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No Exit: Ten Years of "Privacy vs. Speech" Post-Sorrell

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ABSTRACT

Privacy and free speech are often described as oppositional forces. This Essay analyzes First Amendment jurisprudence emphasizing the ten years after *Sorrell vs. IMS Health* was decided in 2011. In this Essay, Hans contextualizes First Amendment challenges to privacy laws. Hans cautions that the Supreme Court has moved perilously close towards a jurisprudence under which privacy laws are nearly impossible to craft. Hans demonstrates that the need for privacy regulation can satisfy a strict scrutiny standard of review. Hans argues that the stakes for privacy are incredibly high and warrant careful consideration by the Supreme Court.

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INTRODUCTION

A decade has passed since the U.S. Supreme Court held in *Sorrell vs. IMS Health* that a Vermont privacy law violated the First Amendment.[1] Somewhat surprisingly, the debate about the intersection between privacy laws and free speech protections has not progressed much in the intervening years. If anything, the concerns that some privacy advocates had following *Sorrell*—that the First Amendment could be used as a tool to overturn privacy regulations—have extended to other areas of economic regulation.[2] As a public interest attorney working on technology law and policy, I entered into practice not long after *Sorrell* was decided, when it seemed that privacy laws might not survive the Supreme Court's ever-expanding First Amendment jurisprudence.[3] It has been dispiriting to see that, in the intervening years, not much has changed. Free speech advocates continue to claim that privacy laws raise significant, if not fatal, First Amendment issues.[4] Privacy experts argue not only for the constitutionality of privacy laws, but also their increased necessity in a digital economy.[5]

Amidst this backdrop, new First Amendment challenges to privacy proliferate even as the Supreme Court continues to expand the scope of First

1. 564 U.S. 552 (2011).

2. *See* Citizens United v. FEC, 558 U.S. 310 (2010) (invalidating portions of the Bipartisan Campaign Reform Act on First Amendment grounds); Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448 (2018) (invalidating mandatory public-sector union fees), Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361 (2018) (invalidating California's FACT Act, which required crisis pregnancy centers to provide notices that California provided free or low-cost services, including abortion).

3. *See, e.g.*, Jane Bambauer, *Is Data Speech?*, 66 STAN. L. REV. 57 (2014) (arguing that data should be considered speech and that data privacy laws should be subject to First Amendment scrutiny).

4. *See, e.g.*, Memorandum from Andrew J. Pincus et al., Mayer Brown, to Christopher Mohr, Gen. Counsel of Software & Info. Indus. Ass'n (Jan. 24, 2019), http://www.siia.net/Portals/0/pdf/Policy/Data%20Driven%20Innovation/Memo%20re%20CCPA.pdf?ver=2019-01-25-163504-003 [https://perma.cc/YJ4E-WPUY] [hereinafter *SIIA Memo*] (arguing that the California Consumer Privacy Act violates the First Amendment on multiple grounds—that it cannot pass even intermediate scrutiny, that it is impermissibly vague, and that it is viewpoint- and content-discriminatory).

5. *See, e.g.*, Margot E. Kaminski & Scott Skinner-Thompson, *Free Speech Isn't a Free Pass for Privacy Violations*, SLATE (Mar. 9, 2020), https://slate.com/technology/2020/03/free-speech-privacy-clearview-ai-maine-isps.html [https://perma.cc/LN67-MDNF] (arguing that First Amendment rights are supported rather than imperiled by privacy regulations); Woodrow Hartzog & Neil Richards, *Getting the First Amendment Wrong*, BOS. GLOBE (Sept. 4, 2020), https://www.bostonglobe.com/2020/09/04/opinion/getting-first-amendment-wrong/ [https://perma.cc/FS3V-5MQG] (criticizing Clearview AI's arguments that Illinois' Biometric Information Privacy Act violates its First Amendment rights).

Amendment protections. Is privacy law under existential threat?[6] And how can that be given the increased concerns and public attention to the lack of effective federal privacy regulation? This Essay seeks to contextualize the First Amendment challenges to privacy laws, arguing that the government's need to protect individual privacy is more persuasive than ever. It also sounds a note of caution, observing how the Supreme Court's recent hesitancy to go all-in on upending related doctrinal areas like commercial speech and standing demonstrates an understanding that putting privacy laws at risk might be a bridge too far. The Essay hopes to persuade that when it comes to privacy, the Court should decline to forestall meaningful, vital privacy regulation at the state and federal levels by using the First Amendment as a cudgel. By doing so, I hope to move beyond the Sartrean trap that we seem to have found ourselves in post-*Sorrell*, in which privacy and speech are hopelessly, endlessly pitted as oppositional.[7]

Part I of the Essay discusses the recent background of the privacy and speech debate, from the early 2000s to *Sorrell* and its aftermath. Part II analyzes the state of First Amendment law post-*Sorrell* to see if a path out of the mess exists, arguing that the need for privacy regulation should satisfy First Amendment scrutiny, even under a strict scrutiny standard, given contemporary concerns about privacy and data that have only increased in the decade since *Sorrell*. Part III briefly discusses cases and situations juxtaposing the First Amendment and privacy statutes in an effort to endorse a view of such statutes that allows them to satisfy First Amendment review. I conclude by examining standing—another doctrinal area in which the Court has shown a desire to upend existing doctrine, only to avoid doing so, in the hopes of seeing a path forward for privacy law even in a world in which the Court has not shied away from using the First Amendment to

6. In this Essay, I used the terms "privacy", "privacy laws", and "privacy regulations" as a shorthand to refer to federal and state laws and regulations that restrict the collection, use, and retention of data relating to individuals. Privacy is a notoriously contested concept in American law that has defied easy definition for over a half-century. *See, e.g.*, SARAH IGO, THE KNOWN CITIZEN: A HISTORY OF PRIVACY IN MODERN AMERICA 5–12 (2018) (surveying the contested, complex landscape of "privacy" as used in the United States throughout its history and particularly in recent years).

7. Jean-Paul Sartre's 1944 play *No Exit (Huis Clos*) depicts three characters trapped in a room unable to escape. Eventually they determine that the room is Hell and that their punishment is to be stuck with each other for eternity, which prompts one character to note that "hell is other people." In my view, the long-running debate—with little appreciable progress—regarding whether privacy laws and First Amendment doctrine can co-exist has more than a passing resemblance to the play's infinite, static environment.

invalidate government action.

