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## **There and Back: Vindicating the Listener's Interests in Targeted Advertising in the Internet Information Economy**

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## There and Back: Vindicating the Listener's Interests in Targeted Advertising in the Internet Information Economy

Caitlin E. Jokubaitis\*

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**INTRODUCTION**

Targeted advertising—the process by which advertisers direct their message at a specific demographic—is neither a recent<sup>1</sup> nor an irrational phenomenon.<sup>2</sup> One industry executive has proclaimed it the “rare win for everyone” because it serves producers, advertisers, and consumers alike.<sup>3</sup> It should be no surprise that the Information sector of the online economy—particularly new and social media platforms<sup>4</sup> with robust access to consumer data—has structured revenue streams to

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\* J.D. Candidate, Columbia Law School, Class of 2019; B.A., Columbia College, Class of 2014; 2018-2019 Editor-in-Chief of the *Columbia Journal of Law & the Arts*. My deepest thanks to Professor Jeremy Kessler for his guidance and feedback during this project, to the editorial staff of the Journal for their thoughtful review, and to my family for their support and encouragement.

1. See Noah Bartolucci, *Exhibit Presents History of Targeted Advertising*, DUKE TODAY (Apr. 27, 2001), <https://perma.cc/4638-LUFQ>. The Perkins Library on the campus of Duke University presented “Moving Targets: Marketing to a Changing America (1890-2001),” a retrospective of targeted advertising.

2. Particularized appeals to consumers with a demonstrated interest or inclination to purchase a good or service are a rational economic decision on the part of the marketer with derivative benefits to the consumer. By providing that consumers who desire a good end up purchasing it, targeted advertising ensures the market “clears” and reduces deadweight loss.

3. See *If A Consumer Asked You, “Why Is Tracking Good?”, What Would You Say?*, ADEXCHANGER (Oct. 28, 2011), <https://perma.cc/UA67-55CG> (quoting David Nelson, Operations & IT Director, Unanimis.co.uk). But see Joseph Turow, Michael Hennessy & Nora Draper, *The Tradeoff Fallacy: How Marketers Are Misrepresenting American Consumers and Opening Them Up to Exploitation*, ANNENBERG SCH. FOR COMMUN (2015), <https://perma.cc/MAS9-9QJA>, discussed Part III, *infra* (concluding “most Americans do not believe that ‘data for discounts’ is a square deal.”).

4. Jason Pridmore & Lalu Elias Hämäläinen, *Market Segmentation in (In)Action: Marketing and ‘Yet to Be Installed’ Role of Big and Social Media Data*, 42 Historical Social Research / Historische Sozialforschung 103, 114 (2017), <https://perma.cc/58DW-Y5B2> (“Social media and new media are said to provide significant opportunities for marketers. Despite some reservations, these are seen to provide the potential for enhanced customer engagement particularly as these allow consumers to voluntarily self-segment in relation to a number of categories. These means of engagement and the ability of new technologies to track consumer behaviour have significantly contributed to the development of “big data.”) (internal citations omitted).

benefit from targeted advertising.<sup>5</sup> These platforms generate “substantially all of [their] revenue from advertising,” which in turn rely on active user engagement.<sup>6</sup>

The Internet Information Economy is premised on the free flowing exchange of data and limited barriers to its collection and transmission.<sup>7</sup> New and social media,<sup>8</sup> including Google, Facebook, and LinkedIn, sustain themselves on a quid pro quo exchange of monetizable user data for a wide array of nominally gratuitous services.<sup>9</sup> This free flow of data has revolutionized how marketers reach their desired audiences.<sup>10</sup> Advertisers are willing to pay a premium for targeted advertisements with the expectation that the investment yields dividends.<sup>11</sup> Currently, the technological prowess of new and social media platforms outpaces the existing regulatory landscape.<sup>12</sup> However, these businesses contend with risks relating to the

5. In its most recent annual filing, Facebook reported generating over \$40 billion in revenue. Facebook Inc., Annual Report (Form 10-K), 14 (Feb. 1, 2018). Although North American Facebook users account for roughly half of Facebook’s revenue, these accountholders only constitute 11.5% of its user base. The as of yet untapped users outside the United States and Canada provide Facebook and similar platforms with new growth sectors in Asia and other developing markets. See Felix Richter, *Facebook’s Growth Potential Lies Abroad*, STATISTA (Nov. 2, 2017), <https://perma.cc/XA5R-ZNPM>.

6. Facebook Inc., Annual Report (Form 10-K), 8–9, 14 (Feb. 1, 2018). Among its risk factors, Facebook lists diminished user experience “as a result of the decisions [they] make with respect to the frequency, prominence, format, size, and quality of ads that [they] display,” “terms, policies, or procedures related to areas such as sharing, content, user data, or advertising that are perceived negatively by [Facebook] users or the general public,” and “[u]nfavorable publicity regarding ... privacy practices ... the actions of [their] advertisers.” *Id.* In its filing, Facebook reported that it generated 98% of its revenue from third party advertisers. *Id.*

7. The term information economy, as distinct from a manufacturing economy, is one in which “information is the core resource for creating wealth.” Shoshana Zuboff, *The Emperor’s New Workplace: Information Technology Evolves More Quickly Than Behavior*, SCIENTIFIC AMERICAN, Sept. 1995, at 202, <http://www.nature.com.ezproxy.cul.columbia.edu/scientificamerican/journal/v273/n3/pdf/scientificamerican0995-190.pdf>. This Note modifies the term to emphasize how platforms available on the Internet have made it possible to approach a true information economy, where we no longer transact in goods and services but pay via information.

8. Pridmore & Hämäläinen, *supra* note 4 and accompanying text.

9. In February 2017, Facebook reported an average revenue per North American user of \$19.81, derived from monetizing user data. Alexei Oreskovic, *Facebook Now Gets Almost \$20 from Each US and Canadian User, Compared to Under \$5 at its IPO*, BUS. INSIDER (Feb. 1, 2017), <https://perma.cc/RR7N-B7PV>. While this Note alludes to the vast array of services championed under the Internet Information Economy model, it will focus on Facebook’s particular advertisement delivery system as a benchmark for proposing regulation.

10. Caitlin Dewey, *98 Personal Data Points that Facebook Uses to Target Ads to You*, WASH. POST (Aug. 19, 2016), <https://perma.cc/L5WD-KLE9>. In 2016, digital media displaced television in terms of revenues generated domestically, generating an estimated \$72.5 billion in sales. George Slefo, *Desktop and Mobile Ad Revenue Surpasses TV for the First Time*, ADAGE (Apr. 26, 2017), <https://perma.cc/38SQ-PC8U>; see also Sydney Ember, *Ads Evolve into New Forms as Media Landscape Shifts*, N.Y. TIMES (May 8, 2016), [https://www.nytimes.com/2016/05/09/business/media/ads-evolve-into-new-forms-as-media-landscape-shifts.html?\\_r=0](https://www.nytimes.com/2016/05/09/business/media/ads-evolve-into-new-forms-as-media-landscape-shifts.html?_r=0).

11. Julia Angwin, *The Web’s New Gold Mine: Your Secrets*, WALL ST. J. (July 30, 2010), <https://www.wsj.com/articles/SB10001424052748703940904575395073512989404>.

12. On April 10, 2018, Facebook’s CEO and founder, Mark Zuckerberg appeared before the Committees on the Judiciary and Commerce, Science and Transportation to testify in the light of the recent revelation that Cambridge Analytica had obtained the data of approximately 300,000 Facebook users by means of a quiz application. Senator Thune, Chairman of the Commerce Committee admitted to the purposeful delay in regulations: “In the past, many of my colleagues on both sides of the aisle have been

nature of targeted advertising, including the propensity to mislead consumers,<sup>13</sup> and concomitant concerns about user privacy.<sup>14</sup>

Acknowledging the ubiquity of targeted advertising and Internet Information Economy participants' market share and political will, this Note proposes several policies for regulating such data collection and transmission practices. Calls for regulations on targeted advertisements—particularly those linked to new and social media—are likely to be met with claims of a First Amendment violation, and invocations of the Commercial Speech Doctrine.<sup>15</sup> While the core of the Commercial Speech Doctrine captures speech *proposing* a commercial transaction,<sup>16</sup> it also encompasses “expression related solely to the economic interests of the speaker and its audience.”<sup>17</sup> Targeted advertising hosted on Internet Information Economy platforms poses a unique challenge to this paradigm. Its reliance on consumer data directly implicates the consumer more so than with “traditional” commercial speech.<sup>18</sup>

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willing to defer to tech companies' efforts to regulate themselves, but this may be changing.” Transcript of Zuckerberg's Senate Hearing, Wash. Post (Apr. 10, 2018), <https://perma.cc/8URT-XY9W>; see also Facebook Inc., Annual Report (Form 10-K), 16 (Feb. 1, 2018) (“[T]he application, interpretation, and enforcement of [U.S. federal and state and foreign laws and regulations] are often uncertain, particularly in the new and rapidly evolving industry in which we operate, and may be interpreted and applied inconsistently . . . For example, regulatory or legislative actions affecting the manner in which we display content to our users or obtain consent to various practices could adversely affect user growth and engagement.”).

13. Facebook, *Facebook Here Together (UK)*, YOUTUBE (Apr. 25, 2018), <https://www.youtube.com/watch?v=Q4zd7X98eOs>. In the spring of 2018, Facebook admitted to its users' data being compromised. In an effort to restore customer goodwill, Facebook released an advertising campaign in which Facebook employed the passive voice to describe the series of recent news items and pitfalls facing the company, seemingly to shift blame away from the company. The text of the campaign is excerpted in relevant part: “But then something happened. We had to deal with spam clickbait, spam, data misuse. That's going to change. From now on, Facebook will do more to keep you safe and protect your privacy.”

14. Tiffany Hsu & Cecilia Kang, *Demands Grow for Facebook to Explain Its Privacy Policies*, N.Y. TIMES (Mar. 26, 2018), <https://www.nytimes.com/2018/03/26/technology/ftc-facebook-investigation-cambridge-analytica.html>. A 2014 Pew Research Center study concluded, *inter alia*, that 80% of users expressed concern regarding data privacy, including access to personal data by third party entities, such as advertisers or businesses. Mary Madden & Lee Rainie, *Americans' Attitudes About Privacy, Security and Surveillance*, PEW RESEARCH CTR. (May 20, 2015), <https://perma.cc/9NYL-QUMJ>.

15. The Commercial Speech Doctrine grew out of a compromise to recognize certain, albeit limited, First Amendment protections for commercial speech but not to accord it the full panoply of protection reserved for ‘higher value’ political speech. See 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 499 (1996) (citing Laurence Tribe, *American Constitutional Law* §§ 12–15, 903 (2d ed. 1998) (“The entire commercial speech doctrine . . . represents an accommodation between the right to speak and hear expression *about* goods and services and the right of government to regulate the sales of such goods and services.”).

16. See Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech*, 76 VA. L. REV. 627, 638 (1990).

17. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 561 (1980). Commercial speech has also been as broadly defined as “[s]peech which promotes at least some type of commerce.” *Commercial Speech*, WEX, <https://perma.cc/65M4-CCZJ> (last visited Sept. 28, 2018).

18. See generally David Ingram, *Facebook Nears Ad-only Business Model as Game Revenue Falls*, REUTERS (May 4, 2017), <https://perma.cc/LPV4-ZCY7>; Melissa Block, *How Does Facebook Generate Ad Revenue*, NPR (Feb 1, 2012), <https://perma.cc/2JSC-YFVC>.

In order to develop an appropriate standard of review for potential regulations, this Note first addresses data collection and transmission methods in the light of the Supreme Court's jurisprudence regarding commercial speech. Although the Supreme Court considered data mining in the context of a commercial speech case in 2011, the Court ultimately left more questions open than answered.<sup>19</sup> Rather than confront the commercial speech question directly, the Court in *Sorrell v. IMS Health Inc.* invalidated a patient privacy law on viewpoint discrimination grounds and applied "heightened scrutiny" without further elucidation. In acknowledging the narrow grounds on which the case was decided, the Court motioned to the status of data collection and transmission as a contentious open issue for future cases to address, including whether data flows qualify as speech.<sup>20</sup> Circuit court decisions have concluded that *Sorrell* did not rewrite commercial speech jurisprudence. Instead, the intermediate scrutiny test announced in *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York* continues to be good law.<sup>21</sup>

However, *Sorrell* showed that a growing contingent of Justices are inclined to find incidental burdens on speech that trigger First Amendment analysis as a way to avoid reading regulations as primarily addressing economic concerns. Effectively, these members of the Court have chiseled away at the government's ability to promulgate regulations on commercial speakers. Simultaneously, the Court has broadened the scope of its inquiry when striking regulations. Whereas in its nascence, commercial speech was judged through the lens of the consumer, the Court has begun to give more heft to the interests of the commercial speaker.<sup>22</sup> While neutral in theory, listener and speaker interests may not always align so congruently.

The critical concern for regulators in the Internet Information Economy post-*Sorrell* is whether there exists an appropriate balance between the speaker's interest in data collection and transmission and the consumer's interest in privacy and receiving accurate information without running afoul of the First Amendment. The ability to manipulate direct-to-consumer messaging via data collection and transmission challenges the original conceit of the Commercial Speech Doctrine to *increase* consumer information and to *prevent* fraud and coercion. Indeed, the government has largely ceded any regulatory imperative to the Internet Information Economy platforms themselves, without creating a satisfying oversight mechanism.<sup>23</sup>

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

20. *Id.* at 579 ("The capacity of technology to find and publish personal information, including records required by the government, presents serious and unresolved issues with respect to personal privacy and the dignity it seeks to secure.").

21. Although *Sorrell* notably used the phrase "heightened scrutiny" as applied in a commercial speech case, the intermediate framework has long since been subject to threat. *Id.* at 586. See Martin H. Redish & Kyle Voils, *False Commercial Speech and the First Amendment: Understanding the Implications of the Equivalency Principle*, 25 WM. & MARY BILL RTS. J. 765, 774 (2017) ("The Supreme Court has not upheld governmental suppression of truthful commercial speech in more than twenty years.").

22. See generally Leslie Kendrick, *Are Speech Rights for Speakers?*, 103 VA. L. REV. 1767 (2017).

23. For example, the December 2017 vote by the Federal Communications Commission to end "Net Neutrality" represents further deregulation of the Internet, albeit towards specific entities, namely

This Note argues *first*, that the Commercial Speech Doctrine as currently conceived is an ill-fitting tool for resolving difficult free speech questions in the context of data, privacy, and the modern Internet Information Economy. The application of the Commercial Speech Doctrine to a particular economic interaction should not be a nigh-complete bar to the regulation of Internet platforms that profit from data collection and transmission.<sup>24</sup> For this reason, qualified constitutional protection appropriately accounts for the speaker's interests while not short-changing those of the listener/consumer. This Note proposes that regulators and reviewing tribunals consider the context surrounding the data collection and transmission process, including: method of collection, relationship between miner and mined party, and whether the user has consented to such collection in justifying the relative need for regulation.<sup>25</sup> *Second*, in order to vindicate the Commercial Speech Doctrine's initial purposes, more transparency of data collection procedures for use in targeted advertising is warranted and indeed *possible* as a regulatory hook to protect consumers, despite the Court's move towards according *more* protection to commercial speakers.

