Co.*, 501 U.S. 663, 665 (1991) (holding that a plaintiff may recover damages for a newspaper's breach of confidentiality); *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984) (holding that a protective order entered pursuant to Fed. R. Civ. P. 26(c) does not offend the First Amendment so



even be situations where the disclosure of data regarding non-public figures will contribute to public debate or democratic processes, and so may be protected. For example, an argument can be made that the names and contact information of corporate executives, even though normally private, may become relevant to self-governance in the face of a corporate or regulatory scandal such as the AIG bonus controversy and subsequent protests of a few years ago.<sup>133</sup> Even with respect to political and social leaders, however, certain kinds of data, such as their credit card or bank account numbers, are surely not relevant to public debate and should be subject to control given the strong regulatory interests at stake. In short, there will be close cases, and judges will be required sometimes to make difficult judgment calls. But that seems a better outcome than that dictated by current doctrine, which threatens all legitimate privacy interests for reasons completely disconnected from the underlying purposes of the First Amendment.

#### CONCLUSION

In this Article I consider an important issue that was raised, discussed, but ultimately avoided in the Supreme Court's decision in *Sorrell v. IMS Health Inc.*<sup>134</sup>: What restrictions does the First Amendment place on the government's ability to limit or prohibit the disclosure of pure data to protect personal privacy? The issue could be avoided in *Sorrell* because the specific Vermont statute at issue in that case did not, as it happens, impose a general restriction on data disclosure for privacy reasons. Rather, it only restricted specific *uses* of regulated data, in order to advance state interests quite distinct from privacy concerns. The broader question of data regulation, however, is lurking in the wings of this and other litigation and is likely to pose difficult challenges for courts in coming years as the spread of the Internet drives legislatures to adopt increasingly stringent privacy laws.

While the *Sorrell* majority did not decide the data-disclosure issue posed in the case, it did address it in ways that strongly suggest the six Justices in the majority would treat such disclosures as fully protected speech. Moreover, this Article demonstrates that the majority's hints are fully justified by current Supreme Court doctrine. As currently interpreted

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long as it is limited to the context of pretrial discovery and does not restrict the dissemination of information gained from other sources).

133. James Barron & Russ Buettner, *Scorn Trails AIG Executives, Even in Their Own Driveways*, N.Y. TIMES, Mar. 19, 2009, at A1.

134. *Sorrell*, 131 S. Ct. at 2653 (2011).

by the Court, the First Amendment provides full constitutional protection to disclosures of even personal data, and so restrictions on such disclosures must survive strict scrutiny, a standard that has proven almost impossible to satisfy in the First Amendment context. As a consequence, under current law most statutes seeking to protect privacy by prohibiting data disclosure are likely to be invalidated.

In the balance of the Article, I suggest that this result reflects a serious weakness in current doctrine: the failure to recognize that factual speech is distinct from, and requires different constitutional analysis than, the sorts of political and cultural speech that have traditionally been the mainstay of First Amendment litigation. In particular, drawing on a number of areas of developed law, I argue that speech consisting purely of specific factual data regarding individuals should be considered to be fully protected under the First Amendment only if the speech meaningfully contributes to the process of democratic self-governance. Other data should remain protected, but under a lower standard of scrutiny, perhaps an intermediate standard incorporating an element of balancing. I also briefly explore how different kinds of privacy laws might fare under such an approach.

There is, however, a broader problem that underlies the specific issues of privacy and data addressed here. In the past several decades, the Supreme Court has adopted a broad approach to First Amendment protections, granting most forms of speech strong constitutional protection without much thought and narrowly limiting the power of courts to create new categories of unprotected or “low-value” speech.<sup>135</sup> That paradigm, however, is coming under great pressure, notably because of the ubiquity of massive computing power and easy access to the Internet. The result of these phenomena is that many kinds of speech, notably disclosure of personal data, can cause harm in ways and to a degree that was impossible until recently. In short, speech has become more powerful. In most contexts, this is of course a good thing. But at times it is not, because the power of speech can work ill as well as good. The modern Court, however, has simply failed to seriously consider whether and how current law needs to be adjusted to accommodate these changes. The proposal advanced here is a modest first step in this direction; but there is clearly much more work to be done.

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135. *See supra* note 63 and accompanying text.