It is always difficult, and perhaps unwise, to try to predict whether and how the courts will move on a particular issue. Nevertheless, the stakes for privacy are incredibly high and warrant careful consideration from the Court. The Court should not recklessly extend the First Amendment and foreclose the possibility for meaningful privacy regulation on constitutional grounds. It's not too late to find a path out of the room where we find privacy and speech inexorably conflicted.

I. "PRIVACY VS. SPEECH" AND *SORRELL*

Most of the Supreme Court's First Amendment jurisprudence dates to within the last hundred years or so, beginning with foundational decisions in *Schenck v. United States*,[8] *Abrams v. United States*,[9] and *Whitney v. California*.[10] These cases established the First Amendment as a limit on the government's ability to regulate or restrict speech.

"Because many of the Supreme Court's First Amendment decisions are relatively recent, the intersection of privacy regulation and speech rights did not receive much judicial or scholarly attention until recent decades.[11] There are a number of First Amendment categories potentially implicated by privacy regulations. Do privacy laws regulate conduct or speech?[12] If such laws regulate the former, they likely do not trigger First Amendment scrutiny. Are privacy laws properly classified as commercial speech regulations, triggering intermediate scrutiny? Or are they content-based restrictions that justify strict scrutiny analysis? Or do privacy laws discriminate based on viewpoint, which would make them presumptively unconstitutional?

These questions demonstrate making a general determination on whether privacy laws pass First Amendment scrutiny may be impossible.

8. 249 U.S. 47 (1919).

9. 250 U.S. 616 (1919).

10. 274 U.S. 357 (1927), *overruled by* Brandenburg v. Ohio, 395 U.S. 444, 449 (1969).

11. Some Supreme Court cases, like *Time, Inc. v. Hill*, 385 U.S. 374 (1967) and *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) address the intersection of free speech and privacy torts. The privacy interests in those cases thus fall under individualized tort theories rather than statutory regimes designed to protect privacy for the public at large by governing data practices.

12. *See, e.g.,* Davey Alba, *A.C.L.U. Accuses Clearview AI of Privacy "Nightmare Scenario"*, N.Y. TIMES (May 28, 2020) (describing an ACLU argument that relevant parts of Illinois' Biometric Information Privacy Act regulate conduct rather than speech).

Too much will ride on the specific provisions of the law at issue. Having said that, critics note that privacy laws are poor fits for existing categories, implying that the easier paths (arguing that privacy laws implicate content and not speech, or that they are purely commercial regulations) are foreclosed. I am of the belief that privacy laws should not automatically fall into the category of content-based regulations—but that even if a privacy law *did*, it would be possible to satisfy strict scrutiny.

In 2000, Eugene Volokh wrote an influential article asserting that privacy protections raised serious, potentially fatal, First Amendment concerns.[13] Volokh argued that existing free speech doctrines—including the commercial speech and speech on matters of private concern—provided a poor fit for privacy laws and that it would be difficult for such laws to meet the First Amendment's strict scrutiny test requiring a compelling government interest and narrow tailoring.[14] Moreover, changing existing doctrines to allow for privacy regulation, in Volokh's view, would create a host of problems for other areas of protected speech.[15] As such, he "reluctantly" concluded, it would not be possible to create information privacy rules that withstood First Amendment scrutiny.[16]

Unsurprisingly, privacy advocates vehemently disagreed. Paul Schwartz's response to Volokh's article critiqued its framing of fair information practice principles.[17] More robustly, Neil Richards' 2005 article *Reconciling Data Privacy and the First Amendment* provided a competing vision of how privacy laws can survive First Amendment challenges.[18] Richards contested Volokh's interpretation of First Amendment doctrine, arguing that privacy and speech can be reconciled, as privacy laws either failed to implicate First Amendment speech or were permissible under existing doctrine.[19] Richards observed that treating privacy laws as fatally flawed under First Amendment scrutiny would allow for an unwinding of the core constitutional distinctions between economic and political rights

13. Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049 (2000).
14. *Id.* at 1052.
15. *Id.*
16. *Id.* at 1053.
17. Paul M. Schwartz, *Free Speech vs. Information Privacy: Eugene Volokh's First Amendment Jurisprudence*, 52 STAN. L. REV. 1559 (2000).
18. Neil M. Richards, *Reconciling Data Privacy and the First Amendment*, 52 UCLA L. REV. 1149 (2005).
19. *Id.* at 1151.

that have existed for decades.[20] Was the Court willing to go that far, dressing up economic rights as political ones, as Richards frames the question?[21]

Sorrell changed the dynamics of this debate, though it provided few answers. The case arose out of IMS Health's challenge to Vermont's Prescription Confidentiality Law, which prohibited the sale, disclosure, and use of pharmacy records that revealed the prescribing practices of individual doctors.[22] Vermont enacted the statute in order to protect individual privacy, as many pharmacies sold subscription information to data miners, who would then sell information to companies for advertising and marketing purposes.[23] According to Justice Anthony Kennedy, who penned the majority opinion, the Prescription Confidentiality Law was designed to prevent a "one-sided" system in which private industries were able to persuade doctors via expensive marketing campaigns with no countervailing information.[24]

Such a system, Justice Kennedy concluded, violated the First Amendment.[25] In Kennedy's view, the Vermont statute was both content- and viewpoint-discriminatory, making it subject to strict scrutiny and almost certainly invalid.[26] Even under Vermont's reasoning that the law burdened only commercial speech and was thus entitled to intermediate scrutiny, Kennedy determined that the statute's many defects meant that it could not withstand even a more deferential review.[27] In effect, because Kennedy identified viewpoint discrimination in the statute, it was presumptively unconstitutional even it were a mere commercial speech regulation.

What makes *Sorrell* a potential Trojan horse (or overdue invitation, depending on one's perspective) to subsequent invalidation of privacy statutes on constitutional grounds? Justice Kennedy's opinion contains dicta that seemed poised to reframe whether and how privacy can be regulated. For example, Kennedy asserted that "there is a strong argument that prescriber-identifying information is speech for First Amendment

20. *Id.* at 1217–21.
21. *Id.* at 1220.
22. Sorrell v. IMS Health Inc., 564 U.S. 552, 557 (2011) (citing Vt. Stat. Ann., tit. 18, § 4631 (2010)).
23. *Id.* at 557–61.
24. *Id.* at 560–61.
25. *Id.* at 557.
26. *Id.* at 571.
27. *Id.* at 571–79.

purposes"[28] This nearly states that such data is speech, and thus challenging to regulate within the bounds of the First Amendment, as a law regulating data would need to withstand strict scrutiny analysis.