In so doing, this Note builds upon Erin Bernstein and Theresa J. Lee's *Where the Consumer Is the Commodity: The Difficulty with the Current Definition of Commercial Speech*, which proposes that the "rise of new non-linear commercial transactions" necessitates a shift in the definition of commercial speech to accommodate the seismic change in the modern online economy.<sup>26</sup> The stakes are not inconsequential: failure to expand the scope of commercial speech would foreclose the use of many tools in a legislature's arsenal to address current concerns related to consumer privacy and eliminating advertisements that seek to capitalize on discriminatory indicia,<sup>27</sup> among other salient policy issues.<sup>28</sup>

Part I details the Court's jurisprudence regarding both personal solicitations and data practices and considers the shift away from a bifurcated speech paradigm that

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ISPs. See Brian Fung, *The FCC Just Voted to Repeal its Net Neutrality Rules, in a Sweeping Act of Deregulation*, WASH. POST (Dec. 14, 2017), <https://perma.cc/8Q9D-56XC>.

24. Cf. *Sorrell*, 564 U.S. at 567 ("[T]he First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech.")

25. In analyzing the nexus between data collection and transmission and commercial speech, this Note recognizes the argument in favor of finding that data collection ought *not* be regulated stems from the potential chilling effect on information collection. However, extending this argument to sweep in all data verges on *Lochnerizing* the very foundation of the modern Internet Information Economy and privileging the commercial speaker above all else. For a defense of this argument, see Jane Bambauer, *Is Data Speech?*, 66 STAN. L. REV. 57, 63 (2014).

26. Erin Bernstein & Theresa J. Lee, *Where the Consumer Is the Commodity: The Difficulty with the Current Definition of Commercial Speech*, 2013 MICH. ST. L. REV. 39, 41 (2013). The authors advocate for redefining "the commercial in an information economy." *Id.* at 71.

27. See Julia Angwin et al., *Facebook Job Ads Raise Concerns About Age Discrimination*, N.Y. TIMES (Dec. 20, 2017), <https://www.nytimes.com/2017/12/20/business/facebook-job-ads.html>, discussed *infra* (outlining concerns that Facebook's "microtargeting" advertising platform may violate Title VII of the Civil Rights Act of 1964 and the Fair Housing Act by systematically excluding certain viewers from advertisements based on their demographics).

28. Should commercial speech made by Google or Facebook be cabined to only that which "propose[s] a transaction," attempts to regulate these platforms will be scrutinized under a heightened standard for non-commercial speech. Bernstein & Lee, *supra* note 26, at 42–44.

treats commercial speech as speech of “lesser value.” Part II illustrates the most common forms of data collection and transmission. Part III locates these methods of data collection and transmission within the current commercial speech framework to conclude that qualified constitutional protection is the coherent tier of scrutiny that should apply. Part IV proposes policy recommendations that fit within the Court’s current approach to commercial speech and alternatives that would require a departure from the present doctrine.

## I. HISTORICAL ROOTS OF THE COMMERCIAL SPEECH DOCTRINE

Although commercial speech falls under the umbrella of the First Amendment, the Supreme Court has deemed it deserving of less than full constitutional protection. In *Central Hudson*, the Court announced an intermediate level of scrutiny test to be applied to regulations of commercial speech.<sup>29</sup> Provided that the speech is neither misleading nor relates to unlawful activity, the regulation must: (i) further a “substantial” regulatory interest; (ii) be proportionate to that interest; and (iii) “directly advance” that interest.<sup>30</sup>

In order to analyze fruitfully any proposed regulation of data collection and transmission, this Note reviews the Court’s nebulous jurisprudence regarding targeted advertising. This Part also examines *Sorrell v. IMS Health Inc.*,<sup>31</sup> as it both represents the Court’s latest articulation of the applicable standards of review and indicates gaps that regulators might exploit. The basis on which *Sorrell* was decided does not make it binding precedent with regard to how future courts may evaluate a future commercial speech case. However, it is relevant in illustrating the modern Court’s discomfort with the bifurcated conception of commercial speech as intrinsically of lower value.

### A. JURISPRUDENCE RELATED TO PERSONAL SOLICITATIONS

Targeted solicitations predate modern digitized technology. Early case law evaluating the legality of targeting arose out of professionals soliciting prospective clients.<sup>32</sup> Despite the divorced factual scenario presented in these early cases, the

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29. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 573 (1980) (Blackmun, J., concurring in the judgment) (alteration in the original) (“Under this four-part test a restraint on commercial ‘communication [that] is neither misleading nor related to unlawful activity’ is subject to an intermediate level of scrutiny.”).

30. *Id.* at 564 (majority opinion).

31. *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011).

32. *See Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 464 (1978). In *Ohralik*, the Court upheld a prophylactic ban on an attorney’s in-person solicitations, finding a sufficiently “substantial” regulatory interest in corraling its bar licensees and protecting the public from harmful solicitation. In subsequent cases, the Court acknowledged the narrow holding of *Ohralik*, due in no small part to the “unique features” associated with the particular solicitations in the case—the petitioner attorney had solicited business from injured individuals lying in hospice. *Edenfield v. Fane*, 507 U.S. 761, 774 (1993); *see also Zauderer v. Off. of Disciplinary Counsel of Sup. Ct. of Ohio*, 471 U.S. 626, 641 (1985) (noting, among other things, that “[i]n-person solicitation by a lawyer . . . was a practice rife with possibilities for overreaching, invasion of privacy, the exercise of undue influence, and outright fraud” and “that in-person solicitation



principles articulated in evaluating the permissibility of regulations can apply to modern day targeted advertising.

In *Edenfield v. Fane*, the Court invalidated a ban on personalized solicitations sent by certified public accountants.<sup>33</sup> Broadly, the Court held that “the constitutionality of a ban on personal solicitation will depend upon the *identity of the parties* and the *precise circumstances of the solicitation*.”<sup>34</sup> In determining whether to uphold a ban on personal solicitation, the Court articulated a multi-factor balancing test examining: (i) whether the speaker is a “professional trained in the art of persuasion;” (ii) whether the speaker has an incentive to act responsibly when engaged in solicitation; (iii) the susceptibility of a listener to “manipulation,” which contemplates how sophisticated the listener is; (iv) whether the listener has an “independent basis” for evaluating the solicitation; (v) whether the listener has some existing professional relationship with the speaker; and (vi) whether the listener can rationally consider the advertisement as opposed to merely “acquiesc[ing].”<sup>35</sup>

The Court concentrated on protecting the interests of the *listener*—in this case, the prospective future client.<sup>36</sup> As described below, the *Edenfield* factors can provide regulators a means to measure the viability of proposed legislation on Internet Information Economy platforms.

#### B. CONTEMPORARY JURISPRUDENCE REGARDING DATA: *SORRELL*

Although *Sorrell v. IMS Health* engaged the Court in a substantive examination of data collection and transmission methods, the grounds on which the Court decided the case renders it not binding precedent for commercial speech cases. However, it is instructive insofar as it reveals drafting pitfalls. In dicta, the Court impliedly questioned the continued viability of the *Central Hudson* intermediate scrutiny standard, leading to some confusion in lower courts.<sup>37</sup> In this respect, *Sorrell* continued the Court’s shift away from the categorical speech model that treats commercial speech as of lesser import, though it did not announce a doctrinal departure from settled case law.

*Sorrell* concerned a challenge to Vermont’s Prescription Confidentiality Law, designed to prohibit health insurers from selling, licensing, or exchanging “prescriber-identifiable information . . . for marketing or promoting a prescription drug” unless the prescribing doctor so consented.<sup>38</sup> Vermont passed the law in

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presents unique regulatory difficulties because it is not visible or otherwise open to public scrutiny” (internal citations omitted).

33. *Edenfield v. Fane*, 507 U.S. 761, 777 (1993).

34. *Id.* at 774 (emphasis added) (internal citations omitted).

35. *Id.* at 775–76.

36. *See* Part I.D, *infra*.

37. *See, e.g.*, *Retail Digital Network, LLC v. Appelsmith*, 810 F.3d 638 (9th Cir. 2016). The Ninth Circuit read *Sorrell* as requiring heightened scrutiny when evaluating “content-based restrictions on non-misleading commercial speech,” a departure from *Central Hudson*’s intermediate scrutiny. *Id.* at 642. The panel, however, was reversed in a hearing *en banc*. *See* *Retail Digital Network, LLC v. Prieto*, 861 F.3d 839 (9th Cir. 2017).

38. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 558 (2011).

response to a growing concern that pharmacies with access to patient prescribing information were selling this data to pharmaceutical marketers who would then target doctors.<sup>39</sup> Although data mining companies claimed that the law's treatment of prescriber data infringed upon their First Amendment rights, the legislature defended the regulation as a means to protect patient and doctor privacy and to reduce drug costs. Crucially, the law did not prohibit marketers from advertising at all. Rather, it sought to limit access to certain forms of information that marketers would rely on to make their advertisements more efficient without a doctor opting in to the system. The law did, however, permit patient collected data to be distributed to universities for research purposes and to insurance companies.

In their petition for certiorari, the state of Vermont broadened the scope of the legal issues to include the "burgeoning business" of "commercial data-mining."<sup>40</sup> The State framed the issue as one involving a law protecting and limiting access to non-public personal information, and argued that the First Amendment does not give license to data-mining companies accessing such private information.<sup>41</sup>

By contrast, the data-mining companies and advertisers highlighted the perceived restrictions on their ability to engage in commercial speech. Accordingly, the State was engaged in viewpoint discrimination by hampering their ability to communicate with prescribing doctors, while allowing the information to "be purchased or acquired by *other* speakers with diverse purposes and viewpoints."<sup>42</sup> The respondents were joined by a host of amici including representatives of the advertising industry who wrote to defend the use of data in modern advertising.

Ultimately, the Court glossed over the technological intricacies of data collection, instead finding both content- and viewpoint-based restrictions and subjecting the law to strict scrutiny.<sup>43</sup> As it determined the statute was deficient under both intermediate and heightened scrutiny, the Court did not rely on a *Central Hudson* analysis. Some commentators attributed this sidestep to the Court's traditional hesitancy to wade heavily into emerging areas of technology that may become outdated and to avoid fixing constitutional doctrine on such an unsteady foundation.<sup>44</sup>

As to whether data is speech, the Court broadly announced that "[t]he creation and dissemination of information are speech within the meaning of the First

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39. *Id.* at 576 (citing Vermont's legislative findings regarding the Patient Confidentiality Law). The legislature expressed concern that these marketing campaigns encouraged doctors to prescribe brand-name drugs that were more expensive than generics and that, based on an incomplete patient profile, might be less safe for patients.

40. Petition for Writ of Certiorari at 1, *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2007) (No. 10-779).

41. Brief for the Petitioner at 26, *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2007) (No. 10-779) ("The commercial use of nonpublic information is better described as commercial conduct than commercial speech.") Further, the opt-in mechanism preserved a doctor's ability to consent such that the law did not function as a blanket restriction prohibiting any dissemination to data-mining companies.

42. *Sorrell*, 564 U.S. at 564 (emphasis added).

43. Having read the law to impose both content and viewpoint discrimination, the Court concluded "there is no need to determine whether all speech hampered by § 4631(d) is commercial." *Id.* at 571.

44. Lyle Denniston, *Argument Preview: How Broad is the Right to Mine Data*, SCOTUSBlog (Apr. 22, 2011, 4:49 PM), <http://perma.cc/MR64-BVF8>.

Amendment.”<sup>45</sup> However, Justice Kennedy relied on three cases in support of this proposition—*Bartnicki v. Vopper*, *Rubin v. Coors Brewing Co.*, and *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*—none of which speak directly to how the data was used in *Sorrell*, nor how data is used in targeted advertisements. Ultimately, these three cases do not provide any clear bases on which lower courts could distinguish between data that receives full First Amendment protection and that which is only used in commercial purposes.

First, the Court principally relied upon *Bartnicki v. Vopper* for the proposition that transfers of information fall within the protections afforded by the First Amendment.<sup>46</sup> *Bartnicki* overturned provisions of a wiretap act that prohibited the disclosure of illegally intercepted communications. The Court held that “privacy concerns give way when balanced against the interest in publishing matters of public importance.”<sup>47</sup> However, communications involving discussions with a teacher’s union during collective bargaining negotiations has a different flavor of privacy than medical data—or even data used for personalized advertising—based on the former’s nexus to a matter of public concern. As it neither directly nor indirectly touches on the commercial speech doctrine, *Bartnicki* is better grouped with *New York Times v. Sullivan* and the First Amendment’s commitment to disseminating and removing obstacles to distribution of matters of public importance.<sup>48</sup>

Second, the Court relied on *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, a defamation suit involving false statements in a credit report.<sup>49</sup> The Court, applying *Gertz v. Robert Welch* and *New York Times v. Sullivan*, held that the assertions in the credit report were *not* matters of public concern. The Court in *Dun & Bradstreet* found that the speech at issue, while “not totally unprotected by the First Amendment,” enjoyed “less stringent” protections, in part because the credit report “concern[ed] no public issue,” and was demonstrably false and damaging.<sup>50</sup> While the plurality held a “credit report is ‘speech,’”<sup>51</sup> it did not find that credit reporting is *commercial* speech, despite requesting supplemental briefing on the issue.<sup>52</sup> *Dun & Bradstreet* stands for the proposition that privacy interests weigh more heavily in the context of private business interest rather than traditional public issue speech.

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45. *Sorrell*, 564 U.S. at 570.

46. *Id.*

47. *Bartnicki v. Vopper*, 532 U.S. 514, 516 (2001).

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

49. *Sorrell*, 564 U.S. at 570.

50. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 760–62 (1985) (plurality opinion).

51. *Sorrell*, 564 U.S. at 570.

52. See Richard L. Barnes, *A Call for a Value-Based Test of Commercial Speech*, 63 WASH. U.L.Q. 649, 688–92 (1985). Barnes walks through the arguments in favor and against finding that credit reports fall within commercial speech definition. The Court ultimately did not decide the case on this issue, applying *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) instead to classify the information contained in the reports as private speech. Barnes faults the Court for failing to capitalize on an “opportunity to synthesize the newly created private speech category with the commercial speech doctrine”.

Third, the Court cited *Rubin v. Coors Brewing Co.* to find that information on labels qualifies as speech.<sup>53</sup> *Rubin* invalidated a provision banning beer companies from displaying the alcohol content on labels. The law was intended to prevent “strength wars” between competing brewers, a tap from which deleterious consequences might readily flow.<sup>54</sup> The Court defended its holding on the basis of removing impediments to increase consumer access to information.<sup>55</sup> However, its relevance to the facts of *Sorrell* is quite limited, since *Rubin* did not address the privacy concerns raised in *Sorrell*.<sup>56</sup>

The few words spent on data specifically may actually prove a boon to those seeking to find a legally sufficient way to enact privacy legislation.<sup>57</sup> Indeed, the majority’s ending remarks acknowledge the narrow grounds on which *Sorrell* was decided, and just how much is left to be resolved regarding data mining: “The capacity of technology to find and publish personal information, including records required by the government, presents serious and unresolved issues with respect to personal privacy and the dignity it seeks to secure.”<sup>58</sup> The opinion provides only the barest advice for future regulators, with the majority stating, “In considering how to protect those interests . . . the State cannot engage in content-based discrimination to advance its own side of a debate.”<sup>59</sup> Vermont had gone too far.

