

## Why a Data Disclosure Law Is (Likely) Unconstitutional

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## INTRODUCTION

At a conference held in October 2019, an investigative reporter was asked a simple question: “How do we make your job easier?” The reporter was Surya Mattu, a data journalist at *The Markup*, who has also worked for *ProPublica*, *Gizmodo*, and the MIT Media Lab.<sup>1</sup> He describes himself as a kind of auditor of technology platforms,<sup>2</sup> and those services are dearly needed. In other industries, we accept that new technologies “solve some problems and create new ones.”<sup>3</sup> But, as Mattu explained, we seem to have forgotten those trade-offs when it comes to online platforms.<sup>4</sup>

So, how do we make Mattu’s job easier? His answer was incisive: Let journalists, like him, collect data from online platforms.<sup>5</sup> For the last seven years, Facebook has limited access to its platform data.<sup>6</sup> The company has restricted third-party access to its programming interfaces,<sup>7</sup> critical access points for journalists and researchers to

1. See *Hello*, SURYA MATTU, <https://perma.cc/XFL9-MT6L> (last visited Mar. 3, 2020). *The Markup* is a nonpartisan publication that reports on the effects that technology has on society. See *About Us*, MARKUP, <https://perma.cc/36NB-X7B4> (last visited Mar. 25, 2020).

2. Specifically, he likened himself to a health inspector “looking for cockroaches.” Knight First Amend. Inst., *The Tech Giants, Monopoly Power, and Public Discourse: Panel 2*, YOUTUBE (Nov. 22, 2019), <https://perma.cc/B7LZ-SV5B> [hereinafter *Tech Giants: Panel 2*], at 41:50.

3. *Id.* at 41:26.

4. *Id.*

5. Mattu was speaking about platforms broadly and his concerns with transparency “extend[] well beyond the sphere of speech.” See Victoria Baranetsky, *Keeping the New Governors Accountable: Expanding the First Amendment Right of Access to Silicon Valley*, KNIGHT FIRST AMEND. INST. (Aug. 21, 2019), <https://perma.cc/M59V-P2RQ> (“[For example, Amazon] offers a variety of tools to local law enforcement agencies around the country and has recently captured 46 percent of online shopping in addition to delivering packages and acting as a credit lender, a producer of content, and a leading provider of cloud server space.”). My focus is limited to the realm of speech and, more specifically, to social media platforms’ effect on public discourse. See *infra* notes 18-49 and accompanying text.

6. See Josh Constine, *Facebook Is Done Giving Its Precious Social Graph To Competitors*, TECHCRUNCH (Jan. 24, 2013, 10:51 PM), <https://perma.cc/J5D7-A6WD>.

7. See Bernie Hogan, *Social Media Giveth, Social Media Taketh Away*, 12 INT’L J. COMM. 592, 593 (2018); Axel Burns, *Facebook Shuts the Gate After the Horse Has Bolted, and Hurts Real Research in the Process*, INTERNET POL’Y REV. (Apr. 25, 2018), <https://perma.cc/UG82-HGA4>. Critics argue that these changes were “as much about strengthening Facebook’s business model of data control as they [were] about actually improving data privacy for users.” See Burns, *supra*; accord Hogan, *supra*, at 594.

efficiently collect data.<sup>8</sup> (Other platforms, such as Twitter, have followed suit.<sup>9</sup>) Facebook also restricts data access through other means. For example, the company's terms of service prohibit the use "basic tools of digital journalism" and, possibly, make the use of such tools illegal.<sup>10</sup> These tools include "the automated collection of public information and the creation of temporary research accounts."<sup>11</sup> Taken together, these restrictions effectively deny access to platform data. Manually collecting public data is often not feasible—it would take too long, and data would not be collected in a usable format.<sup>12</sup>

Social media platforms have a poor history of public transparency. Most platforms provide data access to projects "that dovetail with [their] business goals," but exclude research "adverse to their interests."<sup>13</sup> Facebook went further to protect its business interest in 2016. The company obscured the scope, scale, and even existence of Russia's disinformation campaign on Facebook and Instagram.<sup>14</sup> Social

8. An Application Programming Interface, or "API," allows online platforms to provide third-party applications with regularly formatted data upon request. See David Berlind, *What Are the Benefits of APIs?*, PROGRAMMABLEWEB (Dec. 3, 2015), <https://perma.cc/D8ZT-A94N>. Through an API, researchers can "retrieve, store, and manipulate digital traces left by the users of a [platform] for further empirical analysis." Stine Lomborg & Anja Bechmann, *Using APIs for Data Collection on Social Media*, 30 INFO. SOC'Y 256, 256 (2014). APIs are a crucial access point for researchers because they allow automated data access. See *id.* APIs also have the potential to provide access to nonpublic data, which is otherwise inaccessible to researchers, unless they specifically partner with platforms. See *id.* at 259.

9. See Kara Alaimo, *Twitter's Misguided Barriers for Researchers*, BLOOMBERG (Oct. 16, 2018, 11:00 AM), <https://perma.cc/RX9D-MTK3>; but see Natasha Lomas, *Twitter Offers More Support To Researchers—To "Keep Us Accountable,"* TECHCRUNCH (Jan. 6, 2020, 5:07 AM), <https://perma.cc/2Y56-Z74L> ("If Twitter lives up to its promises of active engagement with researchers and their needs, it could smartly capitalize on rival Facebook's parallel missteps . . .").

10. Open letter from Jameel Jaffer et al., Knight First Amend. Inst., to Mark Zuckerberg, CEO, Facebook 2 (Aug. 6, 2018), <https://perma.cc/9PBS-JDEG> [hereinafter Letter from Jaffer to Facebook].

11. *Id.* The Department of Justice and Facebook have, at times, interpreted the Computer Fraud and Abuse Act ("CFAA") to criminalize violations of a website's terms of service. *Id.* at 2–3. Facebook has used the threat of criminal prosecution to dissuade unauthorized research into its platform. *Id.*; see *Facebook Terms of Service, Automated Data Collection Terms*, FACEBOOK, <https://perma.cc/9VJ6-VWNN> (last visited Apr. 17, 2020). As a matter of law, the extent to which the CFAA criminalizes violations of a website's terms of service is unclear. See Camille Fischer & Andrew Crocker, *Victory! Ruling in hiQ v. LinkedIn Protects Scraping of Public Data*, ELEC. FRONTIER FOUND. (Sept. 10, 2019), <https://perma.cc/DWZ5-5DNM>.

12. Prohibiting automated data collection "effectively prevents" most investigative research. "[I]t is impossible to study trends, patterns, and information flows without collecting information at scale, and it's practically impossible to collect information at scale without collecting it" using automated means. Alex Abdo, Litig. Dir., Knight First Amend. Inst., Free Speech in Black Boxes, Speech at Columbia University's Italian Academy Symposium on Misinformation, Media Manipulation, and Antisemitism (Feb. 5, 2020), <https://perma.cc/RGR4-9N92> [hereinafter Abdo, Black Boxes]; see also Jamie Williams, "Scraping" Is Just Automated Access, and Everyone Does It, ELEC. FRONTIER FOUND. (Apr. 17, 2018), <https://perma.cc/FC5D-CZDF> (arguing that scraping is necessary to provide "meaningful" data access).