Yet Kennedy's opinion unfavorably compared the Prescription Confidentiality Law to HIPAA (the Health Insurance Portability and Accountability Act), which it described as a "more coherent policy."[29] Because HIPAA also regulates health privacy (the putative goal of the Vermont statute), the implication is that the constitutional infirmities of the Prescription Confidentiality Law might have been mitigated with better drafting.[30] The lesson here, effectively, is that bad statutes make bad law.

Commentators post-*Sorrell* have focused on what the majority opinion, as well as subsequent developments in First Amendment jurisprudence, have meant for the possibility of privacy regulation in the United States. This is particularly true as calls for baseline privacy protections increased in the years following the proliferation of smartphones, the rise of the so-called "Internet of Things," and the Snowden disclosures.[31] Shortly after *Sorrell*, Ashutosh Bhagwat observed that the decision might signal the death of privacy regulation given the challenges of withstanding strict scrutiny.[32] Bhagwat instead argued for the Court to treat personal data as less necessary to the democratic ideals of the First Amendment, and thus permit some regulation at a less exacting standard than strict scrutiny.[33]

Jane Bambauer took a bold approach in her 2014 article *Is Data Speech?*, concluding that *Sorrell*'s reasoning very nearly resolves the titular question via the dicta discussed above—and that the answer should be

28. *Id.* at 570.

29. *Id.* at 573. This framing is similar to that of Glickman v. Wileman Brothers & Elliott, Inc., 521 U.S. 457 (1997), as interpreted by United States v. United Foods, Inc., 533 U.S. 405 (2001), which upheld a "comprehensive" statutory program that had multiple other regulatory features (such as an antitrust exemption to allow for detailed coordinated marketing orders). *Id.* at 411–16.

30. Justice Stephen Breyer's *Sorrell* dissent did not focus on the question of data as speech; instead, it discussed the *Glickman* framework and questioning the exacting scrutiny standard that the majority used in analyzing the Vermont statute. Justice Kennedy's troubling dicta thus went largely unaddressed in the case. 564 U.S. 552, 580–603 (2011) (Breyer, J. dissenting).

31. *See, e.g.*, Ctr. For Democracy & Tech., *Federal Privacy Legislation*, https://cdt.org/collections/federal-privacy-legislation/ [https://perma.cc/7EC3-7V83] (calling for a federal privacy law to protect individual data).

32. Ashutosh Bhagwat, Sorrell v. IMS Health: *Details, Detailing, and the Death of Privacy*, 36 VT. L. REV. 855, 871 (2012).

33. *Id.* at 876–79.

"Yes."[34] Bambauer treated the possibility of a world in which privacy regulations that restrict data merit strict scrutiny analysis with sanguinity, asserting that governments can still craft narrower privacy protections under her framework.[35] Because Bambauer saw few issues with the possibility of massive data collection—indeed, she welcomed it[36]—her vision of a world in which privacy laws that focused on use restrictions and other more specialized tools bears little resemblance to the more robust versions of privacy laws that scholars and advocates have called for. Whether privacy meaningfully survives under Bambauer's vision is about as open a question as whether Justice Kennedy thought data was speech.[37]

Neil Richards returned to the issue of the relationship between privacy and speech post-*Sorrell* in a 2015 article, arguing that endorsing a robust reading of *Sorrell* would lead to a destabilization of the post-New Deal constitutional order.[38] Richards' reading of *Sorrell* focused on two elements: first, how the invalidation was arguably necessitated by the Prescription Confidentiality Law's poor drafting and the Supreme Court's decision in *R.A.V. v. City of St. Paul*;[39] and second, the implication that the sale of a database constituted speech.[40] Richards connects these two elements to argue that, like *R.A.V.*, the real issue in *Sorrell* was viewpoint discrimination rather than content discrimination. In effect, under Richards' view, had Vermont drafted a better law that didn't discriminate against marketers, the Court might not have held it unconstitutional.[41]

More pointedly, Richards rebuts the "Data = Speech" argument by analogizing First Amendment jurisprudence to equal protection doctrine and its focus on laws that discriminate against suspect classifications, rather than a concern with *any* kind of discrimination.[42] Endorsing Frederick

34. Bambauer, *supra* note 3, at 71. Bambauer describes Kennedy's hesitancy to "pull the trigger" as perhaps rooted in "the broad and unanticipated consequences that such a declaration might bring about." *Id.* Her Article, in part, seems intended to assuage those concerns.

35. *Id.* at 110–17.

36. *Id.* at 102–05.

37. For example, Bambauer critiqued longstanding privacy and data regulations like the Fair Credit Reporting Act and HIPAA, implying that specific cases or social costs demonstrated that its provisions could not stand up to strict scrutiny. *Id.* at 113–14.

38. Neil M. Richards, *Why Data Privacy Law Is (Mostly) Constitutional*, 56 WM. & MARY L. REV. 1501, 1507–08 (2015).

39. 505 U.S. 377 (1992).

40. Richards, *supra* note 38, at 1519–21.

41. *Id.* at 1523.

42. *Id.* at 1524–26.

Schauer's view that law permissibly restricts all kinds of speech without triggering First Amendment scrutiny (such as sexual harassment, securities regulation, or antitrust),[43] Richards argues that privacy law can fit easily within this frame. If it can't, the spectre of *Lochner* looms.[44]

Other scholarship has analyzed the effects of *Sorrell* from a variety of perspectives, from algorithms to health care, but the core debate has remained focused on the issues described by Volokh, Richards, Bhagwat, and Bambauer. Because the Supreme Court has not since analyzed a privacy law from a free speech lens since *Sorrell*, and due to major shifts in the Court's membership in the intervening decade, the debate has not significantly progressed despite the many changes in regulation and technology.[45]

II. POST-*SORRELL* ANALYSIS: LOOKING FOR A WAY OUT

While the Supreme Court has not refined its analysis on how to balance the values of privacy and speech post-*Sorrell*, its rulings in other First Amendment cases, alongside analyses of state level privacy regulations, show the potential, somewhat rocky path forward for privacy regulations even amidst more searching First Amendment scrutiny. It is difficult, as always, to predict where the Supreme Court will go—particularly when it comes to free speech doctrine, which seems to become more vexing and convoluted each term. Nevertheless, I hope that by sketching an exit out of the fugue state we find ourselves in, the necessity of bolstering privacy laws *ex ante* will become more apparent.