Though the dissent only garnered three votes, it highlights the doctrinal clash between a growing First Amendment jurisprudence friendly to commercial speakers and the scores of economic regulations that will incidentally touch on speech. Justice Breyer’s dissent described the Vermont law as one “related to a lawful governmental effort to regulate a commercial enterprise.”<sup>60</sup> For this reason, there was no need to scrutinize the statute under the First Amendment.<sup>61</sup> Justice Breyer, joined by Justices Ginsburg and Kagan, took issue with the majority’s opening “a Pandora’s Box of First Amendment challenges to many ordinary regulatory practices that may only incidentally affect a commercial message.”<sup>62</sup> The dissent also noted that the majority’s categorization of the restriction as either “content-based” or “speaker-based” had never “before justified greater scrutiny when regulatory activity

53. *Sorrell*, 564 U.S. at 570 (citing *Rubin v. Coors Brewing Co.*) (“Both parties agree that the information on beer labels constitutes commercial speech.”).

54. *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 479 (1995).

55. *Id.* at 484.

56. In an overview of its commercial speech doctrine, the Court emphasized “the free flow of commercial information is indispensable to the proper allocation of resources in a free enterprise system because it informs the numerous private decisions that drive the system.” *Id.* at 481 (citing *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976)).

57. See Agatha M. Cole, Note, *Internet Advertising After Sorrell v. IMS Health: A Discussion on Data Privacy & the First Amendment*, 30 CARDOZO ARTS & ENT. L.J. 283, 285 (2012).

58. *Sorrell*, 564 U.S. at 579.

59. *Id.* at 579–80.

60. *Id.* at 580–81 (Breyer, J. dissenting).

61. *Id.* at 602 (Breyer, J., dissenting) (“The speech-related consequences here are indirect, incidental, and entirely commercial.”).

62. Breyer further invoked *Lochner*, concerned that the majority was getting close to “substituting judicial for democratic decision-making where ordinary economic regulation is at issue.” *Id.* at 602–03 (Breyer, J. dissenting) (internal citations omitted).

affect[ed] commercial speech.”<sup>63</sup> The split within the Court reveals the disagreement between those justices ready to extend more First Amendment protections to all speakers—removing the artificial divide between commercial and non-commercial speech—and those who would view such a move as upending much of the current regulation on commerce.

### C. APPROACHES TO COMMERCIAL SPEECH CASES POST-*SORRELL*

Following *Sorrell*, the conclusion is that *Central Hudson* remains untouched as the lodestar of commercial speech analysis. An alternative reading of *Sorrell* suggests a shift in the Court’s jurisprudence that seeks to provide further constitutional protections to commercial speakers.<sup>64</sup> As support, the Court alluded to the viability of Commercial Speech Doctrine in *Matal v. Tam*, decided in 2016, where it held that the disparagement clause of the Lanham Act violated the First Amendment.<sup>65</sup> As in *Sorrell*, the majority opinion and Justice Kennedy’s concurrence centered on the untenable viewpoint discrimination ensconced in the Trademark Act.<sup>66</sup> Having identified viewpoint discrimination, the Court could dispose of the case without reaching commercial speech issues.<sup>67</sup>

Both Justice Alito, writing for the majority, and Justice Kennedy intimated that the challenges in defining commercial speech can limit the applicability of an intermediate scrutiny analysis. Both Justices endorsed tightening the prongs of *Central Hudson* in order to squeeze out what has formerly been treated as commercial speech.<sup>68</sup> In this way, an intermediate scrutiny standard can be manipulated to be functionally equivalent to a strict scrutiny analysis.<sup>69</sup> The Court has implicitly laid the foundation for eradicating the categorical carve-out accorded to commercial speech.<sup>70</sup> Uncertainty over the reach of commercial speech permits classifying speech on the margin as non-commercial.<sup>71</sup> Further, fear of failing to

63. *Id.* at 588 (Breyer, J., dissenting).

64. David H. Gans, *Sorrell v. IMS Health: Corporate Commercial Speech in the Age of Citizens United*, CONST. ACCOUNTABILITY CTR. (June 24, 2011), <https://perma.cc/USS5-J825>.

65. *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017).

66. *Id.* at 1768 (Kennedy, J., concurring in part and concurring in the judgment) (“To permit viewpoint discrimination in this context is to permit Government censorship.”).

67. Justice Kennedy’s concurrence bypasses any application of *Central Hudson*. Finding that the disparagement clause presented an irreconcilable instance of viewpoint discrimination, the Court applied heightened scrutiny. *Id.* at 1767.

68. *Id.* at 1769 (Thomas, J., concurring in part and concurring in the judgment) (“I continue to believe that when the government seeks to restrict truthful speech in order to suppress the ideas it conveys, strict scrutiny is appropriate, whether or not the speech in question may be characterized as ‘commercial.’”).

69. Redish & Voils, *supra* note 21, at 774 (“Indeed, it seems that, in almost all facets, the Court now affords truthful commercial speech virtually as much First Amendment protection as it does noncommercial speech.”).

70. Commentators have questioned whether there still exists any wiggle room between the “Court’s modern view of *Central Hudson*,” which employs a stringent narrow tailoring articulation, and strict scrutiny. See Case Comment, *Matal v. Tam*, 131 HARV. L. REV. 243, 250–51 (2017).

71. “If affixing the commercial label permits the suppression of any speech that may lead to political or social ‘volatility,’ free speech would be endangered.” *Matal*, 137 S. Ct. at 1765.

protect speech against government encroachment doctrinally presumes deregulation is the preferable course. The implication is that, should such an approach continue to garner a minimum of five votes, the Court will downplay the concerns of Justices Breyer, Kagan, and Ginsburg regarding the continued viability of economic regulations that implicate—however tangentially—speech interests.<sup>72</sup> Post-*Matal*, regulations of commercial speech seeking to withstand the current Court's searching scrutiny must thread a very thin needle.

However, seven years after the Court handed down the *Sorrell* decision, circuit courts continue to apply *Central Hudson*, despite the Court's application of "heightened scrutiny."<sup>73</sup> Some circuits have read *Sorrell* as tacking on a predicate inquiry prior to applying *Central Hudson*, whereby the Court must first determine whether the restriction is content or speaker based.<sup>74</sup> But regardless of this "two step," the *Central Hudson* framework remains viable provided that challenged regulations do not fatally engage in viewpoint discrimination.<sup>75</sup>

#### D. SPEECH FOR WHOSE BENEFIT, THE SPEAKER OR THE LISTENER?

The bulk of First Amendment jurisprudence derives from the importance of protecting the interests of the *speaker*. Commercial speech, by contrast, takes the perspective of the *listener* into account. Early on, the Court vindicated "the particular consumer's interest in the free flow of commercial information," and struck regulations it deemed too paternalistic.<sup>76</sup> Motivated by the premise that a listener ought to have access to necessary and factual information that would enable autonomous decisions,<sup>77</sup> the Court blessed regulations that policed false and

72. See *Sorrell*, 564 U.S. 552 (Breyer, J., dissenting); *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2234–35 (2015) (Breyer, J., concurring in the judgment) (articulating a series of instances where "speech regulated by government . . . inevitably involves[s] content discrimination, but where a strong presumption against constitutionality has no place" including, *inter alia*, regulation of securities, prescription drugs, income tax statements, and signs at petting zoos).

73. See *Retail Digital Network, LLC v. Prieto*, 861 F.3d 839, 841 (9th Cir. 2017) ("*Sorrell* did not modify the *Central Hudson* standard."); *Ocheese Creamery LLC v. Putnam*, 851 F.3d 1228, 1235 (11th Cir. 2017); *1-800-411-Pain Referral Serv., LLC v. Otto*, 744 F.3d 1045 (8th Cir. 2014); *Educ. Media Co. v. Virginia Tech v. Insley*, 731 F.3d 291 (4th Cir. 2013); *United States v. Caronia*, 703 F.3d 149 (2d Cir. 2012).

74. *Ocheese Creamery*, 851 F.3d at 1235 n.7; see also *Caronia*, 703 F.3d at 163–64 ("*Sorrell* engaged in a two-step inquiry." (internal citations omitted)).

75. At the district level, see *Vugo, Inc. v. City of Chicago*, 273 F. Supp. 3d 910, 916 (N.D. Ill. 2017) ("[W]hile the Court applied 'heightened' scrutiny to the commercial speech restrictions in *Sorrell*, it is far from clear that this standard differed from the one *Central Hudson* requires.").

76. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 431–32 (1993) (Blackmun, J., concurring) (quoting *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 763 (1976)).

77. See *Lamont v. Postmaster Gen.*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring) ("I think the right to receive publications is such a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.").

deceptive commercial information.<sup>78</sup> In his concurrence in *City of Cincinnati v. Discovery Network, Inc.*, Justice Blackmun derived the “lesser protection” for commercial speech from “the listener’s First Amendment interests.”<sup>79</sup>

Per the Court’s initial conceit, commercial speech should be accorded fewer constitutional protections because the *speaker* does not enjoy the same dignitary and democratic interests that flow from other modes of First Amendment speech or conduct. Commercial speech, unlike non-commercial, is objectifiable, and the veracity of the speech can be deduced. Because a profit motive renders it “hardy,” commercial speech requires fewer constitutional protections.<sup>80</sup> Professor Robert Post opined that commercial speech is accorded some protections, not because it permits the speaker and listener alike to engage in “democratic legitimacy,” but merely because it facilitates an informational exchange.<sup>81</sup> Per Post, the Supreme Court has established a legal taxonomy that privileges “public discourse” among First Amendment values.<sup>82</sup> Chief among the First Amendment purposes is safeguarding the ability of citizens to criticize robustly the state and to remove impediments to such discourse. Commercial speech, in this model, does not advance a democratic system so regulations of it are less troubling.

The opposing view argues that, even in the absence of strong speaker interests, commercial speech should not be denied the full panoply of constitutional protections.<sup>83</sup> In advocating for the leveling up of constitutional protections for commercial speakers, Professor Martin Redish questions depressing the level of scrutiny based purely on a speaker’s “self-interest, economic or otherwise.”<sup>84</sup> Professor Redish theorizes that, for no other reason than an “ideologically driven desire to penalize those who benefit from the *capitalistic system*,” jurisprudence singles out commercial speech.<sup>85</sup>

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78. *Discovery Network, Inc.*, 507 U.S. at 432 (Blackmun, J., concurring) (citing *Bates v. State Bar of Arizona*, 433 U.S. 350, 383 (1977)) (“A listener has little interest in receiving false, misleading, or deceptive commercial information.”).

79. *Id.* at 434 (Blackmun, J. concurring).

80. *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 n.24 (1976).

81. Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CALIF. L. REV. 2353, 2371–72 (2000).

82. *See also* *Bd. of Trs. v. Fox*, 492 U.S. 469, 477 (1989) (internal citations omitted) (“Our jurisprudence has emphasized that commercial speech enjoys a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values.”).

83. *See, e.g.*, Nat Stern & Mark Joseph Stern, *Advancing an Adaptive Standard of Strict Scrutiny for Content-Based Commercial Speech Regulation*, 47 U. RICH. L. REV. 1171, 1172 (2013) (arguing that strict scrutiny would provide a “more coherent approach than *Central Hudson*’s oft-criticized multi-pronged test” and would ensure that commercial speech is no longer seen as the “doctrinal stepchild” in First Amendment jurisprudence); Martin Redish, *Commercial Speech and the Values of Free Expression*, CATO INST. POL’Y ANALYSIS, No. 813 (June 19, 2017) (praising the Court’s trend “to extend commercial speech protection to the point that it is rapidly approaching a level of constitutional insulation”), <https://perma.cc/P7HB-YHRH>.

84. Redish, *supra* note 83, at 11.

85. *Id.* (emphasis added).

Professor Redish defends the “catalytic role that the corporate form plays in fostering individual self-realization.”<sup>86</sup> As support, he locates the corporate form in Jacksonian democratic theory, which allowed the American everyman to limit his liability to compete on a wider stage. Commercial speech is not devoid of value simply because it is bound up in economics. Nor should the status of a speaker as a participant in commerce somehow result in his enjoying fewer protections. A formal conception of commercial speech inextricable from profit maximization glosses over the nuances otherwise present in First Amendment analysis. Further, such an approach ignores the permeability between commercial and non-commercial speech in practice.

In the last four decades, the Court has gradually dialed up the protections accorded to commercial speakers. In *Lorillard Tobacco Co. v. Reilly*, the Court focused on the interest of speakers—tobacco retailers and manufacturers—in “conveying truthful information about their products.”<sup>87</sup> Commentators have noted this trend of commercial speakers toward reframing challenges to regulations under First Amendment cover.<sup>88</sup> Professor Frederick Schauer has termed this strategy, “First Amendment opportunism.”<sup>89</sup> Tilting its hand toward speakers, the Court has toughened the *Central Hudson* prongs and raised the bar for the government to clear.

Ultimately, however, neither Post’s nor Redish’s frameworks of the Commercial Speech Doctrine maps in a satisfactory way onto the modern framework of targeted advertising—where the listener serves as a predicate provider of data to the speaker, in some instances without the listener’s knowledge. Here, the interests of the listener and speaker may be at odds without a satisfactory approach to reconciling this divergence. Further, to the extent commercial speech contemplates two discrete parties, it is inadequate to fit in the role of the service provider that connects the speaker and listener—but is itself motivated by commercial interests as well.

## II. DATA COLLECTION

This Part details methods of data collection and transmission in the Internet Information Economy. Such platforms present unique challenges to regulators and to the First Amendment given that the commercial activity of these innovative platforms fully implicate the listener. The targeted advertising scheme contemplates three players: the user, the advertiser, and the social media platform—a data repository that can package user data into valuable “dossiers.”<sup>90</sup> First, information—specifically, user-inputted data—is valuable currency for sites such as Facebook and

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86. *Id.* at 7.

87. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 564 (2001).

88. See Jeremy K. Kessler, *First Amendment Lochnerism*, 116 COLUM. L. REV. 1915, 2002 (2016).

89. Frederick Schauer, *First Amendment Opportunism* (John F. Kennedy School of Government, Harvard University, KSG Working Paper No. 00-011, Aug. 2000), <https://perma.cc/J46Z-4PME>. Schauer posits that, following the New Deal, economic libertarians have abandoned lodging arguments based on incursions to economic liberty and now are much more inclined to challenge regulations on a First Amendment basis. For Schauer, the “First Amendment is the authority of choice when no authority is on point.”