13. See Karen Weise & Sarah Frier, *If You're a Facebook User, You're Also a Research Subject*, BLOOMBERG (June 14, 2018), <https://perma.cc/42U5-PMF8>. See MARK R. WARNER, POTENTIAL POLICY PROPOSALS FOR REGULATION OF SOCIAL MEDIA AND TECHNOLOGY FIRMS 10 (July 30, 2018), <https://perma.cc/TZZ2-GZZD>.

14. See Sheera Frenkel et al., *Delay, Deny, and Deflect: How Facebook's Leaders Fought Through Crisis*, N.Y. TIMES (Nov. 14, 2018), <https://perma.cc/8UQE-ZLSQ>. Facebook executives stalled an internal investigation and downplayed the severity of the influence campaign. *Id.* After it was reported to the press, executives continued to obscure the full extent of Russian interference, such as by focusing

media platforms provide *some* data access for public interest research, but these efforts have been the exception, not the norm.<sup>15</sup> Because platforms withhold data necessary for public interest research, Congress might step in and mandate data access.

I conclude that any such effort would (likely) be unconstitutional under the First Amendment.<sup>16</sup> Part I provides relevant background and outlines a hypothetical data disclosure law; Part II.A explores the argument that a data disclosure law compels “speech” and unconstitutionally infringes the rights of platforms; Part II.B explores further arguments which could be raised regarding the constitutionality of the hypothetical data disclosure law;<sup>17</sup> Part III provides a brief recommendation to legislators seeking to draft a data disclosure law; and I conclude in Part IV by arguing for a reinterpretation of free speech jurisprudence.

## I. BACKGROUND

### A. WHY DISCLOSURE?

Social media platforms have upended the ways in which we communicate. Facebook is the quintessence of this transformation. The company has nothing less than “a natural monopoly” over online speech.<sup>18</sup> Facebook mediates communication at a volume “far larger” than was possible even ten years ago.<sup>19</sup> In other words, Facebook has a “natural monopoly” over online speech. The algorithmic rankings in a user’s feed “shape the social lives and reading habits of more than [one] billion daily active users.”<sup>20</sup> Journalists live and die by these rankings.<sup>21</sup> Awareness of current events can be amplified or stifled by algorithmic choices.<sup>22</sup> Despite Mark

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attention on the use of paid ads rather than the use of phony Facebook pages. See Issie Lapowsky, *Shadow Politics: Meet the Digital Sleuth Exposing Fake News*, WIRE (July 18, 2018), <https://perma.cc/P2HX-YHFN>.

15. See *infra* notes 50–52; see also Lomas, *supra* note 9.

16. Compelled disclosure might raise other constitutional claims, such as one under the Takings Clause. Cf. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005–06 (1984) (holding enacted regulations of data and trade secrets constituted a regulatory taking to the extent there was a “reasonable investment-backed expectation” in such data).

17. Part II.B also provides analytical categories of data, which might be useful to practitioners who are litigating the constitutionality of data privacy laws. See *infra* Part II.B.2.

18. See Kyle Langvardt, *Regulating Online Content Moderation*, 106 GEO. L.J. 1353, 1360 (2018). (“Facebook . . . is a natural monopoly that channels several currents of electronic communication . . . through a single clearing house.”).

19. See *id.*

20. Will Oremus, *Who Controls Your Facebook Feed*, SLATE (Jan. 3, 2016, 8:02 PM), <https://perma.cc/5WUS-TB5Y>.

21. Facebook refers to publishers nearly a third of their web traffic. See Nicholas Thompson & Fred Vogelstein, *15 Months of Fresh Hell Inside Facebook*, WIRE (Apr. 16, 2019, 5:30 AM), <https://perma.cc/4M22-YB3P>.

22. See, e.g., Caitlin Dewey, *Why Didn’t #FreddieGray Trend on Twitter?*, WASH. POST (Apr. 27, 2015, 2:42 PM), <https://perma.cc/9ZXW-HWK3> (explaining why the death of Freddie Gray, who suffered a fatal neck injury in a police van, never resulted in a nationally trending hashtag).

Zuckerberg's insistence to the contrary,<sup>23</sup> Facebook is not a neutral conduit for speech; no social media platform can be. As a social media platform, Facebook "disseminates [users'] messages, but it also determines whether their signals will be amplified, suppressed or distorted."<sup>24</sup> The national news and our personal communications are all channeled through this "single clearing house."<sup>25</sup> And Facebook's algorithm determines how all this information is ordered.<sup>26</sup>

Today, a small number of technology platforms are "the primary influencers over online speech."<sup>27</sup> Many find this reality unsettling. Commentators have questioned why it is excusable for a few "technology oligarchs" to exercise such unreviewable power.<sup>28</sup> To some extent, this reality is inevitable. Online content moderation is a necessary evil.<sup>29</sup> Social media platforms handle an unprecedented volume of content.<sup>30</sup> This flood of information threatens to overwhelm technical limitations, making the platform unusable.<sup>31</sup> The flood also threatens to overwhelm the user's limited attention span, making the platform intolerable.<sup>32</sup> Platforms must adopt a system of prior restraints to mitigate these and other harms, but commentators insist that the need to moderate does not excuse opaque practices.<sup>33</sup>

At the moment, platforms dictate and implement their own moderation policies. This gives them near-unilateral authority to shape the freedom of expression online.<sup>34</sup> Given the importance and impact of moderation policies—specifically, social media moderation policies—commentators have argued they should be formulated through

23. When speaking at Georgetown, Mark Zuckerberg described one of Facebook's central goals as "giving everyone a voice." See *Mark Zuckerberg Stands for Voice and Free Expression*, FACEBOOK: NEWSROOM (Oct. 17, 2019), <https://perma.cc/4LC6-EEWA>.

24. Alex Abdo, *Facebook Is Shaping Public Discourse. We Need To Understand How*, GUARDIAN (Sept. 15, 2018, 6:00 AM), <https://perma.cc/DMW8-UHN9> [hereinafter Abdo, *Public Discourse*].