A trio of First Amendment cases decided by the Supreme Court post-*Sorrell* provide some guidance as to how the Court might analyze a privacy law. First, and most worryingly, *Reed v. Town of Gilbert* created a tougher

43. Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1769–71 (2004).

44. Richards, *supra* note 38, at 1519–21. Richards notes that Justice Breyer's dissenting opinion also emphasizes this Lochnerization concern. *Id.* at 1530 (quoting Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2685 (2011) (Breyer, J., dissenting)).

45. The Rorschach-like ambiguity of Justice Kennedy's *Sorrell* opinion comes under criticism from different sides in this debate, and perhaps demonstrates why the debate remains both polarized and somewhat stagnant. *See* Bambauer, *supra* note 3, at 117 (describing Justice Kennedy's analysis as "facile" and "underdeveloped"); Richards, *supra* note 38, at 1521 (describing the majority opinion as "hardly a model of clarity"). Perhaps the one part of *Sorrell* we can all agree on is that the majority opinion is unsatisfying at best.

landscape for governments to defend laws that may affect speech.[46] Justice Thomas' majority opinion held that laws that are content-based—even if they are only "subtle" in doing so, and even if they seem facially content-neutral—invariably warrant strict scrutiny, and government justifications are irrelevant.[47] One way to describe this is that the court must look deeply and longingly at the law's face to determine if it is content-based, even if it seems not to be at first glance.

This potentially raises problems for privacy regulations, particularly if challengers to those arguments are successfully able to cast such regulations as content-based—even those that seem content-neutral. As Genevieve Lakier noted, one consequence is that it is now "much more difficult than previously for the government to defend facially content-based regulations of speech against constitutional challenge."[48] Justice Kennedy's *Sorrell* opinion may provide ballast for challengers on this front.[49] It would not be a stretch for a challenger to argue that even a privacy law that seems content-neutral actually is content-based.

Second, *Matal v. Tam*[50] demonstrates the Court's continued unhappiness with *Central Hudson Gas & Electric Corp. v. Public Service Commission*, the 1980 case that set out a four-factor test for analyzing whether "commercial speech" regulations were constitutional.[51] *Tam* concerned a First Amendment challenge to the Lanham Act's Disparagement Clause, which prohibited disparaging trademarks from being registered under federal law.[52] In a hopelessly fractured opinion, the court held that, while it could not agree on what standard applied to the

46. 135 S. Ct. 2218 (2015).

47. *Id.* at 2227.

48. Genevieve Lakier, Reed v. Town of Gilbert, Arizona *and the Rise of the Anti-Classificatory First Amendment*, 2016 SUP. CT. REV. 233, 235. There are some indications that lower courts have not read *Reed* as fully or broadly as critics feared they might. Dan V. Koslowski & Derigan Silver, *Measuring* Reed*'s Reach: Content Discrimination in the U.S. Circuit Courts of Appeals After* Reed v. Town of Gilbert, 24 COMM. L. & POL'Y 191, 192 (2019) (examining how lower courts have interpreted *Reed* and arguing that it "has not been the basis of a First Amendment revolution.").

49. Lakier observes that the appellee's justifications for the law at issue in *Reed* were particularly ill-articulated, though that was in part based on what the lower courts believed the relevant standard required. Lakier, *supra* note 48, at 254–56. In that way, at the very least, *Reed* is similar to *Sorrell*—with its poorly drafted statutory language—in that a bad situation leads to a potentially radical result.

50. 137 S. Ct. 1744 (2017).

51. 447 U.S. 557 (1980).

52. 15 U.S.C. §1052(a).

Lanham Act, because the law was viewpoint discriminatory it could not satisfy even the *Central Hudson* test.[53] The Court's decades-long ambivalence[54] with the *Central Hudson* framework again rose to the fore, with Justice Alito's plurality opinion stating that "the line between commercial and non-commercial speech is not always clear."[55]

Whether commercial speech has much viability left as a category seems uncertain, and, coupled with *Reed*, laws that regulate commercial activity might be much more likely in the future to be subject in large part or in entirety to strict scrutiny rather than *Central Hudson*'s more relaxed intermediate scrutiny standard. Whether a privacy law would even be categorized as commercial speech regulation is uncertain—and would likely depend on context[56]—but it seems unlikely that post-*Sorrell* and post-*Tam* the Court would be very deferential to the government's defenses of such a law.

Third, *Williams-Yulee v. Florida Bar* may provide some unlikely optimism.[57] While some have characterized strict scrutiny as "strict in theory, and fatal in fact,"[58] the Court itself has sought to dispel the notion that strict scrutiny means a de facto invalidation of the law at issue.[59] *Williams-Yulee* involves the rare First Amendment case where a statute

53. *Tam*, 137 S. Ct. at 1764–65.

54. *See, e.g.*, Thompson v. W. States Med. Ctr., 535 U.S. 357, 367–68 (2002) (observing that "several Members of the Court have expressed doubts about the *Central Hudson* analysis and whether it should apply in particular cases").

55. *Tam*, 137 S. Ct. at 1765.

56. *See* Richards, *supra* note 18, at 1172–74; Bambauer, *supra* note 3, at 105–06 (describing how different types of privacy regulation might trigger different scrutiny standards). Bambauer asserts that data should not be subject to a lower form of scrutiny (namely, rational basis review). *Id.* While I disagree with that categorical statement, I think it difficult to read *Sorrell* and the Supreme Court's subsequent First Amendment moves and feel confident that the Court will construe a privacy law as requiring anything less than intermediate scrutiny.

57. 575 U.S. 433 (2015).

58. This phrase was first coined by the late Gerald Gunther. Gerald Gunther, *The Supreme Court, 1971 Term - Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). For an empirical analysis of how federal courts have actually applied the strict scrutiny test in a less aggressive way than in Gunther's framework, *see* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 795 (2006) ("Reporting the results of a census of every strict scrutiny decision published by the district, circuit, and Supreme courts between 1990 and 2003, this study shows that strict scrutiny is far from the inevitably deadly test imagined by the Gunther myth and more closely resembles the context-sensitive tool described by O'Connor.").

59. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995) ("Finally, we wish to dispel the notion that strict scrutiny is "strict in theory, but fatal in fact.").

survives strict scrutiny and the only Supreme Court free speech case post-*Sorrell* in which a strict scrutiny analysis did not lead to the statute's invalidation.[60] *Williams-Yulee* concerned a judicial candidate's solicitation of campaign funds during a judicial election. After Yulee, the candidate, lost her primary election, the Florida Bar filed a complaint against her for violating the relevant ethical rule that required her to comply with the Code of Judicial Conduct's ban on direct solicitation of campaign funds.[61] Yulee asserted that the Florida Bar could not discipline her because her actions were protected by the First Amendment.[62]

While—once again—the case lacked a clear majority opinion, Chief Justice Roberts' opinion found that Florida's restrictions on direct solicitation were narrowly tailored to serve a compelling government interest.[63] This result might seem inconsistent with the Supreme Court's recent jurisprudence on campaign finance regulation, but Roberts insisted that judicial candidates were fundamentally different than legislative and executive elections.[64] The public's need for confidence in the judicial system meant that Florida's interest was compelling; the rule itself was found to be narrowly tailored.[65] As such, Florida prevailed.

The case is striking for the obvious reason—the Supreme Court rarely

60. The free speech cases that have used a strict scrutiny analysis post-*Sorrell* are *Williams-Yulee*; Arizona Free Enterprise Club's Freedom Club PAC v. Bennett, 564 U.S. 721 (2011); Brown v. Entertainment Merchants Ass'n, 564 U.S. 786 (2011); U.S. v. Alvarez, 567 U.S. 709 (2012); Reed v. Town of Gilbert, 576 U.S. 155 (2015); Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361 (2018); and Barr v. Amer. Assoc. of Pol. Consultants, 140 S.Ct. 2335 (2020). All of these cases, except *Williams-Yulee*, led to the invalidation of the statutory language at issue.

In *McCutcheon v. Fed. Elec. Comm'n*, the court did not specify which standard of review it was applying, as the statute at issue could not satisfy even a lower standard of review than strict scrutiny. 572 U.S. 185, 199 (2014). The Court similarly ruled in *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2465 (2018).

In *Matal v. Tam*, 137 S.Ct. 1744 (2017), the court failed to determine what standard applied to a provision of the Lanham Act, determining that the law could not withstand First Amendment review if it was viewpoint based. In *Iancu v. Brunetti*, 139 S.Ct. 2294 (2019), the Court declared that a different, parallel provision of the Lanham Act was *per se* unconstitutional once it determined that the provision was viewpoint discriminatory; it did not engage in any analysis under a standard of review.

61. *Williams-Yulee*, 575 U.S. at 441.

62. *Id.*

63. *Id.* at 444.

64. *Id.* at 446. One might ask why this might be. Are elected judges special? Is there a special solicitude involving the integrity of the judiciary that differs from the legislative and executive branches? One cannot say with any certainty, but given Chief Justice Roberts' role as the highest-ranking member of the federal judiciary it may be that his view on the role of judges differs from his view on the role of other elected political officials.

65. *Id.* at 455.

determines that a statute can survive strict scrutiny review. Before *Williams-Yulee*, the last time it had done so was five years prior in *Holder v. Humanitarian Law Project*, a case involving national security and political speech.[66] One can interpret this skimpy record as demonstrating that it is only in exceedingly rare situations, involving special circumstances like protecting national security or the need for an impartial judiciary, that the Court will allow a statute to withstand strict scrutiny. Perhaps. But why can't privacy regulation fall into that category?

We know that the Court takes privacy and data rights seriously because of recent decisions involving law enforcement access to data. In *Riley v. California*, the Court unanimously ruled that warrantless searches of cell phones violated the Fourth Amendment's ban on unreasonable searches and seizures.[67] Relevant to the Court's analysis was the sheer volume of data that a cell phone can now carry.[68]

Concerns about the location tracking capabilities of cell phones also influenced the Court's decision in *Carpenter v. United States*, which concerned government collection of cell-site location information (CSLI).[69] *Carpenter* held that individuals retained a privacy expectation in their CSLI and that the government needed to obtain a warrant in order to collect it.[70] These cases establish that the Court is not likely to unthinkingly disregard privacy as an important government interest, and potentially a compelling one. The social and political concerns that have proliferated in the decade post-*Sorrell* demonstrate that the need for effective privacy regulation is greater than ever.[71]

While *ex post facto* justifications for compelling government interests are unlikely to persuade courts, I point to specific events here as merely a selection of justifications that governments might employ in order to meet

66. 561 U.S. 1 (2010).

67. 573 U.S. 373 (2014).

68. *Id.* at 393–97 (describing the privacy concerns that result from the vast amounts of data that a cell phone can contain).

69. 138 S. Ct. 2206 (2018).

70. *Id.* at 2216–21.

71. Perhaps the most notorious example is the Cambridge Analytica scandal, which involved a Facebook user data that was improperly obtained and used to create targeted voter profiles of Americans. *See* Nicholas Confessore*, Cambridge Analytica and Facebook: The Scandal and the Fallout So Far,* N.Y. TIMES (Apr. 4, 2018), https://www.nytimes.com/2018/04/04/us/politics/cambridge-analytica-scandal-fallout.html [https://perma.cc/J8V2-BFED] (providing a timeline of coverage to date and describing how Cambridge Analytica had obtained the Facebook data).

this element of First Amendment scrutiny. Every law is different, and in general, the parade of horribles that the last decade has brought demonstrates that governments must be ever more engaged on these complex questions of privacy regulation.

Predicting what will happen in hypothetical Supreme Court cases is chancy at best. While I believe that privacy regulations should not be automatically subjected to strict scrutiny review, I am sufficiently concerned about the state of the law to note that it is a distinct possibility that the Supreme Court will opt to apply that standard, especially given *Reed* and *Tam*. *Williams-Yulee* demonstrates the continued, if remote, possibility that the Court can uphold a law challenged on First Amendment grounds under strict scrutiny review. The government's interest in promoting individual privacy seems sufficiently compelling—at least to withstand that part of strict scrutiny analysis. Narrow tailoring will, of course, depend upon the law at issue.

Recent cases demonstrate how lower courts have addressed *Sorrell*'s effects on privacy regulations challenged on First Amendment grounds. The record is not sufficiently robust to demonstrate a general trajectory for these challenges, but to date, an expansive reading of *Sorrell* has not gained much traction.