90. See Bernstein & Lee, *supra* note 26, at 64–65.



LinkedIn.<sup>91</sup> The collection and transmission of data, insofar as data may be imbued with speech properties, functions as a structural obstacle to effective regulation. Second, these companies jettison the traditional framework for monetizing services. Rather than charge users access fees, the new model instead leverages user data to sustain the service. Given the first postulate that data has value, a conceptual “swap” of money for data is structurally coherent even if the user does not realize the implicit “cost.”<sup>92</sup> While new and social media do increase consumer welfare, that is not to the exclusion of their own financial interests.<sup>93</sup> Provided users continue to generate content, there is no likely natural end to the proliferation of targeted advertisements.

#### A. TYPES OF DATA COLLECTED

Advertising algorithms parse particular traits to match with data collected and transmitted via new and social media platforms. In short, every key stroke, comment, and disclosure of data functions as an “ad targeting attribute.”<sup>94</sup> Over time, with repeated user inputs and increasingly specific audience parameters, targeting can become “more fine grained.”<sup>95</sup> Demographic indicia enables an advertiser to collate, among other things, a user’s gender, income, employment, age,<sup>96</sup> geographic data reveals a user’s location; behavioral data analyzes a user’s browsing activity. According to Facebook’s Ad Manager platform, an interested marketer can tailor ads by selecting the relevant indicia from a score of potential data points.<sup>97</sup>

Additionally, Facebook and Instagram now allow advertisers to rely on “Personally Identifiable Information,” which includes the user’s name, email

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91. Facebook Inc., Annual Report (Form 10-K) (Feb. 1, 2018), <https://perma.cc/93SG-HYX8>. “In 2017, we continued to focus on our three main revenue growth priorities: . . . (ii) developing innovative ad products that help businesses get the most of their ad campaigns, and (iii) making our ads more relevant and effective through our targeting capabilities and outcome-based measurement.”

92. A user may be lulled into complacency when there is no hit to his wallet or may be led to attribute misplaced goodwill to companies who appear to generously donate their services.

93. Redish, *supra* note 83, emphasizes that a commercial nexus or co-motivation should not serve as grounds on which to deprive particular rights.

94. VICE News, *Everything You Need to Know About the Hidden Ways Facebook Ads Target You*, YOUTUBE (Apr. 13, 2018), <https://www.youtube.com/watch?v=EM11M2QUYjk>.

95. *Id.* (citing G. Venkatadri et al., *Privacy Risks with Facebook’s PII-based Targeting: Auditing a Data Broker’s Advertising Interface*, <https://perma.cc/B7LN-387F>).

96. For a time, advertisers on Facebook’s platform had the option to select such attributes as anti-Semitic when crafting their audience. Following reporting by ProPublica, Facebook removed those categories, defending their existence as created by an algorithm and acknowledging the need for increased human monitoring. *Id.*

97. Facebook Business, *Choose Your Audience*, <https://perma.cc/LW9P-L7ZQ> (last visited Feb. 21, 2018). Advertisers are precluded from explicitly tailoring along racial or ethnic lines. Despite this ostensible prohibition, advertisers have discovered a workaround that achieves roughly the same goal – targeting based on “affinity” or “interest,” whereby advertisers select interest categories that are predominately associated with one race. *Id.* See also J. Angwin et al., *Facebook (Still) Letting Housing Advertisers Exclude Users by Race*, PROPUBLICA (Nov. 21, 2017, 1:23 PM), <https://perma.cc/3ZC2-GTT9>.

address, and phone number.<sup>98</sup> So doing, advertisers can harness offline data requiring no user input or activity.<sup>99</sup>

## B. METHODS OF DATA COLLECTION

The following two sections survey data collection and transmission within the Internet Information Economy before focusing on Facebook's particular methods.<sup>100</sup> Online data collection for use in targeted advertising relies on proxies, drawing on a user's history and expressed preferences to deduce the most relevant advertisements.<sup>101</sup> Typically, such collection is via cookie installation on a user's Internet browser.<sup>102</sup> Cookies are small text files that a website places on the computer of any visitor to that site.<sup>103</sup> Their data gathering capacity ranges based on tracking duration and the quantity and quality of data collected.<sup>104</sup> The entity

98. G. Venkatadri et al., *Privacy Risks with Facebook's PII-based Targeting: Auditing a Data Broker's Advertising Interface*, tbl. 1, <https://perma.cc/B7LN-387F>.

99. *Id.* at 1. See also VICE News, *Everything You Need to Know About the Hidden Ways Facebook Ads Target You*, YOUTUBE (Apr. 13, 2018), <https://www.youtube.com/watch?v=EM1IM2QUYjk>.

100. Facebook makes for an appropriate case study given its market share within the Internet Information Economy and its business model. In April 2018, Facebook enjoyed a market value of roughly \$481 billion. VICE News, *Everything You Need to Know About the Hidden Ways Facebook Ads Target You*, YOUTUBE (Apr. 13, 2018), <https://www.youtube.com/watch?v=EM1IM2QUYjk>. After the release of its second quarter earnings in July 2018, Facebook suffered the largest fall in market capitalization in history—plummeting \$119 billion in a single day. Fred Imbert & Gina Francolla, *Facebook's \$100 billion-plus Route is the Biggest Loss in Stock Market History*, CNBC (July 26, 2018, 12:41 AM), <https://perma.cc/Q3TQ-X7S4>. As of the time of publication, that value has recovered to \$470 billion. Facebook, Inc. Class A Common Stock (FB) Quote & Summary Data, NASDAQ, <https://www.nasdaq.com/symbol/fb> (last updated Sept. 8, 2018).

101. Darla Cameron, *How Targeted Advertising Works*, WASH. POST (Aug. 22, 2013), <https://perma.cc/M9QR-LNEH>.

102. Sites may also install web beacons or flash cookies to assist in better tracking and collection. Web beacons assist advertisers in identifying whether their ad placed on another site appears. Joanna Geary, *Tracking the trackers: What Are Cookies? An Introduction to Web Tracking*, GUARDIAN (UK) (Apr. 23, 2012), <https://perma.cc/F74M-C83P>. In response to attempts to attach cookies, a user can set up an alert system. See Fed. Trade Comm'n, *Online Tracking*, CONSUMER INFO., <https://perma.cc/Q4AV-HCYR> (last visited Jan. 9, 2018).

103. *Internet Cookies*, FED. TRADE COMM'N, <https://perma.cc/LA8S-ALFB> (last visited Nov. 17, 2017).

104. 'Single-session' cookies assist in navigation while a user remains on the site and will only store information until the user exits the page. See Fed. Trade Comm'n, *Online Tracking*, CONSUMER INFO., <https://perma.cc/7XB4-Y4XL> (last visited Jan. 9, 2018). Session cookies allow a user to keep track of items in an online shopping basket; to permit the user to submit complaints or fill out a survey; or to allow ease of navigation. *Internet Cookies*, *supra* note 103; see also Rodica Tirtea et al., *Bittersweet Cookies: Some Security and Privacy Considerations*, ENISA, <https://perma.cc/2D3K-77XB>. As such, single-session cookies do not pose many consumer privacy concerns. See John Barnes, *Internet User's Privacy Concerns May Mean Cookies Start to Crumble*, GUARDIAN (UK) (May 24, 2013, 9:48 AM), <https://perma.cc/VM53-WZHR> ("But the internet simply would not work without cookies—they are a fundamental currency of the internet, enabling web analytics as well as tailoring the online experience, compiling a browsing history and the rest."). 'Permanent' cookies attach to a user's hard drive and follow the user to subsequent visits to other sites. Scientific American, *Use of Cookies*, <https://perma.cc/HC9B-XF9Y> (last visited Jan. 9, 2018). An additional distinction is between 'first party' and 'third party' cookies. First-party cookies are placed by the website that a user is currently visiting. *Online Tracking*, *supra* note 102. By contrast, a third-party cookie is placed by a different domain than the website the user

responsible for placing that cookie can then construct a history and profile around the user for effective targeting.<sup>105</sup>

Cookies, however, are not compatible with mobile devices, forcing advertisers to adapt their data collection and transmission mechanisms. Computers, particularly household computers, are often shared, diminishing the effectiveness of targeted ads.<sup>106</sup> By contrast, mobile trackers rely primarily on unique “device identifiers” that allow advertisers to follow a user’s unique code, thereby solving an inherent verification problem with cookie usage.<sup>107</sup> In exchange for more personalized advertisements that appear on a mobile device, the consumer is exposed to more intrusive tracking.<sup>108</sup>

Access to Facebook and the site’s ability to amass data is predicated on a user disclosing personal information, which is aggregated for future advertising matches. Initially, Facebook supplemented the data keyed into its site by partnering with third-party websites to obtain user browsing history.<sup>109</sup> Data-mining firms that amass user data based on cookies, information gathered from government records surveys, and private sources<sup>110</sup> can match their user profile to the Facebook generated profile. This maps into a robust profile of any user.<sup>111</sup> As of the time of publication, Facebook has announced that it will cease integrating with third party data brokers.<sup>112</sup> Although Facebook will no longer serve as the junction receiving input from both the data broker and the advertiser, nothing precludes the data broker from rerouting the data to feed the advertiser directly for advertisements that will be curated for and displayed to Facebook users.<sup>113</sup>

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is on, which can include an Internet Information Economy platform, and functions largely as a tracker device. *Id.* The collected information is relayed automatically to the domain that placed the cookie the social media site. Support, *Disable Third-party Cookies in Firefox to Stop Some Types of Tracking by Advertisers*, MOZILLA, <https://perma.cc/XJF2-82YH> (last visited Jan. 9, 2018).

105. Google uses permanent cookies to measure user’s activity on a site. Per a study presented at the Federal Trade Commissions’ “PrivacyCon” in 2016, Google and Facebook topped the list of entities with the greatest potential for online tracking. Ibrahim Altaweel et al., *Web Privacy Census v3.0*, TECH. SCI. (Dec. 2015), <https://perma.cc/WD9W-ADHK>.

106. At the same time, most advertisers are aware of how appendage-like smart-phone devices have become. Failing to capture the market segment of those who spend a vast majority of their Internet browsing time online via their phone as opposed to on a computer would represent a significant value loss.

107. Donna Hong, *5 Reasons Why Mobile Device ID Tracking is the Future of Marketing*, BRIDGE (Oct. 6, 2016), <https://perma.cc/J5W4-EC9G>.

108. *Id.* (“The mobile device ID is a powerful piece of information because it’s a window into the most used device by consumers. Gaining insight into how they are spending their time on mobile (app downloads, app usage, etc.) is extremely valuable to understanding their interests, media preferences, and consumer behaviors.”).

109. Dewey, *supra* note 10.

110. Kashmir Hill, *Facebook Joins Forces with Data Brokers to Gather More Intel About Users for Ads*, FORBES (Feb. 27, 2013, 3:11 PM), <https://perma.cc/8F6V-QXAS>.

111. *What is Your Facebook Data Worth?*, REUTERS (June 21, 2010), <https://perma.cc/3BQU-9TU7>.

112. VICE News, *Everything You Need to Know About the Hidden Ways Facebook Ads Target You*, YOUTUBE (Apr. 13, 2018), <https://www.youtube.com/watch?v=EM1IM2QUYjk>.

113. *Id.*

### C. METHODS OF DATA TRANSMISSION

Broadly speaking, advertisements reach consumers via an intermediary auction platform.<sup>114</sup> Data is sold to advertisers and ad-networks through an auction either by contracting directly with websites or with Internet Service Providers (ISPs).<sup>115</sup> Facebook and Google each host their own auction, where the winner proposes the most relevant advertisement, not the highest bid.<sup>116</sup> Recently, Facebook and Google rolled out the “Custom Audience” feature to their respective advertising interfaces. An advertiser uploads “Personally Identifying Information” about a *user* that the advertiser desires to target specifically. This powerful targeting system inverts the traditional model by enabling the advertiser to select specific users *ex ante*, as opposed to drilling down by attributes.<sup>117</sup> Across all methods of data collection, the underlying concern remains the relative lack of transparency about the process of reaching the consumer.<sup>118</sup>

### III. CONCEPTUALIZING DATA COLLECTION AND TRANSMISSION WITHIN CURRENT COMMERCIAL SPEECH DOCTRINE

The paucity of claims challenging data collection and transmission is commonly attributed to the claim that consumers willingly give up their data in a rational cost-benefit exchange.<sup>119</sup> However, a 2015 study conducted by the Annenberg School for Communication at the University of Pennsylvania found that consumers’ furnishing of their data may be explained by (i) a sense of resignation about the inevitability of

114. For a particularly helpful summation of the structure of these intermediary ad exchanges, see Shuai Yuan et al., *Real Time Bidding for Online Advertising: Measurement and Analysis*, ADKDD 2013, <https://perma.cc/C9SM-8FWR>. It is projected that over half of all online ads will be sold via RTB by 2018. Special Report, *Buy, Buy, Baby*, ECONOMIST (Sept. 13, 2014), <https://perma.cc/6DVH-JL98>.

115. Vincent Toubiana et al., *Adnostic: Privacy Preserving Targeted Advertising*, PROCEEDINGS NETWORK & DISTRIBUTED SYS. SYMP., Mar. 2010, at 3, available at <https://perma.cc/3BP3-YKEU>.

116. Facebook Business, *About the Delivery System: Ad Auctions*, FACEBOOK, <https://perma.cc/J9HN-RW2D> (last visited Nov. 17, 2017); see also Cade Metz, *How Facebook’s Ad System Works*, N.Y. TIMES (Oct. 12, 2017), <https://www.nytimes.com/2017/10/12/technology/how-facebook-ads-work.html>. Metz’ article describes the blurring between advertisement and ‘content’ that appears on a Facebook user’s page. Facebook’s auction algorithm is responsible for handling both advertisements and organic content.

117. G. Venkatadri et al., *supra* note 98. Venkatadri and his co-contributors’ scholarship focuses on the privacy implications of relying on “Personally Identifiable Information” (“PII”). Their work describes how information about a user can be de-anonymized and identifies a spreading effect whereby knowledge of a user’s email address alone can be harnessed to reveal further personal information.

118. The most extreme version of this precise targeting manifested in ‘dark posts’ or unpublished posts whose viewership is controlled by the author but are otherwise unsearchable. *Id.* See also Pierre Omidyar, *6 Ways Social Media Has Become a Direct Threat to Democracy*, 35 NPQ 42 (Jan. 2018), <https://onlinelibrary.wiley.com/doi/epdf/10.1111/npqu.12123> (explaining how dark posts were used in the 2016 Presidential election). Facebook has since announced the end of dark posts, in a shift towards greater transparency. Garrett Sloane, *No More ‘Dark Posts’: Facebook to Reveal All Ads*, ADAGE (Oct. 27, 2017), <https://perma.cc/46DA-BQGA>.