25. See Langvardt, *supra* note 18, at 1360.

26. See Abdo, *Black Boxes*, *supra* note 12 (describing how Facebook "structures" speech).

27. Baranetsky, *supra* note 5; see also Langvardt, *supra* note 18, at 1358 ("Today, a small number of politically-unaccountable technology oligarchs exercise state-like censorship powers"); Olivia Solon, *To Censor or Sanction Extreme Content? Either Way, Facebook Can't Win*, GUARDIAN (May 23, 2017), <https://perma.cc/U6YE-BCK8> (suggesting Facebook's content moderation policy is "the most important editorial guide sheet the world has ever created"); Jeffrey Rosen, *The Deciders: Facebook, Google, and the Future of Privacy and Free Speech*, BROOKINGS (May 2, 2011), <https://perma.cc/XA4V-BUKN> ("[T]he person who arguably has more power than any other to determine who may speak and who may be heard around the globe isn't a king, president or Supreme Court justice. She is Nicole Wong, the deputy general counsel of Google . . .").

28. See Langvardt, *supra* note 18, at 1358.

29. Depending on your perspective, a system of prior restraints may be "condemned as 'censorship' or accepted as 'content moderation.'" See *id.* at 1359.

30. See *id.* at 1359 ("This dilemma never arose in the twentieth century . . ."). When scrolling through Facebook's News Feed, a user typically sees a few hundred posts—a selection curated from anywhere between 1,500 and 10,000 possible pieces of content. See Oremus, *supra* note 20.

31. See Langvardt, *supra* note 18, at 1359–60.

32. See *id.* at 1360 ("Imagine your email without spam filtering, or your Facebook feed if it were populated daily with beheading videos and violent pornography.")

33. See *id.* at 1358. For example, "bad actors" like trolls and spammers can render a platform unusable. See *id.* at 1360–63; Tim Wu, *Is the First Amendment Obsolete?*, KNIGHT FIRST AMEND. INST. at 11–17 (Sept. 1, 2017), <https://perma.cc/U2NB-6LJR> (page numbers refer to the PDF of Wu's article).

34. See *supra* note 27.

a process of transparent, public debate.<sup>35</sup> Many commentators seek to hold social media platforms politically accountable for their moderation decisions, but attempts to do so run into a fundamental difficulty: a lack of transparency.<sup>36</sup>

Platforms have long refused to disclose their moderation policies. At Facebook, for example, the moderator's handbook was long treated as a trade secret.<sup>37</sup> Often, the platforms' programmers *cannot* disclose their moderation policies because they do not know how their algorithms work.<sup>38</sup> This means that whistleblowers and investigative reporters can only accomplish so much on their own. In order to understand how social media platforms structure speech, independent researchers need to audit platform algorithms.<sup>39</sup> To do so, they need access to platform data.

No social media platform can be a neutral conduit for speech.<sup>40</sup> As Alex Abdo, Litigation Director at the Knight First Amendment Institute, explains: "Facebook influences the relationship between users and distorts the flow of information among them."<sup>41</sup> These distortions can have unsavory effects. Algorithmic distortions can exacerbate inequality (intentionally or unintentionally) on the basis of race.<sup>42</sup> For example, researchers at Harvard found that, in 2014, ads for arrest records were "significantly more likely" to be served with search results for "distinctively black names or a historically black fraternity."<sup>43</sup> Similar distortions can muzzle social movements.<sup>44</sup> Despite national news coverage and a trending hashtag in Baltimore, the violent protests after the death of Freddie Gray, a black man who suffered a fatal neck injury in a police van, never became a national trending topic on Twitter.<sup>45</sup>

35. Jamie Grierson, "No Grey Areas": Experts Urge Facebook To Change Moderation Policies, *GUARDIAN* (May 22, 2017), <https://perma.cc/ZC2P-EKYS> (quoting Yvette Cooper, then chair of Great Britain's Home Affairs Select Committee).

36. See *id.*; WARNER, *supra* note 13, at 11 (suggesting increased transparency would inform regulation of technology platforms).

37. See Julia Carrie Wong & Olivia Solon, *Facebook Releases Content Moderation Guidelines—Rules Long Kept Secret*, *GUARDIAN* (Apr. 24, 2018), <https://perma.cc/7CWC-YLBX>.

38. See Abdo, *Public Discourse*, *supra* note 24 ("The algorithms are opaque—even to Facebook—because they rely on a form of computation called 'machine learning', in which the algorithms train themselves to achieve goals set by their human programmers."); Langvardt, *supra* note 18, at 1377–78; see also Maayan Perel & Niva Elkin-Koren, *Black Box Tinkering: Beyond Disclosure in Algorithmic Enforcement*, 69 *FLA. L. REV.* 181, 188–90 (2017).

39. See Perel & Elkin-Koren, *supra* note 38, at 199–202 (describing the benefits of "black box tinkering" compared to more passive observational studies).

40. See Abdo, *Black Boxes*, *supra* note 12; see also *infra* notes 82–84 and accompanying text.

41. Abdo, *Public Discourse*, *supra* note 24; see Abdo, *Black Boxes*, *supra* note 12 ("Facebook structures the speech that remains on its platform. It decides whether and how its users can interact, and it decides whether and when to amplify or suppress each form of speech posted to its platform."). This occurs when Facebook does something as simple as order content in your News Feed. *Id.*

42. See Claire Cain Miller, *When Algorithms Discriminate*, *N.Y. TIMES* (July 9, 2015), <https://perma.cc/3CCC-RFA6>.

43. *Id.* Unequal results can occur on the basis of other classes, such as displaying advertisements for high-income jobs more often for men than for women. See *id.* For a survey of algorithmic bias, see Komal S. Patel, Note, *Testing the Limits of the First Amendment: How Online Civil Rights Testing is Protected Speech Activity*, 118 *COLUM. L. REV.* 1473, 1477–82 (2018).

44. See Dewey, *supra* note 22.

45. See *id.* Similarly, #OccupyWallStreet never trended in New York City because of the steady, sustained use of the hashtag in the city. See Megan Garber, *Why Hasn't #OccupyWallStreet Trended in New York?*, *NIEMAN LAB* (Oct. 17, 2011), <https://perma.cc/4RGG-XQPX> (citing research by Gilad Lotan).

Most concerning, these distortions can be gamed by extremists and other bad actors.<sup>46</sup> Targeted political advertising is especially worrisome in this regard, because it is hard to “know who is distributing what information to whom.”<sup>47</sup> We have long been in the dark about how social media platforms “shap[e] public discourse.”<sup>48</sup> This lack of transparency stifles public debate over the rules governing online platforms—the forums where, according to the Supreme Court, free speech values have their fullest expression.<sup>49</sup>

Recently, platforms have taken some steps to increase transparency, but these efforts are limited. Facebook has taken steps to increase transparency regarding political ads, while Twitter has banned such ads altogether.<sup>50</sup> Facebook also partnered with the Social Science Research Council to facilitate “independent, credible research about the role of social media in elections,”<sup>51</sup> but the initiative nearly fell through after twenty months of protracted negotiations.<sup>52</sup> Even before this debacle, some commentators insisted the plan, while a step in the right direction, did not go far enough.<sup>53</sup>

Because platforms have a poor record of public transparency, Congress might step in and mandate disclosure. Of course, such a law should not sweep too broadly.