III. PRIVACY LAWS AND FIRST AMENDMENT CHALLENGES

A few well-reported challenges to privacy laws provide some visibility into how courts and attorneys have addressed the privacy and speech puzzle post-*Sorrell*. They provide a glimpse of what the future might hold for cases that raise First Amendment challenges to privacy laws.

In 2018, California enacted the California Consumer Privacy Act (CCPA),[72] designed to protect Californians from privacy violations and to promote consumer protection.[73] Several technology companies opposed this effort,[74] and in January 2019, three Mayer Brown attorneys (including Eugene Volokh) drafted a memo to the Software and Information Industry

72. Cal. Civ. Code §§ 1798.100-199 (2018).

73. *See* Daisuke Wakabayashi, *Silicon Valley Faces Regulatory Fight on Its Home Turf*, N.Y. TIMES (May 13, 2018), https://www.nytimes.com/2018/05/13/business/california-data-privacy-ballot-measure.html [https://perma.cc/B5EF-FG62] (describing the fight over the CCPA, which initially began as a ballot initiative and later was enacted into law by the legislature).

74. *Id.*

Association (SIIA) arguing that the CCPA violated the First Amendment on multiple grounds.[75] The SIIA Memo asserted that the CCPA failed to advance a compelling or even substantial government interest (thus failing even intermediate scrutiny); that it was impermissibly vague; and that it was both content- and viewpoint-discriminatory.[76] The SIIA Memo sought to categorize the CCPA as fatally flawed—perhaps in order to prompt subsequent modifications to the law prior to its effective date of enforcement.[77] In March 2020, SIIA continued to argue that provisions of the CCPA remained unconstitutional despite modifications that had been made by the legislature.[78] Because of the uncertainty posed by the California Privacy Rights Act, a recently enacted November 2020 California ballot initiative, it remains unclear as to whether and how these alleged constitutional infirmities will be cured, or if SIIA or another plaintiff will challenge the CCPA on First Amendment grounds.[79]

SIIA's arguments fail to engage with the holdings from *Glickman* and *United Foods*, which state that a comprehensive statutory regime that incidentally burdens speech does not fail First Amendment review.[80] Indeed, this formulation was referenced in *Sorrell* in Justice Kennedy's unfavorable comparison of Vermont's statute against HIPAA.[81] A court could certainly interpret the CCPA as being more akin to HIPAA or the program described in *Glickman* than to the Vermont statute in *Sorrell*.

SIIA's arguments could also potentially imperil the Fair Credit

75. *See SIIA Memo*, *supra* note 4.

76. *Id.*

77. SIIA was partially successful on the front. *See SIIA Privacy Update: The CCPA, the Public Domain, and the First Amendment*, SIIA (Mar. 2020), https://www.siia.net/Divisions/Public-Policy-Advocacy-Services/Priorities/Privacy-and-Data-Security/SIIA-Privacy-Update-The-CCPA-the-Public-Domain-and-the-First-Amendment [https://perma.cc/X8YS-JSSE].

78. Sara C. DePaul, *SIIA Comments on the Second Set of Modifications to the Proposed Text of the CCPA Regulations*, SIIA (Mar. 27, 2020), https://www.siia.net/Portals/0/pdf/Policy/Privacy%20and%20Data%20Security/SIIA%20Comments%20on%20CCPA%20Regs%2027%20MAR.pdf?ver=2020-03-30-102111-393 [https://perma.cc/886L-8C69] (arguing for the exclusion of publicly available information that is published in "widely distributed media").

79. *See* Allison Grande, *As Final Calif. Privacy Regs Drop, Enforcement Fights Loom*, LAW360 (June 12, 2020), https://www.law360.com/articles/1282100/as-final-calif-privacy-regs-drop-enforcement-fights-loom [https://perma.cc/T2P2-NZEA].

80. *See* United States v. United Foods Inc., 533 U.S. 405, 411–12 (2001); Glickman v. Wileman Brothers & Elliott, Inc., 521 U.S. 457, 469 (1997).

81. Sorrell v. IMS Health Inc., 564 U.S. 552, 573 (2011); *see supra* notes 29–30 and accompanying text.

Reporting Act (FCRA),[82] which contains a provision preventing credit reporting agencies from disclosing information about consumers after a period of years (generally seven), with some exceptions.[83] Under the SIIA reading, FCRA's mandatory deletion requirement of factual public information would also violate the First Amendment. While there have been challenges to FCRA's constitutionality on this front,[84] courts have held that its statutory scheme is sufficiently robust and deliberate to withstand First Amendment scrutiny.[85] Turning away from that jurisprudence would be a seismic misstep.

A recent case in Maine demonstrates how courts have interpreted First Amendment challenges to privacy laws. In early 2020, a group of telecommunications companies filed a challenge to a Maine law that required Internet service providers (ISPs) to obtain approval from customers before selling or using their personal information.[86] The ISPs alleged, amongst other claims, that the law violated the First Amendment in part because it discriminated against them but not against other speakers, regulated content, and could not meet strict scrutiny or even an intermediate scrutiny standard.[87]

The District Court did not accept these arguments, ruling against the plaintiffs' motion for judgment on the pleadings. While the Court acknowledged that the case had a limited record at the time, it quickly dismissed with the First Amendment claims, which it described as a "shoot-

82. 15 U.S.C. § 1681.

83. 15 U.S.C. § 1681(c).

84. *See* King v. Gen. Info. Servs., Inc., 903 F. Supp. 2d 303 (E.D. Pa. 2012) (denying motion to dismiss case against consumer reporting agency on First Amendment grounds). *King v. GIS* gained some notoriety as the first post-*Sorrell* case to argue that *Sorrell*'s holding meant that FCRA was unconstitutional. GIS' motion to dismiss failed on this ground, as the trial court found that FCRA was "a more coherent policy" than the law at issue in *Sorrell* and that it passed commercial speech review. *Id.* at 309–13. The case was ultimately settled. *General Information Services Announces Settlement of* King v. GIS *and* Dowell v. GIS, BUSINESSWIRE (June 20, 2014), https://www.businesswire.com/news/home/20140620005074/en/General-Information-Services-Announces-Settlement-King-v [https://perma.cc/F5PK-D4Q9].