119. Joseph Turow, Michael Hennessy & Nora Draper, *supra* note 3, at 7 (“Marketers enthuse over the idea that people’s acceptance of the general idea of tradeoffs justifies marketers’ collection of enough data points about consumers to lead to the kind of personalization Yahoo calls the pathway to advertising nirvana”) (internal citations omitted).

data collection and (ii) ignorance of the ways in which digital commerce operates and where the current legal regime fails to protect their interests.<sup>120</sup> The growth of personalized solicitations has eroded the democratizing effects of an open marketplace and undermined consumer autonomy.<sup>121</sup> The Annenberg study indicates that consumers are not receiving the types of information that Commercial Speech Doctrine seeks to guarantee.<sup>122</sup>

This Part weighs legal arguments in favor of increasing and decreasing protections for targeted advertising. Considering the philosophical underpinnings of commercial speech and lower courts' recent treatment of related cases, qualified constitutional protection best vindicates listener interests in data privacy and usage, and receipt of accurate information. Subjecting regulations to this tier of scrutiny addresses the current legal interstices and ensures informed consumer consent when furnishing data within the Internet Information Economy.

#### A. ADVERTISING INDUSTRY ARGUMENTS IN FAVOR OF "LEVELED-UP" SPEECH PROTECTIONS

An oft-cited justification for increased constitutional protections is the challenge in adequately distinguishing between commercial and non-commercial speech.<sup>123</sup> The advertising industry, joined by libertarian scholars, contends "[t]he First Amendment safeguards the *entire* communication process, including the gathering of data used to create a commercial or non-commercial message."<sup>124</sup> Narrowly defined commercial speech should capture only speech explicitly proposing a commercial transaction; speech outside of that scope is entitled to the full panoply of First Amendment protection.<sup>125</sup> The Supreme Court has been sympathetic to positing that *ex ante* raw user data does not "propose a commercial transaction."<sup>126</sup> Even applying *Central Hudson's* broader definition of commercial speech, data that

120. *Id.* at 8–9.

121. *Id.* at 19. Among the reported findings, the survey revealed fundamental misconceptions surrounding consumer choice. The survey highlights the existence of "tailored offers" which may not reflect the best price or option depending on a consumer's particular demographics.

122. *See Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 866–67 (1982) (op. of Brennan, J.) ("We have held that in a variety of contexts 'the Constitution protects the right to receive information and ideas.'") (quoting *Stanley v. Georgia*, 394 U.S. 557, 564 (1969)). In the commercial context, the audience's right to receive information exists as a predominant right, not one that is solely derived from the speaker's right to engage in commercial speech. The emphasis, thus, must always be on the audience and in ensuring that the audience receives factually true and not misleading information.

123. *See Nike, Inc. v. Kasky*, 539 U.S. 654, 657 (2003).

124. Brief for Nat'l Advertisers, Inc., American Advertising Fed. & American Ass'n of Advertising Agencies as Amici Curaie Supporting Respondents at 6, *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011) (No. 10-779) (emphasis added). *See also* Bambauer, *supra* note 25, at 63. Professor Bambauer argues "in every context relevant to the current debates in information law, data is speech. Privacy regulations are rarely incidental burdens to knowledge. Instead, they are deliberately designed to disrupt knowledge creation."

125. Brief for Nat'l Advertisers, *supra* note 124, at 7.

126. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. at 776, 777 (1976).

is in one form used for targeted advertising could have decidedly non-economic uses as well. For this reason, labeling data as commercial speech is under-inclusive.

Advertisers claim that regulations that render the targeted message less ‘individualized’ represent an untenable violation of the First Amendment. The Tenth Circuit has held that “a restriction on speech tailored to a particular audience, ‘targeted speech,’ cannot be cured simply by the fact that a speaker can speak to a larger indiscriminate audience.”<sup>127</sup> The court found impermissible restrictions on an advertiser’s ability to reach its desired audience by prohibiting the use of personal information to target consumers. However, no other circuits have expressly adopted the Tenth Circuit’s stance on restrictions to targeted advertising as constituting de facto impermissible burdens, and the D.C. Circuit has distinguished its approach to weighing regulatory interests under *Central Hudson*.<sup>128</sup>

A generous reading in favor of “leveling up” constitutional protections for consumer data draws strength from the interests of the speaker. Internet Information Economy platforms argue that such data practices are not merely economic but are imbued with other speech properties and concomitant constitutional protections. The counter position does not deny that the ultimate commercial message is not deserving of First Amendment protections. Rather, as Professor Neil Richards prophesizes, finding data to be speech would result in “every restriction on the disclosure—not to mention the collection or use—of information [facing] heightened First Amendment scrutiny.”<sup>129</sup> Although the advertising industry and advocates for increased speech

127. *U.S. W., Inc. v. F.C.C.*, 182 F.3d 1224, 1232 (10th Cir. 1999). U.S. West challenged the FCC’s regulation obligating telecommunications companies to obtain consent prior to the companies’ using “customer proprietary network information” (CPNI) in marketing initiatives. In applying a *Central Hudson* analysis, the Court narrowly read the government’s asserted privacy right as avoiding “undue embarrassment or ridicule” as a result of disseminating private information, ultimately finding this was not sufficient. *Id.* at 1235. Although the regulations did not cover the substance of what a company could say to its customers or limit the breadth of such messaging, the Tenth Circuit, in applying *Central Hudson* found the regulations impermissible “restrictions on speech.” In determining what was commercial speech, the Court included not only the marketing to the consumers, but also “intra-carrier” speech based on CPNI as “integral to and inseparable from the ultimate commercial solicitation.” *Id.* at 1233 n.4.

128. *See Nat’l Cable & Telecomms. Ass’n v. F.C.C.*, 555 F.3d 996, 1001 (D.C. Cir. 2009) (“[W]e do not share the Tenth Circuit’s doubt. For one thing, we have already held, in an analogous context, that “protecting the privacy of consumer credit information” is a “substantial” governmental interest, as *Central Hudson* uses the term); *Individual Reference Servs. Grp. v. F.T.C.*, 145 F. Supp. 2d 6, 42 (D.D.C. 2001); *Trans Union LLC v. F.T.C.*, 295 F.3d 42 (D.C. Cir. 2002) (distinguishing *U.S. West* as lacking a “satisfactorily articulated” concept of privacy).

129. Neil M. Richards, *Why Data Privacy Law is (Mostly) Constitutional*, 56 WM. & MARY L. REV. 1501, 1522 (2015). Though the Court in *Sorrell*—as explained in Part I.B, *supra*—left this important question of law open, some scholars, such as Professor Bambauer, argue privacy regulations are “deliberately designed to disrupt knowledge creation,” and therefore “presumptively illegitimate.” Bambauer, *supra* note 25, at 60, 70. That position concedes that such a rule would call into question almost every existing privacy regime. *Id.* at 61–62. However, for the purposes of this Note, both the Court and regulators can—as the Court did in *Sorrell*—side-step an ultimate determination as applied to legislation specifically aimed at targeted advertising. This Note instead identifies a situation in which contemplated privacy regulations, while they might incidentally burden some commercial speech, are not enacted with the desire—expressed or inferred—to curtail the creation or dissemination of information. As long as Internet Information Economy platforms continue to operate free of charge, they are fundamentally businesses seeking to advertise as effectively as possible. For these reasons, the ensuing analyses progress from the premise that much of the data at issue contains a commercial nexus and should

protections put forward attractive arguments, leveling up the protections structurally guts the potential for effective consumer protection.

### B. CLASSIFYING DATA COLLECTION AS ECONOMIC ACTIVITY

The appeal of classifying data collection and transmission as purely economic activity, rather than speech, is to obtain the lower rational basis judicial scrutiny of data regulations—rather than strict scrutiny, were it speech. This tier increases the likelihood that such regulations would be deemed constitutional.<sup>130</sup> The argument proceeds from finding that user data is non-expressive and therefore not speech. This is the argument Justice Breyer put forth in his dissent in *Sorrell*.<sup>131</sup> Recall that the alternate ground on which the case was decided means that *Sorrell* does not provide clear guidance on the viability of labeling data a commodity. Instead, the lack of binding precedent on this issue provides regulators some leeway.

Framing data collection and transmission as a passive economic activity treats the input of data into a platform as a mere exchange for access. As an exemplar for the ensuing legal analyses, this Note focuses on Facebook's practices.<sup>132</sup> Facebook bases its business model upon packaging user data into monetizable and discrete bundles of individualized consumer data. Facebook's intake of the initial data when a user first launches his or her profile is supplemented by tracking cookies and other software, which provide continuous forms of data collection back to the platform. Effectively, the user has paid in his or her data in order for access to the site. Each continued use functions as a credit to the service platform, which is now amassing a warehouse of particularized data.

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be evaluated under a separate First Amendment framework. Further, the specific *contents* of the advertisement are not themselves tailored to the individual; rather, it is the means by which the advertisement reaches the consumer, as determined by data collection and transmission practices, which are at issue.

130. See *United States v. Carolene Prod. Co.*, 304 U.S. 144, 152 (1938) (“[R]egulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.”).

131. See Part I.B, *supra*. The Court in *Sorrell* expressly declined Vermont's request that sales, transfers and use of prescriber identifying information be treated as non-expressive conduct not speech. In fact, the Court ruled that the outcome in the case would be the same regardless of whether it treated the information as a “mere commodity.” *Sorrell v. IMS Health*, 564 U.S. 552, 571 (2011).

132. At the outset, this Note flagged several recognized platforms that comprise the Internet Information Economy, namely, Facebook, Google, Instagram, and LinkedIn. Each platform operates in slightly different ways, whether as a difference in how ad buys are conducted, how the platform stores user data, and whether the platform sells the data directly to advertisers or retains it itself to serve as an intermediary ‘match-maker’ of sorts between user and advertiser. This Note will only emphasize Facebook. This selection was made for several reasons: primarily, the ubiquity of Facebook and the recent issues surrounding certain advertisements displayed on the platform have led to calls for some form of regulation of the platform directly. Second, Facebook's size and popularity worldwide make it a fitting subject of analysis. Third, given Facebook's penchant for acquiring smaller platforms (i.e. Instagram), many participants in the Internet Information Economy are currently or may become part of the Facebook ‘family.’ See *Price of Selected Acquisitions by Facebook as of July 2017 (in Million U.S. Dollars)*, STATISTA, <https://perma.cc/4EH7-RQUB> (last visited Jan. 9, 2018).

According full First Amendment protection to Facebook's data collection and transmission risks overly insulating a commercial transaction from necessary economic regulation. Instead, Facebook serves as a broker for advertisers to facilitate the transmission of information. Matching advertisers with users is not an expressive speech act but an economic arrangement, categorically distinct from use of the platform to advance political ideas. Although the users may be engaged in speech, it does not necessarily follow that Facebook, the platform, is engaged in speech production or expressive conduct per se. For example, the user's act of liking a politician's public page indicates an endorsement of that figure.<sup>133</sup> The analytical gap occurs in claiming Facebook is speaking when, as a result of user activity, that user's data is used to service a relevant ad buy. The argument delineates speech from Facebook's algorithmic pairing. However, this framework falters given the jurisprudence concerning computer source code holding that the code itself can garner First Amendment protection.<sup>134</sup>

There remains a fundamental obstacle to classifying data as economic activity. Commodities which may appear divorced from speech have, based on a nexus to First Amendment protected conduct, been accorded First Amendment protection. For example, the Court held an ink and paper tax violated the First Amendment based on the burdens it imposed on print media.<sup>135</sup> Similarly, circuit courts have concluded that computer source code is "an expressive means for the exchange of information and ideas about computer programming," warranting First Amendment protections.<sup>136</sup>

The doctrinal move to label Facebook-user interactions purely economic appears unlikely to garner support either in the Court or among regulators for two reasons: (i) prior precedent counters against a bright-line pronouncement that subjects data to mere economic regulations,<sup>137</sup> and (ii) the Court tends to classify borderline conduct as worthy of speech protections, in the interest of erring on the side of promoting speaker interests. The end-stage commoditization of a user's activity does not rob a user's activity of its inherent speech quality. In *Bland v. Roberts*, the Fourth Circuit held that a "like" on Facebook both "constituted pure speech" and "symbolic expression" in the context of local government officials who had "liked" the

133. This hypothetical roughly maps onto the facts in *Bland v. Roberts*, 730 F.3d 368, 386 (4th Cir. 2013). However, the same logic follows for endorsements of goods and services.

134. The difference between computer source code, as any series of computer instructions, and a Facebook algorithm that links the data to an advertisement is the latter's proprietary nature.

135. *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 591 (1983).

136. See *Junger v. Daley*, 209 F.3d 481, 485 (6th Cir. 2000). Junger sought to freely distribute encryption software on his website, which fell under the Export Administration Regulations and would require a license to distribute. After resolving that the code was in fact entitled to First Amendment protection, the court remanded for consideration of Junger's facial challenge to the Regulations. See also *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 449 (2d Cir. 2001) ("[W]e join the other courts that have concluded that computer code, and computer programs constructed from code can merit First Amendment protection.").

137. *Corley*, 273 F.3d at 446-47 ("Even dry information, devoid of advocacy, political relevance, or artistic expression, has been accorded First Amendment protection."); *Boelter v. Hearst Commc'ns, Inc.*, 192 F. Supp. 3d 427, 446 (S.D.N.Y. 2016).



Facebook page of a local political candidate.<sup>138</sup> The *Bland* court found the activity of liking the page to be the “Internet equivalent of displaying a political sign in one’s front yard, which the Supreme Court has held is substantive speech.”<sup>139</sup> The resulting inquiry is whether *ex ante* speech is stripped of its speech properties by virtue of its downstream uses. The hybrid nature of data, which both facilitates commercial transactions and retains some expressive aspects, suggests that neither full First Amendment protection nor lack of such protection is the appropriate path to chart. Instead, the next section considers a third alternative.

### C. DATA USED IN TARGETED SOLICITATION WARRANTS QUALIFIED PROTECTION

#### 1. The Intermediate Scrutiny Framework Vindicates Listener Interests

Commentators have expressed discomfort at the thought of online users unwittingly serving as fodder for commercial activity by virtue of participating in the new Internet Information Economy.<sup>140</sup> They contend the current bounds of commercial speech fail to reach business models that harvest data from users instead of charging a fee for service, but nevertheless engage in commercial activity.<sup>141</sup> Likewise, empirical research reveals consumer concern over a general lack of transparency over data practices.<sup>142</sup>

In keeping with the prevailing—though challenged—framework of applying reduced constitutional protections to commercial speech, three factors characterize the exchange of data used in targeted advertising between a service platform and an advertiser. First, data transmission for advertising exists in a transactional space. The exchanging parties each derive a benefit and are motivated by commercial gain. Second, the exchanged data pertains to private matters, or at least touches on matters of private concern.<sup>143</sup> To be sure, certain inputs that a user might include in a profile are publicly available, but the complete aggregation where a digital person emerges is distinct. There exists a spectrum of information that can be collected about an individual—ranging from the innocuous to the intrusive. The degree of privacy protections ought to be keyed to the degree of intrusiveness.<sup>144</sup> Third, the two-party matrix involving the Internet Information Economy platform and the advertiser excises the user. This section considers each of these factors in turn to support the conclusion that regulations on data collection and transmission ought not be accorded

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138. *Bland v. Roberts*, 730 F.3d 368, 386 (4th Cir. 2013).

139. *Id.*

140. *See* Bernstein & Lee, *supra* note 26.

141. *Id.* at 74. “[I]n the case of advertisements for free web-based services, the consumer is being commodified in a way that he or she might not realize, but that makes the transaction no less commercial.”