46. See Langvardt, *supra* note 18, at 1360-63; Wu, *supra* note 33, at 11-17; see also Jonathan Albright, *Untrue-Tube: Monetizing Misery and Disinformation*, MEDIUM (Feb. 25, 2018), <https://perma.cc/UD5H-8544> (describing how YouTube’s recommendation algorithm facilitates online extremism).

47. See Wael Ghonim & Jake Rashbass, *Transparency: What’s Gone Wrong with Social Media and What Can We Do About It?*, HARV. KENNEDY SCH. SHORENSTEIN CTR. ON MEDIA, POL. & PUB. POL’Y (Mar. 27, 2018, 9:03 AM), <https://perma.cc/ADR8-53XT> (finding that the advent of micro-targeting “has huge implications for our ability to detect false advertising”). Traditional political advertising is more transparent, like speaking to a friend on the street. No matter how quietly you talk, it is obvious who you are speaking to. A close listener can also pick up bits of your conversation. Targeted advertising, on the other hand, is analogous to telepathy. It is impossible for a third party to tell whether you are communicating at all, let alone to whom.

48. Abdo, *Public Discourse*, *supra* note 24.

49. In the past, there may have been difficulty identifying “the most important places” for the exchange of views; today “the answer is clear. It is cyberspace—the ‘vast democratic forums of the Internet’ in general, and social media in particular.” Packingham v. North Carolina, 137 S.Ct. 1730, 1735 (2017) (quoting Reno v. ACLU, 521 U.S. 844, 868 (1997)).

50. See Josh Constine, *Facebook Launches Searchable Transparency Library of All Active Ads*, TECHCRUNCH (Mar. 28, 2019), <https://perma.cc/SKA5-GUQL>; Devin Coldewey, *Twitter Makes Its Political Ad Ban Official*, TECHCRUNCH (Nov. 15, 2019, 7:00 PM), <https://perma.cc/3NNU-8TJ6>.

51. Elliot Schrage & David Ginsberg, *Facebook Launches New Initiative To Help Scholars Assess Social Media’s Impact on Elections*, FACEBOOK, <https://perma.cc/95QQ-MPCX> (last visited Feb. 17, 2020).

52. See Gary King & Nathaniel Persily, *Unprecedented Facebook URLs Dataset Now Available for Academic Research Through Social Science One*, SOC. SCI. ONE BLOG (Feb. 13, 2020), <https://perma.cc/CED8-7P4Z>; Hannah Murphy, *First Project Studying How Facebook Affects Elections Runs into Privacy Concerns*, FIN. TIMES (Sept. 29, 2019), <https://perma.cc/8ZQJ-PDMS> (“Facebook’s first effort to open up its platform for academics to study its impact on elections has been thrown into doubt, after the social media group failed to hand over its data and cited privacy concerns.”).

53. See, e.g., Abdo, *Black Boxes*, *supra* note 12 (“Even before its dissolution, however, Facebook’s partnership with the Social Science Research Council was at best a partial solution. It focused narrowly, at least in its initial scope, on research related to election integrity. It accepted requests for access to data by researchers, but not by journalists.”). See also Ghonim & Rashbass, *supra* note 47; Burns, *supra* note 7.

Granting researchers indiscriminate access to platform data would raise serious policy concerns.<sup>54</sup> Nonetheless, platforms could share more data than they already have “while respecting concerns for user privacy, trade secrets, and intellectual property.”<sup>55</sup> Policy concerns can, and should, limit the scope of disclosure.

Social media platforms are among the most prominent and powerful institutions of our day.<sup>56</sup> These platforms exert significant influence over online speech, which places them at the center of many contentious debates. These public debates would benefit from independent research and raw data, which could shed light on the “erratic and obscure” ways platforms moderate content.<sup>57</sup> Because platforms have largely withheld data necessary for public interest research, Congress could soon step in and mandate disclosure.<sup>58</sup>

### B. HOW WOULD DISCLOSURE OCCUR?

Few scholars have explored the constitutionality of a data disclosure law. Most scholars who have written about the government regulation of content moderation policies have not considered such a law.<sup>59</sup> Those who have considered a disclosure regime give the topic cursory treatment.<sup>60</sup> This is my attempt to fill that gap in legal scholarship.

Despite the popularity of a disclosure regime among certain activists and academics,<sup>61</sup> no one has offered a concrete proposal for such a law. The most concrete proposal comes from Senator Mark R. Warner, whose “Public Interest Data Access Law” serves as a useful starting point for analysis.<sup>62</sup> The remainder of this section outlines a data disclosure law which is sufficiently detailed to be analyzed, but vague enough to ensure my analysis is applicable to yet-to-be proposed data disclosure laws.

Any data disclosure law must address three primary components: the data recipients, the regulated platforms, and the data itself.

54. See WARNER, *supra* note 13, at 11.

55. Ghonim & Rashbass, *supra* note 47.

56. See Rosen, *supra* note 27.

57. See Langvardt, *supra* note 18, at 1355.

58. See Frenkel et al., *supra* note 14; Lapowsky, *supra* note 14.

59. See, e.g., Jack Balkin, *How to Regulate (and Not Regulate) Social Media*, KNIGHT FIRST AMEND. INST. (Mar. 25, 2020), <https://perma.cc/AA7V-9TAM>; Madeleine Rosuck, Comment, *When Lies Go Viral: The First Amendment Implications of Regulating the Spread of Fake News*, 21 SMU SCI. & TECH. L. REV. 319 (2018); Sofia Grafanaki, *Platforms, the First Amendment and Online Speech: Regulating the Filters*, 39 PACE L. REV. 111 (2018); Frank Fagan, *Systemic Social Media Regulation*, 16 DUKE L. & TECH. REV. 393 (2018).

60. See Langvardt, *supra* note 18, at 1383–85; but see Dawn Carla Nunziato, *The Marketplace of Ideas Online*, 94 NOTRE DAME L. REV. 1519 (2019) (providing more in-depth analysis of disclosure regarding political ads).

61. See WARNER, *supra* note 13, at 10 n.14 (collecting articles); Burns, *supra* note 7.

62. Warner’s Act would guarantee “that platforms above a certain size provide independent, public interest researchers with access to anonymized activity data, at scale,” via a standard interface for sharing data access—that is, “a secure API.” WARNER, *supra* note 13, at 10. The “goal” of the Act would be to facilitate research “to measure and audit social [media] trends.” *Id.* This research, in turn, would guide further regulation of technology platforms. See *id.*

## 1. The Data Recipients

Ordinarily, when we think of disclosure laws, we think of public disclosures. For example, the SEC mandates that companies file an annual financial report and make the report publicly available.<sup>63</sup> But a data disclosure law is different. Under the law, data would be provided to select private parties who requested access and who would use the data to serve the “public interest.”<sup>64</sup> Senator Warner would disclose data only to “public interest researchers,” but this class could be expanded to include journalists as well.<sup>65</sup> In any case, the sensitivity of disclosed data suggests that the class of data recipients must be narrow.<sup>66</sup> Moreover, the Cambridge Analytica scandal demonstrates the need for clear and effective limitations on who collects data and how it is used.<sup>67</sup>

A precise definition of “researcher” or “journalist” is beyond the scope of my Note.<sup>68</sup> What is important to recognize here is that a narrow definition, although necessary, could raise concerns of bias. If any aspect of this definition were based on viewpoint, broadly defined, selective disclosure of data might be unconstitutional.<sup>69</sup>

63. See Form 10-K, 17 C.F.R. § 249.310 (2019). Other laws compel disclosure to a subset of the public, such as mandated safety briefings made by flight attendants to airline passengers. See *Reed v. Town of Gilbert*, Ariz., 135 S. Ct. 2218, 2235 (Breyer, J., concurring) (collecting examples).