85. *See, e.g.*, Trans Union Corp. v. FTC, 245 F.3d 809 (D.C. Cir. 2001) (rejecting First Amendment challenge to FCRA); Trans Union LLC v. FTC, 295 F.3d 42 (D.C. Cir. 2002) (rejecting First Amendment challenge to FCRA). Justice Kennedy dissented from the denial of certiorari in the latter case, arguing that the D.C. Circuit's opinion extended First Amendment protections beyond the then-precedent established in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985). Trans Union LLC v. FTC, 536 U.S. 915 (2002).

86. Me. Rev. Stat. tit. 35-A, § 9301(1)(C) (2019).

87. Plaintiff's Motion for Judgment on the Pleadings with Incorporated Memorandum of Law at 10–17, ACA Connects v. Frey, No. 1:20-cv-00055-LEW (D. Me. Apr. 6, 2020).

the-moon" argument—hardly auguring success.[88] The Court determined that the Maine ISP statute was a commercial speech regulation entitled to intermediate scrutiny—already a victory for the government—and held that its provisions did not so obviously fail that test as to entitle plaintiffs to a final judgment at such an early stage of litigation.[89]

Because the case remains at an early stage of litigation, it is unwise to read too much into this decision. The judge, understandably, ruled cautiously given that the record was not yet robust. The Maine law seems to have a decent shot of surviving this challenge—if the Court were inclined to adopt the reasoning of critics who find privacy laws almost always fatally unconstitutional under a maximalist reading of *Sorrell*, it certainly could have done so at an early stage of the case. Instead, it chose to endorse a limited reading of *Sorrell* akin to one adopted by other circuits, in which commercial speech regulation survives and is appropriate for privacy statutes.[90] Many eyes will be on this case as it proceeds through the District Court (and likely beyond).

Finally, the American Civil Liberties Union recently filed a case against Clearview, a purveyor of facial recognition technology, alleging violations of Illinois' Biometric Information Privacy Act (BIPA).[91] Based on reporting, the ACLU seems to assert that Clearview's actions are not actually speech but is actually *conduct*,[92] and thus not protected by the First Amendment under the test articulated in *United States v. O'Brien*.[93] *O'Brien*

88. Order on Cross Motions for Judgment on the Pleadings at 10, ACA Connects v. Frey, No. 1:20-cv-00055-LEW (D. Me. July 7, 2020).

89. *Id.* at 11–14. The Court also dismissed with plaintiffs' vagueness arguments for similar reasons. *Id.* at 14–20.

90. *Id.* at 11–12.

91. 740 Ill. Comp. Stat. 14/1-14/99 (2008); *see* Davey Alba, *A.C.L.U. Accuses Clearview AI of Privacy 'Nightmare Scenario*,' N.Y. TIMES (June 3, 2020), https://www.nytimes.com/2020/05/28/technology/clearview-ai-privacy-lawsuit.html [https://perma.cc/9EFS-U46K]. In November 2020, I co-drafted an amicus brief in support of the ACLU's opposition to Clearview's motion to dismiss on behalf of a group of law professors. Clearview argued that BIPA could not satisfy First Amendment scrutiny—a claim that my clients argued against in the amicus.

92. *See id.* (quoting an ACLU attorney asserting "Our lawsuit does not challenge Clearview's scraping of images off of social media platforms. . . . It challenges the secret, nonconsensual and unlawful capture of individuals' biometric identifiers from those images. Capturing a face print is conduct, not speech."). *See also* Complaint, ACLU v. Clearview AI, Inc., No. 2020 CH 04353 (Ill. Cir. Ct. May 28, 2020), https://www.aclu.org/sites/default/files/field_document/2020.05.28_aclu-clearview_complaint_file_stamped.pdf [https://perma.cc/V9NG-KXHZ].

93. 391 U.S. 367 (1968).

holds that laws that prohibit non-communicative aspects of conduct do not violate the First Amendment; the ACLU's argument appears to be that the capture of biometric identifiers from images, *rather than the collection of images themselves*, is not protected speech even under a broad reading of *Sorrell*. This is a creative theory and one that I happen to agree with. Given that FCRA—which arguably regulates an analogous process to the one described by the ACLU, but for credit reporting—has survived post-*Sorrell* constitutional review, it seems possible that this framing of BIPA could sidestep the entire *Sorrell* framework.[94]

Clearview believes that BIPA cannot withstand First Amendment scrutiny, disagreeing with the potential *O'Brien* argument and resorting to the standard "privacy vs. speech" fight we have become accustomed to.[95] But Clearview cannot blanketly assert that *Sorrell* requires strict scrutiny for privacy laws or that BIPA cannot meet any standard of review. Beyond extant judicial interpretations of other privacy laws, the particular concerns that Illinois had about biometric identifiers remain compelling amidst rising issues with technology and its use.[96]

Surveying this landscape demonstrates that the wealth of recent commentary seeking to reconcile privacy and speech has much to commend it.[97] Those who seek to read *Sorrell* in its broadest form indulge in a dangerous game—prioritizing one constitutional value above any other concern — in short-sighted efforts that may leave us trapped without a path

94. Assuming that one agrees with the ACLU's apparent framing, if the alleged actions violate BIPA and fail to regulate speech, the dynamic set up by *Sorrell* would not come into play at all.

95. *See* Kashmir Hill, *Facial Recognition Start-Up Mounts a First Amendment Defense*, N.Y. TIMES (Aug. 11, 2020), https://www.nytimes.com/2020/08/11/technology/clearview-floyd-abrams.html [https://perma.cc/W9KZ-MXUT]. (in which noted First Amendment litigator Floyd Abrams, whom Clearview has retained as counsel, asserts "where there is a direct clash between privacy claims and well-established First Amendment norms, what would otherwise be appropriate manners of protecting privacy have to give way before the constitutional limitations imposed by the First Amendment", and refers to *Sorrell* as a relevant case).

96. *See, e.g.*, Kashmir Hill, *Wrongfully Accused by an Algorithm*, N.Y. TIMES (June 24, 2020), https://www.nytimes.com/2020/06/24/technology/facial-recognition-arrest.html [https://perma.cc/9X8B-6NZ3]. (describing a false match made by a facial recognition algorithm that led to an innocent man's arrest). A recent Illinois Supreme Court decision, *People v. Austin*, upheld an Illinois law that criminalized the nonconsensual dissemination of private sexual images in the face of a First Amendment challenge; the U.S. Supreme Court denied certiorari in the case. 2019 IL 123910, *cert. denied*, No. 19-1029, 2020 WL 5882221 (U.S. Oct. 5, 2020). *Austin* provides another example of how privacy laws are likely to withstand First Amendment scrutiny; this argument was made in the *ACLU v. Clearview* amicus that I co-drafted.