142. Turow, *supra* note 3, at 20–21.

143. *See e.g.*, *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 760 (1985) (plurality opinion).

144. Privacy, in the Internet age, might be better reframed in light of the user’s expectations that certain actions or material shared will not be later used by a third party.

full First Amendment protection, but rather fit within the scope of Commercial Speech Doctrine.

First, intermediate scrutiny is appropriate given that the end goal of a data exchange is to consummate a commercial transaction. The foregoing analysis draws on companion class action cases heard by the Southern District of New York in 2016 considering challenges to Michigan's Preservation of Personal Privacy Act (PPPA) and Video Rental Privacy Act (VRPA). Both state laws "restrict[] the sellers of certain products from disclosing the identity of individuals who purchase those products."<sup>145</sup> In *Boelter v. Advance Magazine Publishers Inc.*, the parties stipulated that the personal information that was disclosed to data miners and later sold in aggregated lists constituted speech.<sup>146</sup> The court nevertheless found that "even outside the advertising context, speech may in certain circumstances be subject to less stringent scrutiny based on its 'plainly commercial nature and effect,'" and applied intermediate scrutiny.<sup>147</sup>

In *Boelter v. Hearst Communications, Inc.*, the court emphasized the economic motivation undergirding the collation of consumer reports detailing "an individual's economic decisions . . . [and] elucidat[ing] an individual's economic preferences."<sup>148</sup> Data that is compressed into a readable format "facilitate[s] the proposal of new commercial transactions on the part of third parties."<sup>149</sup> Acknowledging the shift to an information currency model, the court found that the disclosure of data is "primarily, if not entirely—an economic act."<sup>150</sup> Implicit in this analysis is the sense that activity in the service of an economic transaction does not reach the lofty goals set out for full First Amendment protection.

Second, either approach of treating consumer purchase reports as effectuating privacy interests or as characterizing data as principally commercial lead to an application of intermediate scrutiny. In *Boelter v. Advance Magazine Publishers Inc.*, the court acknowledged, "[W]hether the sale of data to third parties for targeted solicitation of consumers is commercial speech appears to be an open question in the Second Circuit."<sup>151</sup> The general understanding, however, was that it warranted qualified protection.<sup>152</sup> The *Advance Magazine* court's approach to applying the intermediate scrutiny tranche is noteworthy because privacy considerations surrounding the data precluded a strict scrutiny analysis.<sup>153</sup> In light of the Supreme Court's continued discomfort with the scope of commercial speech, an emphasis on

145. *Boelter v. Hearst Commc'ns, Inc.*, 192 F. Supp. 3d 427, 445 (S.D.N.Y. 2016); *Boelter v. Advance Mag. Publishers Inc.*, 210 F. Supp. 3d 579, 586 (S.D.N.Y. 2016) ("Although drafted to reach a broader range of materials than the VPPA, the PPPA pursues a similar objective.").

146. *Advance Mag. Publishers Inc.*, 210 F. Supp. 3d at 597.

147. *Id.* (citing *Conn. Bar Ass'n v. United States*, 620 F.3d 81, 95 (2d Cir.2010)).

148. *Hearst Commc'ns, Inc.*, 192 F. Supp. 3d at 445.

149. *Id.*

150. *Id.* (internal citations omitted).

151. *Advance Mag. Publishers Inc.*, 210 F. Supp. 3d at 597.

152. *Id.* ("The conclusion that this speech should receive intermediate scrutiny is supported by several out-of-circuit decisions addressing laws limiting disclosure of personal information to marketers based on similar privacy concerns.").

153. *Hearst Commc'ns, Inc.*, 192 F. Supp. 3d at 446. See *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66–68 & n.15 (1983).

privacy interests may be a crucial component to effective regulation.<sup>154</sup> This finding holds in two respects: (i) strict scrutiny should not be the prism through which data regulation is evaluated, and (ii) privacy interests supply the significant government interest necessary for a regulation to surpass intermediate scrutiny.

Third, that the disclosure of consumer data is of interest only to a limited universe of persons supports extending qualified, rather than full, First Amendment protection. Robert Post's participatory conception of the First Amendment suggests that commercial speakers enjoy reduced protections because the speech does not promote a democratic function. Further, if the Commercial Speech Doctrine is intended to vindicate listener interests, the listener plays no active role in either collection or transmission of his data.

The appeal of preserving an intermediate scrutiny framework is twofold. Intermediate scrutiny, as opposed to leveling up to a strict scrutiny framework, acknowledges the indispensable role privacy plays in the exchange of the personal data. The test is flexible enough to accommodate a spectrum of data comprising varying degrees of privacy interests. Intermediate scrutiny balances Neil Richards' concern that the calls of *Lochner* in the Information Age will deny the government's ability to regulate data flows, and Jane Bambauer's readiness to launch a new paradigm for economic transactions that handicaps any regulation *ex ante*. To the extent data contains speech properties, rational basis is an inappropriate standard of review. Rational basis review is the most deferential standard, an acquiescence by the judiciary to the legislative process.<sup>155</sup> But when the legislature is engaged in curtailing speech, rational basis would undermine the *raison d'être* of the First Amendment as guardian of self-governance and robust critiques of institutions of power.<sup>156</sup> Privacy interests also caution against applying strict scrutiny to regulations seeking to cabin uses of personal data exchanged in a commercial context.

## 2. "Step 0" *Central Hudson* Analysis

The threshold inquiry for an application of qualified intermediate scrutiny is that the speech is lawful and not misleading. Speech failing to meet this requirement is filtered out from any application of the *Central Hudson* test. This section considers two nascent applications of data collection and transmission of questionable legality that have triggered pre-existing laws: (i) data scraping and (ii) data-driven discrimination.

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154. See Part I, *supra*, discussing the Supreme Court's application of an increasingly stringent *Central Hudson* test to invalidate recent commercial speech regulations.

155. See, e.g., Erwin Chemerinsky, *Challenging Direct Democracy*, 2007 MICH. ST. L. REV. 293, 305 (2007) ("Generally there's trust in the legislative process. So there's great deference to the legislative process; that's why rational basis is generally used. But in those instances where we're very distrustful of the legislature, well that's where strict scrutiny gets used. And if we're somewhat distrustful, but not as much, it's intermediate scrutiny.").

156. See, e.g., Post, *supra* note 81, at 2371–72.

a. *Data Scraping*

An open issue before the courts is the legality of “data scraping,” a process by which third parties use software code to gain access to a service platform and mass download data without either the service platform’s or the user’s express consent.<sup>157</sup> Cambridge Analytica’s mechanism of obtaining Facebook user data in Spring 2018 through a quiz application constituted a form of data scraping.<sup>158</sup> Challenges to the use of scraping tend to be lodged as violations of pre-existing anti-fraud, privacy, and copyright laws.<sup>159</sup> The Ninth Circuit is currently considering a high-profile appeal that could decide, among other things, the ownership of data placed on social media platforms. That case, *hiQ v. LinkedIn*, involves a start-up that deploys bots to scrape allegedly publicly available data from LinkedIn users’ profile pages.<sup>160</sup> As emphasized in an amicus brief, “[p]ersonal data is central to this case even though users are not represented in this proceeding.”<sup>161</sup> hiQ, represented by Professor Laurence Tribe, markets its business model as talent-management that is “informed by public data sources,”<sup>162</sup> including LinkedIn’s “public” data.<sup>163</sup> LinkedIn, represented by former Solicitor General Donald B. Verrilli, Jr., claims hiQ “expropriates member data from LinkedIn’s servers on a massive scale,” then profits off the sale of that data.<sup>164</sup>

157. Noortje Marres & Ester Weltevrede, *Scraping the Social: Issues in Live Social Research*, 6 J. CULTURAL ECON. 313, 313 (2013). Cambridge Analytica’s mechanism of obtaining Facebook user data in Spring 2018 via a quiz application constituted a form of data scraping.

158. In his testimony submitted to Congress, Facebook CEO Mark Zuckerberg admitted that third parties were able to scrape its users’ data. However, he reiterated Facebook’s policy prohibiting third parties from selling or licensing such data and from sharing that data “with any ad network, data broker or other advertising or monetization-related service.” *Facebook: Transparency and Use of Consumer Data: Hearing Before the H. Comm. on Energy and Commerce*, 115th Cong. (2018) (letter submitted by Facebook on June 29, 2018 in response to questions supplementing the record), <https://perma.cc/2XMJ-VPG5>. Numerous consumer privacy actions against Facebook and Cambridge Analytica flooded dockets across the country alleging that both that Cambridge Analytica “exploited Facebook’s platform to obtain user data” and that Facebook failed to impose “more robust controls . . . to prevent this conduct.” *In re Facebook, Inc., Consumer Privacy User Profile Litig.*, MDL No. 2843 (J.P.M.L. 2018). In June 2018, these actions were consolidated in the Northern District of California. *Id.* The District Court aggregated all relevant materials pertaining to the ongoing case, available at <https://perma.cc/SURB-PDG4>.

159. See *Power Ventures v. Facebook*, 138 U.S. 313 (*cert. denied* Oct. 10, 2017); *U.S. v. Auernheimer*, 748 F.3d 525, 529 (3d Cir. 2014) (hacker’s conviction was vacated on improper venue grounds after he scraped personal data that was publicly available by virtue of a glitch in AT&T’s code); *Associated Press v. Meltwater U.S. Holdings, Inc.*, 931 F. Supp. 2d 537, 541 (S.D.N.Y. 2013) (Meltwater used an automated system to “crawl” the Internet for news in order to compile an index. The Associated Press challenged the practice under the Fair Use doctrine.)

160. *hiQ Labs, Inc. v. LinkedIn Corp.*, 273 F.3d 1099 (9th Cir. 2018).

161. Brief of Amicus Curiae Electronic Privacy Information Center (EPIC) in Support of Neither Party Urging Reversal, *hiQ Labs, Inc. v. LinkedIn Corp.*, 273 F.Supp.3d 1099 (N.D. Cal. 2017) (No. 17-16783), <https://perma.cc/2XMJ-VPG5>.

162. *hiQ LABS*, <https://perma.cc/49FM-WEZS> (last visited Oct. 22, 2017).

163. *hiQ Labs, Inc. v. LinkedIn Corp.*, 273 F.Supp.3d 1099, 1103 (N.D. Cal. 2017) (order granting preliminary injunction).

164. Brief for Appellant, *hiQ Labs, Inc. v. LinkedIn Corp.*, 273 F.Supp.3d 1099 (9th Cir. 2017) (No. 17-16783).

The Northern District of California granted the preliminary injunction for hiQ, noting that “[t]he actual privacy interests of LinkedIn users in their public data are at best uncertain.”<sup>165</sup> It would not be unreasonable for users with a “public view” setting to expect that their information would be subject to data collection; in uploading information, the user may be relinquishing a privacy right.<sup>166</sup> The district court wrestled with the implications of according LinkedIn the authority to deny access to publicly available information as this move “could pose an ominous threat to public discourse and the *free flow of information promised by the Internet*.”<sup>167</sup>

The district court’s order is notable in another respect: it failed to find convincing hiQ’s First Amendment claim that LinkedIn is a public forum. Although hiQ obtained its preliminary injunction, it won by challenging the applicability of the Computer Fraud and Abuse Act (CFAA)<sup>168</sup> and state competition law, not the First Amendment. To be sure, the district court may have impliedly declined to reach the First Amendment question on constitutional avoidance grounds.<sup>169</sup> However, should the Ninth Circuit apply the CFAA to prevent unauthorized data scraping, it will reinforce a “step 0” inquiry whereby certain methods of data collection and transmission fall outside the scope of protectable speech.

*b. Discrimination in Housing and Employment Advertisements*

Certain data collection and transmission methods—particularly those that discriminate along age, racial, and gender<sup>170</sup> lines—can result in alleged violations of anti-discrimination statutes, including the Fair Housing Act and Title VII of the Civil Rights Act of 1964.<sup>171</sup> Socioeconomic targeting, whereby a consumer’s financial profile is gleaned by virtue of prior shopping habits, may also result in systematic exclusion of offers to certain consumers.<sup>172</sup>

165. *hiQ Labs*, 273 F. Supp. 3d at 1119. Despite hiQ’s argument, the district court declined to extend public forum analysis to the Internet to find LinkedIn is a ‘modern public square.’

166. *Id.* (“It is likely that those who opt for the public view setting expect their public profile will be subject to searches, data mining, aggregation, and analysis.”).

167. *Id.* (emphasis added).

168. Brief for Appellant at 32, *hiQ Labs, Inc. v. LinkedIn Corp.*, 273 F.Supp.3d 1099 (9th Cir. 2017) (No. 17-16783). The CFAA provides for liability for unauthorized access to computers.

169. *hiQ Labs*, 273 F. Supp. 3d at 1116.

170. In September 2018, the Communications Workers of America and individual job seekers, with the assistance of the American Civil Liberties Union, filed a complaint with the Equal Employment Opportunity Commission alleging Facebook’s ad platform discriminates against women and nonbinary people. The complaint alleges the platform violates *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Rels.*, 413 U.S. 376 (1973) (upholding a local ordinance banning sex designated advertising for employment opportunities). See *Comms. Workers of Am. et al. v. Facebook, Inc.* (Sept. 18, 2018), <https://perma.cc/2AYP-XWKM>.

171. The clash between First Amendment and anti-discrimination statutes is by no means recent. See, e.g., *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000); *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984).

172. Currently, socio-economic groups are not considered a constitutionally protected class. Julianne Pepitone, *Facebook Uses Offline Purchases to Target Ads*, CNN (Apr. 11, 2013), <https://perma.cc/UE4D-V4G6>. For more on targeted advertising based on price discrimination, see Exec. Office of the President, *Big Data and Differential Pricing*, (Feb. 2015), [https://obamawhitehouse.archives.gov/sites/default/files/whitehouse\\_files/docs/Big\\_Data\\_Report\\_None\\_mbargo\\_v2.pdf](https://obamawhitehouse.archives.gov/sites/default/files/whitehouse_files/docs/Big_Data_Report_None_mbargo_v2.pdf).

Facebook's "Exclude People" button enables advertisers to carve out their desired audiences.<sup>173</sup> A 2016 ProPublica study found that no mechanism exists "to prevent ad buyers from purchasing ads related to employment/housing and then excluding based on . . . illegal characteristics," such as race, sex, or religion.<sup>174</sup> In the light of this reporting, two class actions—including one filed by the National Fair Housing Alliance—are pending in federal court, each challenging "the functioning of Facebook's online advertising tools and alleged discrimination."<sup>175</sup> As of the time of publication, the plaintiffs in these actions have joined in settlement negotiations with Facebook, which might prevent a full accounting of Facebook's practices.<sup>176</sup>

Though Facebook maintains that Section 230 of the Communications Decency Act insulates it from liability,<sup>177</sup> it is the platform's algorithm that matches the advertisement with the audience.<sup>178</sup> The argument that Facebook has inserted itself in the commercial speech arena flows from finding that the algorithm has a speech-like quality akin to the computer code.<sup>179</sup> This threshold inquiry permits liability actions for violations of anti-discrimination statutes by determining Facebook has shed the role of a disinterested Internet server.