64. WARNER, *supra* note 13, at 10.

65. *Id.*; see Letter from Jaffer to Facebook, *supra* note 10, at 4 (proposing a limited safe harbor in Facebook’s Terms of Service which would allow journalists who report on “matters of public concern” to collect data through automated means).

66. This problem is impossible to avoid. Disclosed data will be sensitive, even if anonymized, because users’ real identities could easily be uncovered and linked to collected data. See Paul Ohm, *Broken Promises of Privacy: Responding to the Surprising Failure of Anonymization*, 57 UCLA L. REV. 1701, 1704 (2010). For elaboration on categories of collected data, see *infra* Part II.B.2.a.

67. Aleksandr Kogan, a psychologist and faculty member at Cambridge University, had permission from Facebook to access user data. See U.K. INFO. COMM’R’S OFFICE, INVESTIGATION INTO USE OF DATA ANALYTICS IN POLITICAL CAMPAIGNS 27 (2018), <https://perma.cc/X962-KTTJ> [hereinafter U.K. INVESTIGATION REPORT]. In 2014, Kogan used these permissions to harvest data from 87 million profiles. *Id.* at 31; see also Cecilia Kang & Sheera Frenkel, *Facebook Says Cambridge Analytica Harvested Data of Up To 87 Million Users*, N.Y. TIMES (Apr. 4, 2018), <https://perma.cc/23FA-5A7K>. Kogan developed a personality quiz application which became wildly popular. In order to take the quiz, users had to provide access to their “basic information.” U.K. INVESTIGATION REPORT, *supra*, at 30. When a user granted permission to access their “basic information,” they granted access to their page posts, Friends list, and private messages, among other data (to varying degrees, depending on their specific profile privacy settings). *Id.* at 30–31. The user also granted access to pages, likes, and public profile data of each one of their friends. *Id.* Kogan harvested all this data and sold it to Cambridge Analytica, which used that data to micro-target potential voters with campaign ads. *Id.* at 14.

68. A definition of “journalist” seems particularly hard to pin down, especially today, “when anyone, it seems, can claim to be a journalist.” Lee C. Bollinger, President, Columbia Univ., Tanner Lectures, Part 2 at Clare Hall, University of Cambridge (Nov. 6, 2018), <https://perma.cc/3RBB-LGKT>. Even the Supreme Court has avoided defining a “journalist” class entitled to superior First Amendment protection (with the notable exception of the *Hayes* privilege not to disclose information gathered while reporting). See *id.*

69. See *infra* Part II.B.1.b.

## 2. The Regulated Platforms

Although a data disclosure law could target a variety of social media platforms, large platforms are likely to be the primary targets. For one, these platforms could bear the costs of compliance more easily than smaller platforms.<sup>70</sup> More importantly, large platforms are often the ones journalists and researchers most want to study.

Critics of social media recognize an urgent need to increase transparency over the platforms which dominate our channels of communication.<sup>71</sup> Accordingly, a data disclosure law is likely to target “megaplatforms”: those platforms with “the most market power from network effects and lock-ins.”<sup>72</sup> Most “general-purpose” social media platforms, such as Facebook and Twitter, should fall into this category.<sup>73</sup>

In order to simplify the definition of “platform” for purpose of my analysis, our imagined law will specifically target Facebook. I have chosen Facebook because it is a quintessential “megaplatform.” As a “natural monopoly” channeling “several currents of electronic communication,” Facebook exerts tremendous power.<sup>74</sup> Furthermore, because users are “locked in” to the platform, Facebook can wield this power without consequence.<sup>75</sup>

## 3. The Data

Senator Warner’s law would compel disclosure of a social media platform’s activity data.<sup>76</sup> “Put simply, activity data is the record of *any* user action (online or in the physical world) that can be [electronically] logged.”<sup>77</sup> It is hard to overstate the breadth of this category. Facebook records “everything” a user does—every

70. See Evelyn Douek, *The Rise of Content Cartels*, KNIGHT FIRST AMEND. INST. (Feb. 11, 2020), <https://perma.cc/9G6L-5R5Q> (arguing that applying the same content moderation standards to large and small platforms risks overburdening small platforms and start-ups, thereby erecting barriers to entry).

71. See Abdo, *Black Boxes*, *supra* note 12; see also Rohit Chopra, Comm’r, Fed. Trade Comm’n, Prepared Remarks at Silicon Flatirons Conference, University of Colorado Law School (Feb. 10, 2019), <https://perma.cc/SLH9-A9DQ>.

72. See Langvardt, *supra* note 18, at 1372.

73. See *id.* at 1371 (describing Facebook and Twitter as “general-purpose platforms for discussion that operate at enormous scales”).

74. *Id.* at 1360.

75. “The larger and more eclectic a social network becomes, the more the user is ‘locked in’ to it, as opposed to alternative channels.” *Id.* at 1371. National governments have proved ineffective at checking the power of megaplatforms. For example, in July, the FTC levied a \$5 billion fine against Facebook for abusing user privacy. This fine, however, was a pittance. That large sum represents a few months’ *revenue*, not profit, for the social media giant. Moreover, the FTC’s settlement agreement does not prevent Facebook from collecting and sharing user data in the future. Nor does the agreement, in any meaningful way, restrict Facebook’s “lucrative ad business, which relies upon [collecting and exploiting users’] data.” See Nilay Patel, *Facebook’s \$5 Billion FTC Fine is an Embarrassing Joke*, THE VERGE (July 12, 2019), <https://perma.cc/R4S3-SGF6>; see also Facebook, Inc., F.T.C. File No. 182-3109, 2019 WL 3451729 (July 24, 2019) (dissenting statement of Comm’r Rohit Chopra) (criticizing the settlement for imposing “no real restraints on Facebook’s business model”).