97. *See, e.g.*, Kaminski & Skinner-Thompson, *supra* note 5; Hartzog & Richards, *supra* note 5.

out of the false stalemate that "privacy vs. speech" creates.

CONCLUSION

Ten years ago, the Supreme Court heard oral argument in *First American Financial v. Edwards*, a case ostensibly involving a challenge to the Real Estate Settlement Procedures Act.[98] This anodyne description obscures the real issue in the case—whether Congress could create a statutory right of action that allowed a citizen to sue without showing an "actual" injury.[99]

Perhaps you still find that dull. But consider the implications of a ruling that said "No, Congress cannot." How would advocacy organizations, who may use "testers" to determine whether a landlord is violating the Fair Housing Act even though the testers have no actual plans to rent apartments, have standing to sue?[100] What about a plaintiff who alleged that a company had violated a federal environmental statute prohibiting release of a toxic aerosol that can cause cancer in fifty percent of the population, but had not yet developed cancer? What about a plaintiff who alleged that a company had collected more information from the plaintiff than it had claimed it would in its privacy policy?

Perhaps because the justices realized the difficulty in drawing the lines of standing in such a way to preserve all the federal causes of action they liked and eliminate all the ones they didn't, the Court took the unusual step of dismissing *First American* as improvidently granted and issuing no ruling.[101] While the Court did not issue an explanation as to why it granted certiorari only to realize a year later that it should not have, it seems likely that the justices could not figure out how to coherently resolve the challenge that some were eager to take on.[102]

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98. 564 U.S. 1018 (2011) (granting certiorari in part).

99. *See* Christopher Wright, *Argument Preview: Standing to Challenge Kickbacks that Do Not Directly Affect Price*, SCOTUSBLOG (Nov. 18, 2011), https://www.scotusblog.com/2011/11/argument-preview-standing-to-challenge-kickbacks-that-do-not-directly-affect-price/ [https://perma.cc/GYS6-CVWB].

100. The Supreme Court ruled in *Havens Realty Corp v. Coleman* that such testers do, in fact, have standing to sue. 455 U.S. 363 (1982).

101. First Am. Fin. Corp. v. Edwards, 567 U.S. 756, 757 (2012).

102. *See, e.g.*, Kevin Russell, First American Financial v. Edwards*: Surprising End to a Potentially Important Case*, SCOTUSBLOG (June 28, 2012), https://www.scotusblog.com/2012/06/first-

That did not stop the Court from trying again to address the issue a few years later in *Spokeo v. Robins*, a case involving Spokeo's challenge to FCRA provisions that it had allegedly violated because it claimed that the respondent had not actually suffered an injury.[103] The second time around proved no easier than the first in finding a principled solution to this question. As Justice Scalia had passed away after oral argument, the *Spokeo* decision failed to address the central question presented perhaps because a coherent majority, as in *First American*, was impossible to find. Instead, Justice Alito wrote an unsatisfying opinion arguing that the Ninth Circuit had failed to properly analyze whether Robins' injury was "concrete *and* particularized," remanding the case.[104] This finicky analysis is hardly the type of ruling one expects when the Supreme Court grants certiorari. Yet perhaps because of Justice Scalia's death or because the Court had not solved the problem in the years since *First American*, a major ruling on the bounds of standing once again eluded the Court.[105]

I note this line of cases to demonstrate that the Court not infrequently finds itself in the position of skepticism or displeasure with an area of the law, but fails to figure out a path out of the trap it finds itself—a trap it, in some instances, may have actually created in the first place. Commercial speech is a similar situation—as discussed previously, multiple Justices seem dissatisfied with the *Central Hudson* framework, but seem unable either to find an alternative test or to require strict scrutiny analysis of

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american-financial-v-edwards-surprising-end-to-a-potentially-important-case/ [https://perma.cc/QTA7-NVS3] ("Some Justices may have been concerned that there is no principled way of making these distinctions, short of having judges decide which interests or statutory rights are, in their view, sufficiently important to be worth suing about.").

An unofficial rule of the Court is that majority opinions are equally distributed amongst Justices per sitting (to the extent possible). During the sitting when *First American* was heard, Justice Thomas was the only Justice to not write a majority opinion. Thus, it seems possible that he was assigned to write the majority but was unable to obtain sufficient votes in support of his opinion.

103. 136 S. Ct. 1540 (2016). In the interests of disclosure, I co-wrote an amicus brief in *Spokeo* in support of respondent on behalf of the Center for Democracy & Technology (my former employer), the Electronic Frontier Foundation, the World Privacy Forum, and New America's Open Technology Institute, which was cited by Justice Ginsburg's dissent. *See* Brief for Ctr. for Dem. & Tech. et al. as Amici Curiae Supporting Respondents, Spokeo v. Robins, 136 S. Ct. 1540 (2016) (No. 13–1339).

104. *Spokeo*, 136 S. Ct. at 1548 ("We have made it clear time and time again that an injury in fact must be both concrete *and* particularized." (emphasis original)).

105. The Court arguably again faced this problem in *Frank v. Gaos*, a case challenging the "cy pres" doctrine in class action settlements, which also presented a standing question. The Court eventually issued a *per curiam* decision in *Gaos* remanding the case for further analysis of the standing issue in light of *Spokeo*—because of the complex procedural history in *Gaos*, that issue had not been addressed. 139 S. Ct. 1041 (2019).

commercial speech.[106]

The post-*Sorrell* world of speech challenges to privacy laws risks falling into the same trap as standing for statutory violations or commercial speech. The Court has moved perilously close towards a jurisprudence under which privacy laws are nearly impossible to craft without concerns that they will subject to constitutional challenge under the First Amendment. The First Amendment itself has taken an aggressive, deregulatory turn. While this Essay has sought to shine a light on a path out of this thicket, and there are promising signs that courts may follow that path or a similar one, the recent history of the Supreme Court on First Amendment cases does not fill one with much hope.

It seems likely that a privacy statute will come before the Court in the coming years. If and when that does happen, the Court should take care to analyze the governmental interests in promoting privacy and the very real concerns that privacy regulations seek to protect, and will hopefully uphold such regulations with more clarity than the analysis presented in *Sorrell*. Too much is at stake to hold otherwise.

106. *See supra* notes 50–55 and accompanying text.