Customized advertising hosted online reflects a drastic shift from billboards and "the classifieds."<sup>180</sup> Online platforms offer the means to deny users access to advertisements that marketers have determined are "not of interest." This feature ensures a user might never discover such discrimination, robbing that user of a cognizable injury on which to stake a claim.<sup>181</sup> Concern about paternalism—filtering

173. Facebook Business, *About Detailed Targeting*, <https://perma.cc/9WYC-D7CA> (last visited Jan. 9, 2018). Part III.C, *supra* details information about Facebook's "Custom Audience" feature and "dark posts."

174. Compl. ¶ 32, *Mobley et al. v. Facebook, Inc.*, No. 5:16-cv-06440-EJD (N.D. Cal. Nov. 3, 2016) (emphasis added). See Compl. ¶¶ 59–71, *Nat'l Fair Hous. Alliance v. Facebook, Inc.*, 18-cv-2689-JGK (S.D.N.Y. Mar. 27, 2018). The NFHA complaint details how NFHA first made Facebook aware in 2016 of potential liabilities from using "ethnic affinity marketing," and Facebook's response in November 2016 that it would disable such a feature in credit, housing, and employment advertisements and would begin requiring advertisers to "self-certify" compliance with applicable laws. However, a year later, ProPublica reported that Facebook continued to approve discriminatory advertisements that that ProPublica's investigative team had tested. NFHA then opened its own independent investigation, culminating with its formal complaint. *Id.*

175. Joint Post-Mediation Status Report & [Proposed] Order, *Mobley et al. v. Facebook, Inc.*, No. 5:16-cv-06440-EJD (N.D. Cal. June 8, 2018) (referencing *Nat'l Fair Hous. Alliance v. Facebook, Inc.*, 18-cv-2689-JGK (S.D.N.Y. Mar. 27, 2018)). See Compl. ¶¶ 24–33, *Mobley et al. v. Facebook*.

176. *Id.*

177. Defendant's Mot. to Dismiss First Am. Compl. 4-14, *Mobley et al. v. Facebook, Inc.*, No. 5:16-cv-06440-EJD (N.D. Cal. Apr. 3, 2017) (Plaintiff's "allegations describe the classic sort of neutral tool protected by the CDA . . . which facilitate the publication of third-party content . . . [Such tools] are subject to CDA immunity even if the users committed their misconduct using such tools." (internal citations omitted)).

178. Facebook Business, *About the Delivery System: Ad Auctions*, <https://perma.cc/D6WM-FTLD> (last visited Feb. 21, 2018).

179. See, e.g., *Junger v. Daley*, 209 F.3d 481 (6th Cir. 2000).

180. Although advertisers selected the publication based on readership demographics, any potential customer could purchase the magazine or newspaper.

181. Compl. ¶ 33, *Mobley et al. v. Facebook, Inc.*, No. 5:16-cv-06440-EJD (N.D. Cal. Nov. 3, 2016). See also Compl. ¶¶ 3–5, *Nat'l Fair Hous. Alliance v. Facebook, Inc.*, 18-cv-2689-JGK (S.D.N.Y. Mar. 27, 2018) ("Discriminatory advertising is just as damaging as discrimination at the point of rental or sale.").

what pertinent information a consumer could receive—motivated the Supreme Court when deciding the early commercial speech cases. Here, a private actor, not the state, facilitates cognizable facial discrimination by preferentially selecting certain individuals for commercial and housing opportunities.

### 3. Privacy as a Substantial Government Interest

The qualified constitutional protection framework articulated in *Central Hudson* requires that the regulation further a “substantial” government interest. In the context of data collection and transmission, privacy interests are oft-cited grounds upon which to regulate.<sup>182</sup> That said, the Court has intimated that it is not wildly receptive to invocations of privacy as a defensible motivation for regulations which burden the exercise of the First Amendment.<sup>183</sup> Similarly, the Tenth Circuit has held that the government cannot merely “assert[] a broad interest in privacy” without some particular justification.<sup>184</sup>

But, as Professor Bhagwat notes, privacy interests are unlike the “highly paternalistic approach” which caused consternation among the Justices.<sup>185</sup> Concern over suppressing the public dissemination of truthful information largely motivated the Court’s decision in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*<sup>186</sup> Privacy, however, implicates the individual on a decidedly different basis than speech on “matters of public concern” or in non-targeted advertising.<sup>187</sup> Applying Post’s theory, the lack of self-governing principles does not warrant increased protections for user data, such as would suggest applying strict scrutiny to any proposed regulation.<sup>188</sup> Last, privacy exists on a spectrum, suggesting that successful regulations will articulate *particularized* privacy interests.<sup>189</sup>

182. See, e.g., *Nat’l Cable & Telecomm. Ass’n v. F.C.C.*, 555 F.3d 996, 1001 (D.C. Cir. 2009).

183. Ashutosh Bhagwat, *Sorrell v. IMS Health: Details, Detailing, and the Death of Privacy*, 36 VT. L. REV. 855, 880 n.98 (2012) (collecting cases where the Court invalidated laws restricting truthful information for privacy reasons); but see *Florida Bar v. Went For It*, 515 U.S. 618, 625 (1995) (“Our precedents leave no room for doubt that ‘the protection of potential clients’ privacy is a substantial state interest.”).

184. *U.S. W., Inc. v. FCC*, 182 F.3d 1224, 1234–35 (10th Cir. 1999). The Tenth Circuit added “privacy is not an absolute good because it imposes real costs on society. Therefore, the specific privacy interest must be substantial, demonstrating that the state has considered the proper balancing of the benefits and harms of privacy.” *Id.*

185. Bhagwat, *supra* note 183, at 871 (quoting *Thompson v. W. States Med. Ctr.*, 535 U.S., 357, 375 (2002)).

186. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 773 (1976) (“What is at issue is 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.”). The Court went on to note that a “consumer’s interest in the free flow of commercial information” may be “as keen, if not keener by far, than his interest in the day’s most urgent political debate.” *Id.* at 763.

187. The advertisements at issue in *Virginia Board* were non-targeted.

188. See Bhagwat, *supra* note 183, at 877.

189. Such disclosures of data in some instances may not implicate the same privacy concerns as other disclosures—compare data that illustrate music preferences with data that reveal sensitive financial or medical information.

#### IV. SOLUTIONS

In considering how to structure workable regulations to address issues raised by targeted advertising, the factors set out in *Edenfield v. Fane*<sup>190</sup> provide an instructive blueprint, more so than lessons gleaned from *Sorrell*. *Edenfield* considers, *inter alia*, (i) the identities of parties involved; (ii) the particular circumstances contextualizing the solicitation; (iii) whether the speaker is a “*professional trained in the art of persuasion*,” and (iv) whether the audience is liable to be manipulated.<sup>191</sup> These factors are flexible to accommodate the technological shift that has moved personal solicitations from the bedside of an accident victim to the screen of a Facebook user browsing on a personal device. Facially, distinctions between the two situations are readily available. However, the pervasive nature of certain Internet Information Economy platforms and the degree to which personal data can be amassed means that communications from such a platform can persist far longer than a mailer.

A proposal banning personal solicitations lacks practical and legal support. The Internet Information Economy ushered in a revenue model relying principally on advertising. This Note does not seek to uproot this paradigm by advocating that Facebook move to a subscription-based model. Such a solution would be an overreach and disfavored under constitutional avoidance. Nor would current users broadly embrace this change having grown accustomed to “free” services.<sup>192</sup>

Any proposal in this Part runs into criticisms of paternalism.<sup>193</sup> Indeed, the majority in *Virginia Board* grounded its analysis on vindicating the individual’s autonomy.<sup>194</sup> While the government’s purposeful intervention ought not to be blindly sanctioned, claims of paternalism ignore two fundamental differences between commercial and non-commercial speech. First, the commercial speaker, *de facto*, “distorts” dialogue with an audience.<sup>195</sup> Second, regulations of commercial

190. *Edenfield v. Fane*, 507 U.S. 761 (1993) (describing a framework for evaluating the constitutionality of personal solicitation bans).

191. *Id.*

192. One survey from 2013 found that only 15% of Facebook users would be willing to pay a subscription fee in exchange for seeing no advertisements. David Cohen, *Poll: 15 Percent of Facebook Users Would Pay to Avoid Ads*, ADWEEK (July 25, 2013) (citing Greenlight’s Search & Social Survey (2012-2013)). *Contra* Zeynep Tufekci, *Mark Zuckerberg, Let Me Pay for Facebook*, N.Y. TIMES (June 4, 2015), [https://www.nytimes.com/2015/06/04/opinion/zeynep-tufekci-mark-zuckerberg-let-me-pay-for-facebook.html?\\_r=0](https://www.nytimes.com/2015/06/04/opinion/zeynep-tufekci-mark-zuckerberg-let-me-pay-for-facebook.html?_r=0) (operating from the assumption that a subscription fee would be equivalent to the amount each user’s data package is worth to Facebook, currently around 20 cents).

193. See C. Edwin Baker, *Paternalism, Politics, and Citizen Freedom: The Commercial Speech Quandary in Nike*, 54 CAS. W. RES. L. REV. 1161, 1173 (2004), <https://perma.cc/HTM5-TV5S> (“[T]he government acts on the belief that a consumer cannot be trusted to take care of herself in deciding about tobacco use or gambling or buying from irresponsible cut-rate pharmacists, or to act in a socially responsible fashion in deciding on electricity usage, especially during periods of peak demand. Certainly, anyone who sees the underlying premise of the First Amendment to involve a demand that the government respect individual autonomy should find such paternalism offensive.”).

194. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

195. Baker, *supra* note 193, at 1174 (“Partly because the views of a commercial speaker are structurally determined, the state could reasonably want to exclude this speaker from the discourse—this was essentially John Stuart Mill’s suggestion . . . Of course, the exclusion might produce bad consequences—but evaluations of this type of trade-off is the normal task of legislative bodies.”).



speech need not chill speech. Rather, as detailed below, harnessing pre-existing legislative tools such as the Compelled Speech Doctrine works to *increase* speech, resulting in a more informed consumer audience.

## A. SOLUTIONS WITHIN THE CURRENT DOCTRINAL LANDSCAPE

### 1. Maintain the Current Self-Regulatory Framework

Currently, Internet Information Economy platforms self-regulate, having thus far resisted attempts to install a governmental oversight regime.<sup>196</sup> The benign neglect approach preserves the *status quo* by refusing to disrupt the technology disrupters. Facebook and similar entities could continue to rely on their algorithms, without requiring manpower oversight to sift through advertisements or uses of data.<sup>197</sup> No First Amendment interests are implicated under this model. This option delays determination of whether the data harvested for targeted advertising have speech qualities, resists criticism of government action as paternalistic, and avoids inquiring into whether consumers are sophisticated parties when sharing data.

But consumers would not be without recourse, even should the government opt not to intervene with a satisfying legal regime. In response to the “creep” of targeted advertising, various self-help remedies have emerged in the Internet space, including, *inter alia*, affirmatively deleting cookies<sup>198</sup> or installing ad blocker technology.<sup>199</sup> Plug-ins such as ad blockers function as band-aids—though they prevent the end stage commercial speech from reaching the consumer, they fail to restrict any actual data collection. Nevertheless, these patchwork solutions provide at least immediate

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196. In April 2018, Senators Klobuchar and Kennedy introduced a bipartisan bill seeking to impose new regulations on Internet Information Economy platforms. Social Media Privacy Protection and Consumer Rights Act of 2018, S. 2728, 115th Cong. (2d Sess. 2018) (hereinafter Social Media Privacy Act), <https://perma.cc/3BYX-LQUZ>. The proposed legislation contemplates solutions that are found throughout this section of the Note, including increased disclosure regarding to what ends data is used, requirements to alert users in the event of mishandling of their data. The bill likewise provides that a user may at his discretion “withdraw consent to the terms of service . . . as easily as the user is able to give such consent.” *Id.* at Sec. 3(a)(3)(A). As of the time of publication, the bill has yet to pass through either Congressional body.

197. Such complete hands-off monitoring seems increasingly unlikely. See discussion of anti-Semitic attributes, *supra* note 96. Facebook has indicated that it will make greater use of human monitors, despite the capital costs.

198. See Part II.B, *supra*.

199. See, e.g., the “Privacy Badger” plug-in released by Electronic Frontier Foundation. PRIVACY BADGER, <https://perma.cc/WXB5-N8MA> (last visited Oct. 13, 2017). Some ad blockers, however, are a band-aid solution as they merely filter out what a user can see on his/her page. Adblock Plus or dedicated tracking blockers such as Disconnect can prevent tracking that preclude third parties from sending advertisements to the page that the user is currently viewing. Robert L. Mitchell, *Ad Blockers: A Solution or a Problem?*, COMPUTERWORLD (Jan. 15, 2014), <https://perma.cc/7XVB-JSQR>; see Grant Storey et al., *The Future of Ad Blocking: An Analytical Framework and New Techniques* (Working Paper Apr. 14, 2017), <https://perma.cc/8SUF-JNL7>. However, Facebook has responded to the onslaught of ad-blockers by altering the structure of their pages such that all items that appear on a Newsfeed look identical (regardless of whether they are ads or non-ads) so as to throw ad-blockers off the scent. Storey, at 6; Mike Isaac, *Facebook Blocks Ad Blockers, but It Strives to Make Ads More Relevant*, N.Y. TIMES (Aug. 9, 2016), [https://www.nytimes.com/2016/08/10/technology/facebook-ad-blockers.html?\\_r=0](https://www.nytimes.com/2016/08/10/technology/facebook-ad-blockers.html?_r=0).

relieve and can be implemented on a personal device far faster than any legislation will wind its way through Congress.

## 2. Robust Compelled Disclosures for Targeted Advertising

This proposal contemplates a regulation obligating Internet Information Economy platforms to disclose to users the specific data points used to service a targeted advertisement, thereby revealing *why* the user was seeing a particular advertisement. Requiring disclosure of the sources driving the advertisements would not be viewpoint-discriminatory, under *Sorrell*, so as to subject it to heightened scrutiny. This proposal has implicit support within the industry itself: in 2014, Facebook announced installation of “Why am I seeing this Ad,” which accompanies each advertisement it displays for a user.<sup>200</sup> Facebook launched this initiative in response to concerns that advertisements had gotten too “personal.”<sup>201</sup> Addressing backlash from “dark posts,” Facebook is currently testing a feature whereby any user may view all advertisements that an advertiser is currently running.<sup>202</sup> A regulation would merely codify what platforms have demonstrated a willingness to implement.

Informing consumers as to how their data is used in targeted advertising *empowers* them to alter their behavior in response and addresses the asymmetrical relationship between consumers and data marketers.<sup>203</sup> Assuming industry compliance, the drawback to such a solution is user saturation: depending on the configuration of the disclosure, a user may find innumerable data points in service of advertisements. Yet, providing this information enables the individual to evaluate whether he deems the data relatively innocuous or worthy of affirmative action. Thus, this proposal vindicates a primary objective of the Commercial Speech Doctrine.