76. WARNER, *supra* note 13, at 10.

77. Tom Franklin et al., *Exploiting Activity Data in the Academic Environment*, ACTIVITYDATA.ORG, <https://perma.cc/N8BJ-WFGL> (last visited Feb. 15, 2020) (emphasis added).

keystroke, comment, and more.<sup>78</sup> Platforms have the potential to record, and capitalize upon, every search query we type, our physical movements while holding our phones, and much more.<sup>79</sup> All of this data, including users' private messages, could potentially be disclosed under our imagined law.<sup>80</sup>

There are many policy reasons why compelled disclosure should be more narrow. Thankfully, proponents of a data disclosure law seem to have only limited categories of data in mind.<sup>81</sup> The relative merits of broad or narrow disclosures are not my primary concern. Instead, I want to see where the First Amendment would draw the line and pose a constitutional bar to data disclosure.

I will analyze an imagined data disclosure law which reads as follows:

Upon request, large social media platforms shall disclose activity data to public interest journalists and public interest researchers.

In Part II, I analyze whether compelled data disclosure would violate the First Amendment. Part II.A explores the argument that such a law compels "speech" and unconstitutionally infringes the rights of platforms. This seems to be the most natural and most effective argument which platforms challenging a data disclosure law could raise. In addition to the compelled speech argument, Part II.B evaluates three further arguments that platforms could make: (1) that a data disclosure law infringes the editorial freedom of social media platforms; (2) that a data disclosure law is an attempt to "tilt" public debate in favor of critics of social media; and (3) that compelled disclosure burdens the speech and associational rights of platform users.

## II. WHY A DATA DISCLOSURE LAW WOULD VIOLATE THE FREE SPEECH CLAUSE

No social media platform can be a neutral conduit for speech. In order to protect speech online, platforms are forced "to adopt a pervasive system of prior restraints . . . [a system which] sits in tension with [our] American free speech tradition."<sup>82</sup> The more speech-protective the moderation policy, the more "hands-on" content

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78. VICE News, *All the Hidden Ways Facebook Ads Target You*, YOUTUBE (Apr. 13, 2018), <https://perma.cc/ZR2N-TJYF>.

79. See Hannes Grassegger & Mikael Krogerus, *The Data that Turned the World Upside Down*, MOTHERBOARD (Jan. 28, 2017, 9:15 AM), <https://perma.cc/RBN6-86M7>.

80. See Gabriel J.X. Dance et al., *As Facebook Raised a Privacy Wall, It Carved an Opening for Tech Giants*, N.Y. TIMES (Dec. 18, 2018), <https://perma.cc/56GL-FDVJ> (recounting how Facebook shared users' private messages and calendar entries with third-party corporations, without its users' knowledge).

81. See, e.g., Ghonim & Rashbass, *supra* note 47 (proposing a disclosure regime which would share "three categories of data": public posts, ad-related data (such as an ad's content, buyer, and targeted audience), and censored content).

82. Langvardt, *supra* note 18, at 1358–59.

moderation needs to be.<sup>83</sup> This basic dilemma poses “new and unprecedented challenge[s]” for our system of free expression.<sup>84</sup>

Our traditional conception of free speech focuses almost exclusively on the protection of speakers from government censorship.<sup>85</sup> This tradition makes it difficult, or downright impossible, for the government to involve itself in content moderation policies of online platforms.<sup>86</sup> For example, one regulatory proposal would have Congress directly oversee content moderators.<sup>87</sup> Another would designate platforms as “public utilities.”<sup>88</sup> In either case, the government, rather than the private platform, would have the final say over content moderation policy. In either case, the government would impose prior restraints on the platform user’s speech.<sup>89</sup>

This distinction between private and public censorship is crucial. With one exception not relevant here, the First Amendment only restrains censorship initiated by the state.<sup>90</sup> Parents can punish their children for their political views without violating the First Amendment. Government officials are far more constrained.<sup>91</sup> The content moderation policies adopted by social media platforms sit in tension with our free speech *tradition*, but these private schemes do not violate the First Amendment. However, once the government becomes involved—once the government dictates the moderation policy—the same system of prior restraints seems to be unconstitutional.<sup>92</sup>

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83. *Id.* at 1363. “The moderators’ dilemma is, by all indications, a permanent social problem sewn into the logic of the Internet.” *Id.* at 1362. It is impossible to eschew content moderation—and thereby avoid oppressive content moderation with a prophylactic rule—because *some* moderation is necessary to make Internet platforms usable. *Id.* at 1363. “The dilemmic logic of content moderation therefore eliminates the possibility of a ‘clean’ libertarian solution to the problem [of oppressive censorship].” *Id.* This poses a problem for regulators. Any government intervention—just like any private regime of content moderation—will raise “a novel and unsettling tradeoff: the more speech-protective the government’s policy, the more hands-on the government’s approach will need to be.” *Id.*

84. *Id.* at 1358; *accord* Wu, *supra* note 33, at 27.

85. *See* Wu, *supra* note 33, at 2.

86. *See id.* at 3, 19–20.

87. *See* Langvardt, *supra* note 18, at 1364.

88. *See, e.g.,* K. Sabeel Rahman, *Regulating Informational Infrastructure: Internet Platforms as the New Public Utilities*, 2 GEO. L. TECH. REV. 234 (2018). *See also* Matthew P. Hooker, Note, *Censorship, Free Speech & Facebook: Applying the First Amendment To Social Media Platforms Via the Public Function Exception*, 15 WASH. J.L. TECH. & ARTS 36 (2019) (arguing that social media companies are quasi-governmental state actors).

89. *See* Langvardt, *supra* note 18, at 1364.

90. *See* Wu, *supra* note 33 (describing the state action doctrine). The exception is *Marsh v. Alabama*, 326 U.S. 501 (1946), a case where the Court found a company town qualified as a state actor because it performed “the full spectrum of municipal powers and stood in the shoes of the State.” *Lloyd Corp. v. Tanner*, 407 U.S. 551, 569 (1972) (citing *Marsh*, 326 U.S. 501). It is hard to argue social media platforms are indistinguishable from a municipality. *See* Wu, *supra* note 33, at 22.

91. *See, e.g.,* *Bd. of Airport Comm’rs v. Jews for Jesus*, 482 U.S. 569 (1987).

92. *See* Balkin, *supra* note 59 (“Facebook’s and Twitter’s community standards, for example, have many content-based regulations that would be unconstitutional if imposed by government actors.”); Langvardt, *supra* note 18, at 1364–66 (analyzing the constitutionality of direct government limitations on content moderation and concluding that platforms have the winning argument); Jack Balkin, *The First Amendment in the Second Gilded Age*, 66 BUFF. L. REV. 979, 983 (2018) (“In short, the First Amendment, as currently interpreted by federal courts, may be of little help in securing the practical ability to speech

One way to avoid this dilemma is to use government intervention only to increase transparency. In commercial contexts, the government is free to compel public disclosures without unconstitutionally infringing upon a corporation's freedom of speech.<sup>93</sup> For example, securities regulations impose an invasive and complex system of disclosure requirements on publicly traded corporations.<sup>94</sup> As it stands, these regulations are constitutional.<sup>95</sup>

A data disclosure law could threaten the speech and privacy interests of platform users and might be challenged on that basis. However, it seems silly to argue that a data disclosure law infringes upon platforms' freedom of speech. A data disclosure law seems somewhat analogous to securities disclosure laws and, if a data disclosure law could be challenged based on the *platform's* speech rights, then other long-standing disclosure laws could also be attacked. In our post-*Lochner* world, against the backdrop of expansive government regulation, a compelled speech argument seems untenable. Nonetheless, as I will explain in Part II.A.1, such a claim is actually the most natural line of attack under the First Amendment.

In Subpart A, I explain why a data disclosure law seems to unconstitutionally infringe upon the speech rights of regulated platforms. Part II.A.2 explains why a data disclosure law seems to regulate protected speech. Part II.A.3 explains why a data disclosure law is likely subject to strict scrutiny. Part II.A.4 explains why such a law may not survive that level of judicial review.

In addition to the compelled speech argument, I address further arguments which might be made under the First Amendment to invalidate our imagined law. Parts II.B.1 and II.B.2 explore two further claims based on the platforms' speech rights. Compelled disclosure might burden a platform's "editorial" content moderation decisions.<sup>96</sup> Alternatively, selective data disclosure might "tilt" public debate and thereby discriminate on the basis of viewpoint.<sup>97</sup> Part II.B.3 asks whether compelled disclosure of activity data would burden the speech rights of platform users or advertisers. Platforms could rely on the constitutional rights of these third parties as a basis for their facial constitutional challenge.<sup>98</sup>

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through the privately-owned digital infrastructure [and, in some cases] may even be a positive hindrance."); Wu, *supra* note 33 (suggesting "that the First Amendment and its jurisprudence is a bystander" in an age of aggressive, private efforts to control speech because the First Amendment "has been primarily understood as a negative right against coercive government action").

93. See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985).

94. See, e.g., Form 10-K, 17 C.F.R. § 249.310 (2019) (mandating annual reports of a company's business and financial conditions).

95. In dicta, the Supreme Court has asserted that securities disclosures can be regulated without regard for the First Amendment. See *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978); *but see* *Lowe v. SEC*, 472 U.S. 181, 233–36 (1985) (White, J., concurring) (subjecting an injunction against an unregistered investment adviser from publishing a financial newsletter to First Amendment scrutiny). Recent precedent suggests the constitutionality of securities regulations "require[s] a second look." See Amanda Shanor, *First Amendment Coverage*, 93 N.Y.U.L. REV. 318, 331 (2018) (quoting Floyd Abrams, a noted First Amendment attorney and Supreme Court advocate); *see also infra* note 100.

96. See *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974).

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

98. See *United States v. Stevens*, 559 U.S. 460, 473 (2010).

## A. THE PLATFORM'S SPEECH RIGHTS—COMPELLED SPEECH

### 1. Free Speech and First Principles

First Amendment doctrine is motivated by first principles, that is, the philosophy underpinning the law.<sup>99</sup> The most cited free speech opinions evoke democratic ideals such as the “marketplace of ideas”<sup>100</sup> and the “freedom of mind.”<sup>101</sup> A debate over the meaning of these principles—over what “free expression” means—has shaped free speech jurisprudence.<sup>102</sup> And these debates continue to motivate judicial decisions.<sup>103</sup> Often, disagreements between the majority and dissenting opinions in a particular case can only be explained as a disagreement over first principles.<sup>104</sup>

I am concerned with the application of free speech jurisprudence to regulations of commercial activity.<sup>105</sup> Today the doctrine of free speech is routinely invoked to invalidate regulations which have “historically been treated as beyond the ambit of the First Amendment.”<sup>106</sup> Regulations of business licenses,<sup>107</sup> food product labels,<sup>108</sup> and labor relations<sup>109</sup> have been struck down, to name just a few.<sup>110</sup> Few of these regulations raised First Amendment concerns even a few decades ago.

99. See generally FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* (1982) [hereinafter SCHAUER, ENQUIRY]; see also Thomas M. Crowley, *Books Reviewed*, 29 AM. J. JURIS. 213, 224 (1984) (reviewing SCHAUER, ENQUIRY, *supra*) (“[Schauer’s] general point is that we must understand the philosophical underpinnings of a principle such as free speech in order to successfully apply it.”).

100. *United States v. Alvarez*, 567 U.S. 709, 718 (2012) (plurality opinion) (quoting *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 52 (1988)); accord *Abrams v. United States*, 250 U.S. 616, 630 (Holmes, J., dissenting) (“[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market [of ideas].”).

101. *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943), quoted in *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); accord *Janus v. Am. Fed’n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2463 (2018); *Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2387 (2018).

102. See, e.g., Genevieve Lakier, *Not Such a Fixed Star After All: West Virginia State Board of Education v. Barnette, and the Changing Meaning of the First Amendment Right Not To Speak*, 13 FIU L. REV. 741 (2019).

103. See Vincent Blasi, *Rights Skepticism and Majority Rule at the Birth of the Modern First Amendment*, in *THE FREE SPEECH CENTURY* 13, 28–32 (Lee C. Bollinger & Geoffrey R. Stone eds., 2019).

104. See *id.* at 30–33 (describing the Justices’ inability to “truly . . . engage” with each other in a recent campaign finance case because “they were miles apart in terms of what they took to be the most important considerations bearing on the First Amendment issue”).

105. The First Amendment is not implicated by regulations of nonexpressive conduct. Nonetheless, many “ordinary” economic regulations have recently been struck down for violating the First Amendment. See Robert C. Post & Amanda Shanor, *Adam Smith’s First Amendment*, 128 HARV. L. REV. F. 165, 165–67 (2014). “Across the country, plaintiffs are using the First Amendment to challenge commercial regulations, in matters ranging from public health to data privacy. It is no exaggeration to observe that the First Amendment has become a powerful engine of constitutional deregulation.” *Id.* at 167.

106. Shanor, *supra* note 95, at 318 (2018).

107. See, e.g., *Edwards v. District of Columbia*, 755 F.3d 996 (D.C. Cir. 2014) (invalidating a licensing scheme for tour guides); *Kagan v. City of New Orleans*, 753 F.3d 560 (5th Cir. 2014) (same).

108. *Ocheessee Creamery LLC v. Putnam*, 851 F.3d 1228 (11th Cir. 2017).

109. *Nat’l Ass’n of Mfrs. v. NLRB*, 717 F.3d 947, 950 (D.C. Cir. 2013) (invalidating NLRB regulations requiring employers to post notices of employee rights in the workplace).