Compelled disclosure in Commercial Speech Doctrine, while a nascent area of First Amendment jurisprudence, functions as a means to prevent consumer deception.<sup>204</sup> A compelled disclosure regulation regarding an *advertisement* that did not otherwise change the content of the speech nor its intended audience would likely be subject to a low tier of scrutiny. Scholars have proposed that disclosures in a

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200. Facebook Help Center, *How Does Facebook Decide Which Ads to Show Me and How Can I Control the Ads I See?*, <https://perma.cc/5KCJ-9AK6> (last visited Jan. 5, 2018). See also *Improving the Control You Have Over Advertising on Facebook* (June 12, 2014, 6:07 AM), <https://perma.cc/G5BT-NXE6>.

201. Cotton Delo, *Facebook to Use Web Browsing History for Ad Targeting*, ADAGE (June 12, 2014), <https://perma.cc/K8CA-NXNC>.

202. VICE News, *Everything You Need to Know About the Hidden Ways Facebook Ads Target You*, YOUTUBE (Apr. 13, 2018), <https://www.youtube.com/watch?v=EM11M2QUYjk>.

203. See Turow, *supra* note 3, at 21.

204. See *Zauderer v. Off. of Disciplinary Counsel of Sup. Ct. of Ohio*, 471 U.S. 626, 650–51 (1985) (highlighting the “material differences between disclosure requirements and outright prohibitions on speech” and holding that “an advertiser’s rights are adequately protected as long as disclosure requirements are reasonably related to the State’s interest in preventing deception of consumers.”).

commercial context aiming to inform the public and not to “spread[] the government’s normative message” ought to be subject to rational basis review.<sup>205</sup>

In markets susceptible to “manipulation,” *Edenfield* advises that consumers not be kept in the dark so as to benefit “professional[s] trained in the art of persuasion.”<sup>206</sup> Empirical evidence establishes that exposure to targeted advertising changes viewer’s perception of himself or herself, underscoring that targeted advertising can manipulate its audience.<sup>207</sup> This research indicates that targeted advertising operates on the minds of viewers differently than non-targeting advertising, a fact weighing in favor of regulation. The algorithm matching advertisement with consumer is designed to drill down to ever more granular levels. It is therefore irrelevant whether the advertiser is an experienced marketer or amateur, provided that they seek to have their messages displayed on an Internet Information Economy platform.<sup>208</sup>

### 3. Opt-in Mechanism for Data Collection

At present, advertising platforms operate with *opt-out* mechanisms, whereby users must affirmatively decline to have their activity and data collected and used.<sup>209</sup> This proposal advocates for an *opt-in* procedure where users consent to be tracked.<sup>210</sup>

205. Jennifer M. Keighley, *Can You Handle the Truth? Compelled Commercial Speech and the First Amendment*, 15 U. PA. J. CONST. L. 539, 543 (2012).

206. *Edenfield v. Fane*, 507 U.S. 761, 775 (1993).

207. Rebecca Walker Reczek et al., *Targeted Ads Don’t Just Make You More Likely to Buy – They Can Change How You Think About Yourself*, HARV. BUS. REV. (Apr. 4, 2016), <https://perma.cc/6RRF-JU48> (“The data show that participants [in the study] evaluated themselves as more sophisticated after receiving an ad that they thought was individually targeted to them, compared to when they thought the same ad was not targeted. In other words, participants saw the targeted ad as reflective of their own characteristics. The ad told them that, based on their browsing history, they had sophisticated tastes. They accepted this information, saw themselves as more sophisticated consumers, and this shift in how they saw themselves increased their interest in the sophisticated product.”); for the full study, see Christopher A. Summers et al., *An Audience of One: Behaviorally Targeted Ads as Implied Social Labels*, 43 J. CONSUMER RES. 156 (2016).

208. See Nicholas Carlson, *How to Buy a Facebook Ad in 15 Minutes or Less*, BUS. INSIDER (Sept. 17, 2009), <https://perma.cc/SY4S-3HYP> (illustrating the ease of using Facebook’s ‘self-service’ advertisements). Injecting the algorithm into the mix is the easiest distinction between targeted advertising conducted offline and what is hosted by an Internet Information Economy platform.

209. See, e.g., Google Ads Help, *Opt Out of Seeing Personalized Ads*, <https://perma.cc/529K-CTSQ> (last visited Jan. 5, 2018) (detailing, also, the limits to the opt-out regime, including that opting-out cannot remove advertisements altogether, and that the opt-out function may not perfectly map onto mobile technologies).

210. See Joseph A. Tomain, *Online Privacy & the First Amendment: An Opt-in Approach to Data Processing*, 83 U. CIN. L. REV. 1, 63 (2014) for an in-depth survey of the constitutionality of moving to an opt-in framework. Tomain concludes that the *Central Hudson* prongs uphold his proposed opt-in regime, by finding sufficient government interests in “protecting the privacy of individuals, preventing overreaching of data processors, and avoiding the commodification of natural persons.” The proposal, by its nature, is narrowly tailored and merely “ensures that online commercial actors cannot process data without first receiving affirmative, express, and informed consent.” See also Zeynep Tufekci, *We Already Know How to Protect Ourselves from Facebook*, N.Y. TIMES (Apr. 9, 2018), <https://www.nytimes.com/2018/04/09/opinion/zuckerberg-testify-congress.html>. The Social Media Privacy Act requires that the user be sufficiently informed and allowed to specify individualized privacy

An opt-in framework vindicates the rationales of the Doctrine—to protect the listener and his right to receive information, cognizant of the “hardiness” of commercial speech to buck against regulation.<sup>211</sup> At its core, this approach restores the user as the owner of his data, to be shared *consensually*.<sup>212</sup> The right to receive information is not derivative of the commercial speaker’s right to disseminate information, which suggests that the consumer should be the party who affirmatively makes the decision to opt-in.

Opting in does not envision wiping away advertisements in light of economic inertia, nor does it presuppose that a user *de facto* assents to his online activity being tracked. Rather, a user can select either to receive non-targeted advertisements or to assent to being tracked for future targeted advertisements. If platforms and advertisers are correct in their conclusion that targeted advertising represents a boon for all parties, an informed and rational consumer will choose to opt in voluntarily.<sup>213</sup>

## B. SOLUTIONS REQUIRING ALTERATIONS TO THE DOCTRINE

### 1. Explicitly Expanding the Definition of “Commercial Speech”

This two-step process merely codifies economic changes. First, “commercial speech” must stretch beyond the confines articulated in either *Virginia Board* or *Central Hudson* to capture the types of data-for-services transactions in the Internet Information Economy. Second, consumer data is conceived not as a “matter of public concern.”

This Note began with a reference to Bernstein and Lee’s proposed expansion of commercial speech.<sup>214</sup> The ensuing sections have built upon this initial premise by illustrating how participants in the Internet Information Economy monetize the user experience by relying on input data to drive targeted advertising, and by focusing on the privacy interests also at play in a viable regulatory scheme. Narrowly defined commercial speech that omits these data collection and transmission methods excludes much of the commercially flavored activity of the Internet Information

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preferences, including agreeing to the terms of service and prohibiting the collection of data should the user so desire. S. 2728, §3(a)(1)(A).

211. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557, 564 n.6 (1980) (“commercial speech, the offspring of economic self-interest, is a hardy breed of expression that is not particularly susceptible to being crushed by overbroad regulation.”) (internal citations omitted).

212. U.S. legislators can look to the European Union’s approach to data protection for a cross-border example and support for legally mandated user opt-in. In Spring 2018, the European Union implemented the General Data Protection Regulation (EU) 2016/679 (“GDPR”), a comprehensive overhaul of data privacy legislation. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, OJ 2016 L 119/1 [hereinafter GDPR]. The GDPR establishes a rigorous compliance regime for companies that process individual data. “Consent” is defined as “any freely given, specific, informed and unambiguous indication of the data subject’s wishes by which he or she, by a statement or by a *clear affirmative action*, signifies agreement to the processing of personal data relating to him or her.” GDPR, art. 4(11) (emphasis added). Further, “[s]ilence, pre-ticked boxes or inactivity should not therefore constitute consent.” *Id.* para. 32.

213. See Nelson, *supra* note 3.

214. See Bernstein & Lee, *supra* note 26.

Economy.<sup>215</sup> Judicial intransigence would foreclose evaluating the above-detailed solutions under intermediate scrutiny and, instead, would subject data-driven targeted advertising to the more stringent, strict scrutiny standard of review.

## 2. Expanding Liability Under the Communications Decency Act

As discussed above in Part III.C, violations of pre-existing laws such as anti-discrimination statutes, fall outside the qualified constitutional protection matrix. The current legal regime under Section 230 of the Communications Decency Act,<sup>216</sup> however, insulates Internet Information Economy platforms from liability, where the platforms are not content generators, despite their hospitality to advertisers operating with discriminatory intent.<sup>217</sup> As applied, Section 230 provides federal and state immunity for “service providers,”<sup>218</sup> defeating most claims brought against Facebook and similar interactive service providers at the initial stages of litigation.<sup>219</sup>

This proposed shift in liability acknowledges that the new paradigm of employment and housing advertisements entails users engaged in job hunting on sites like Facebook and LinkedIn. Similarly, the majority of American adults who are active on Facebook consume news not from reading newspapers, but via curated “Newsfeeds.”<sup>220</sup> In this respect, the Internet Information Economy—and the algorithms connecting users to a curated experience—have moved away from mere passive conduits of information, warranting an update to the legal regime.

## 3. Regulating Social Media Platforms as “Utilities”

A final approach considers regulating Internet Information Economy platforms as broadcasters, considering the displacement of traditional broadcasters in favor of the Internet as the primary source of communication and the impact of quasi-

215. This concern is likewise shared by Tomain, *supra* note 210, at 44 (“If the current definition of commercial speech does not include data processing by commercial actors, then the definition ought to be expanded to include this substantial area of our information economy”).

216. Section 230 of the Communications Decency Act establishes that “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” 47 U.S.C. § 230(c)(1).

217. See discussion Part III.C.2, *supra*, on current litigation regarding the degree to which Facebook’s advertising auction platform results in discrimination along the metrics used to identify viewers.

218. See *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1169 n.24 (9th Cir. 2008) (en banc) (§ 230 extends to claims “under state or federal law”).

219. *But see* *Mobley et al. v. Facebook, Inc.*, No. 5:16-cv-06440-EJD, 2016 WL 6599689 (N.D. Cal. Nov. 3, 2016). Although Facebook moved to dismiss the complaint in June 2017, asserting, *inter alia*, Section 230 immunity, the parties have since moved into an allegedly productive mediation phase, resulting in a request to the court to stay a ruling on Facebook’s motion. Joint Post-Mediation Status Report & [Proposed] Order in *Mobley et al. v. Facebook, Inc.*, No. 5:16-cv-06440-EJD (N.D. Cal. Oct. 27, 2017). As of October 15, 2018, the parties are continuing to engage in mediation discussions, while still preparing for the December Motion to Dismiss hearings. Joint Status Report, *Mobley et al. v. Facebook Inc.*, No. 5:16-cv-06440-EJD (N.D. Cal. Oct. 15, 2018).

220. Jeffrey Gottfried & Elisa Shearer, *News Use Across Social Media Platforms 2016*, PEW RES. CTR. (May 26, 2016), <https://perma.cc/A78T-NLET>.

monopolistic actors.<sup>221</sup> Labeling these platforms as such will enable legislators to apply consumer protections more easily.<sup>222</sup> Traditional broadcasters are unable to personalize advertisements, thus ensuring a “strong disincentive[] . . . to disseminate materially false, inflammatory, or contradictory messages to the public.”<sup>223</sup> The lack of such a check within the Internet Information Economy warrants regulations on commercial speech, mindful of the need to ensure the individual consumer is apprised of neither misleading nor fraudulent statements.

However, a few structural distinctions between traditional broadcasters and Internet Information Economy platforms undermine this proposal. First, whereas traditional broadcast traded access to airwaves on governmental regulation, the Internet suffers from no literal analogous “scarcity” issue. The response is that Facebook and similar entities such as Google operate as de facto monopolies bolstered by network effects and high user engagement.<sup>224</sup> Second, while platforms in the Internet Information Economy may function in practice as broadcasters, imposing a broadcast regulatory framework would represent an ex post solution, compared to government’s ex ante decision to license traditional broadcasters. Third, platforms in the Internet Information Economy, unlike traditional broadcasters, function as troves of user data, whereas broadcasters contract with third party firms such as Nielsen to acquire information regarding trends in viewership.<sup>225</sup> Characterizing Internet Information Economy participants as dispensaries for news glosses over the role they also play as commercialized data banks and risks losing the hook to labeling their conduct as commercial speech.

## V. CONCLUSION

While the Internet Information Economy has democratized information sharing, a gap in the law persists regarding its data collection and transmission practices. This Note has proposed initiatives derived from first principles of the Commercial Speech Doctrine in order to address a lack of transparency and the individual’s loss of

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221. This radical approach to regulate social media platforms as utilities garnered some bipartisan support from members in both the Obama and Trump administrations. Further, over a decade ago, Mark Zuckerberg emphasized “the utility component” of Facebook. Laura Locke, *The Future of Facebook*, TIME (July 17, 2007), <https://perma.cc/EB3D-2P2C>.

222. In the wake of accusations that Facebook failed to police adequately purchasers of ad space during the 2016 election season, a bipartisan group of Senators introduced a proposed bill, the “Honest Ads Act.” Although targeted specifically at regulating political advertisements, the bill highlights the fact that “social media platforms . . . can target portions of the electorate with direct, ephemeral advertisements on the basis of private information the platform has on individuals.” The Honest Ads Act is cabined in scope to political advertisements made online but the reasoning can encompass similar concerns in any targeted advertisement. Honest Ads Act, S. 1989, 115th Cong., <https://perma.cc/7D22-RJZV>.

223. *Id.*

224. Darwin Capital Management, *Facebook’s Network Effects, Innovative Culture, and Valuable Assets*, SEEKING ALPHA (June 1, 2017), <https://perma.cc/4SHJ-J56A>.

225. See *CBS Radio Contract with Nielsen Unlocks Trove of New Audience Data*, INSIDE RADIO (May 9, 2017), <https://perma.cc/HZY5-GKJB>. However, the value of having firsthand information about viewers is clearly evident about traditional broadcasters as evidenced by the relatively recent jump to online streaming services, a byproduct of which is that broadcasters have access to that information directly.

autonomy surrounding personalized commercial speech. Recognizing a substantial government interest in preventing listener deception and manipulation and cognizant of limitations imposed by the First Amendment, the proposals contained in this Note do *not* advocate for reduced speech, nor do they segment out commercial speakers. Rather, any proposals would increase relevant speech to assist the consumer.

Data collection and transmission practices represent the new paradigmatic way in which commercial speakers interact with their audiences. To the extent that First Amendment scholars seek to protect data related activity, their arguments should be grounded on a commercial speech paradigm that embraces first principles, rather than shoehorning arguments into the Supreme Court's increasingly speaker focused commercial speech jurisprudence. Ultimately, the solutions advocated for here can engender a market place of ideas through the Internet Information Economy that is informationally-symmetric for both speakers and listeners in a manner that is designed to fulfill the First Amendment potential of new and social media.