110. See Shanor, *supra* note 95, at 329–30 nn.44–51 (collecting a striking number of similar cases).

Our cultural conception of “free speech” centers on the protection of dissident ideas.<sup>111</sup> The first great free speech cases focused on the protection of the press and political speakers.<sup>112</sup> Over time, the Supreme Court moved beyond a narrow focus on political speech and extended free speech jurisprudence to protect other interests, such as artistic expression.<sup>113</sup> The bounds of protected speech “are dynamic, not static”; nonetheless, our tradition is difficult to square with current doctrine.<sup>114</sup> Today, platforms might persuasively argue that “data is speech” and that compelled disclosure of financial information should be given the strictest constitutional scrutiny.<sup>115</sup>

Two fundamental expansions in free speech jurisprudence have made these claims possible. The first is an expansion in coverage; that is, in the universe of speech entitled to constitutional protection. The second is an expansion in protection, meaning the level of scrutiny applied to laws that regulate speech. Using a data disclosure law as an exhibit, I explore both doctrinal shifts. I also seek to explain *why* these shifts have occurred. Following the lead of other scholars, I argue that both expansions can be traced back to a fundamental change in free speech first principles.

Our traditional conception of free speech was structural.<sup>116</sup> Dissident speech was not protected for its inherent worth, but for the function it serves in a healthy democracy.<sup>117</sup> Today the primary, if not the singular goal of the First Amendment is to protect individual autonomy.<sup>118</sup> Speakers have a near-absolute right to say what they want without government interference. At the Court, the economic character of

111. As Justice Jackson famously pronounced, in dicta: “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.” *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

112. See Wu, *supra* note 33, at 3.

113. See, e.g., *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995) (finding abstract artworks are “unquestionably shielded” by the First Amendment).

114. See Shanor, *supra* note 95, at 321.

115. See *infra* Part II.A.2; *supra* note 95.

116. “[T]he First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a *structural* role to play in securing and fostering our republican system of self-governance.” *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 587 (1980) (Brennan, J., concurring) (emphasis original). See *Cohen v. California*, 403 U.S. 15, 24 (1971) (Harlan, J.) (finding that the First Amendment is designed to remove impediments to public discussion “in the hope that the *use* of such freedom will ultimately produce a more capable citizenry” (emphasis added)); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (“[D]ebate on public issues should be uninhibited, robust, and wide-open . . . .”); *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (“Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government.”); see also *The Supreme Court, 1979 Term*, 94 HARV. L. REV. 1, 151 n.9 (collecting cases and scholarly sources).

117. See *supra* note 111. See also Lee C. Bollinger, President, Columbia Univ., Tanner Lectures, Part 1 at Clare Hall, University of Cambridge (Nov. 6, 2018), <https://perma.cc/9RRD-HB9Y> (concluding Holmes and Brandeis were more concerned about “the *reactions* to [dissident] speech,” rather than a desire “to *protect* speech as such,” when carving out protections for extremist speech); Blasi, *supra* note 103, at 14–28.

118. See Blasi, *supra* note 103, at 30–32; Lakier, *supra* note 102, at 751.

regulated speech does not reduce the level of scrutiny to be applied,<sup>119</sup> and the countervailing rights of other speakers and of listeners seem to fall by the wayside.<sup>120</sup> Unsurprisingly, this shift has provided a “versatile” justification for invalidating a wide range of laws.<sup>121</sup> The following subsections explore the implications of the Court’s near-singular focus on individual autonomy by examining the constitutionality of a data disclosure law.

## 2. What Is Speech?

Under the First Amendment, a simple definition of “speech” is hard to pin down. What counts as speech, in the ordinary sense, is not necessarily protected by the Constitution.<sup>122</sup> Commercial advertising and motion pictures were denied such protection for decades.<sup>123</sup> Participating in a parade and burning a flag are not activities we ordinarily refer to as speech. Nonetheless, both are “speech” for First Amendment purposes.<sup>124</sup> In short, “freedom of speech” is a term of art which both scholars and courts have struggled to define.<sup>125</sup> This section explores whether a data disclosure law compels protected “speech.”

119. That “a case is defined by business entities or relationships” no longer offsets the constitutional scrutiny due under the First Amendment. Kyle Langvardt, *A Model of First Amendment Decision-Making at a Divided Court*, 84 TENN. L. REV. 833, 858 (2017) [hereinafter Langvardt, *A Divided Court*]; see also *id.* at 859–61 (describing how the Court today considers “multiple facets of the business environment to be inherently expressive,” including advertising, employment relations, and the mere verbal communication of prices); *Leading Cases: Matal v. Tam*, 131 HARV. L. REV. 243, 247 (2017) [hereinafter *Leading Cases: Tam*] (“The [split] opinions in *Tam* are yet another indication of the First Amendment’s deregulatory power: Descriptively, they further tighten scrutiny of commercial speech regulations and, predictively, they suggest the Justices’ continued willingness to do so.”); 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, 765 (2017) (concluding that commercial speech has reached a status “almost equivalent” to the most protected forms of speech).

120. See Lakier, *supra* note 102, at 748–49 (explaining that the *Hurley* court affirmed that “the state may ‘not compel affirmance of a belief with which the speaker disagrees’” and “implicitly rejected . . . the suggestion in Justice Jackson’s opinion in *Barnette* that the government might enjoy greater power to compel speech in cases where there was a ‘collision’ between competing constitutionally-protected interests”); Case Comment, *Nat’l Inst. of Family & Life Advocates v. Becerra*, 132 HARV. L. REV. 347, 353 (2018) [hereinafter Case Comment, *Becerra*] (“*NIFLA*’s characterization of the interests at play also curiously ignores the consumers whose interest in access to timely, accurate information underlies the First Amendment protection of commercial speech.”).

121. Blasi, *supra* note 103, at 29.

122. See ENQUIRY, *supra* note 99, at 13.

123. Commercial advertising and motion pictures are now considered protected “speech.” See *Mut. Film Corp. v. Indus. Comm’n*, 236 U.S. 230 (1915) (excluding motion pictures from First Amendment protection), *overruled by* *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952); *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) (excluding commercial speech from First Amendment protection), *overruled by* *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976).

124. See *Texas v. Johnson*, 491 U.S. 397, 406 (1989) (treating burning an American flag during a protest rally as expressive conduct subject to First Amendment protection); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569–70 (1995) (holding that forcing private citizens to include in their parade a group which they would rather exclude infringes on the parade organizer’s freedom of speech); see also *id.* at 569 (finding that the protected expression inhering in a parade “is not limited to its banners and songs” but extends to some nonverbal conduct of parade marchers).

125. See Shanor, *supra* note 95 at 322–23; see also *id.* at 324–26.

When the government regulates the transmission of information, that regulation is arguably subject to First Amendment scrutiny. Under this rule, a data disclosure law would compel protected speech. Our imagined law would compel the disclosure of activity data. Activity data, as conventionally defined, is an electronic log of user behavior—in other words, a fixed record of fact.<sup>126</sup> Platforms might be tempted to argue that factual information is protected speech in any context, but that argument is overbroad and unlikely to succeed.<sup>127</sup> Instead, platforms would be smart to make a more narrow claim: When the government deliberately interferes with the free flow of information, the First Amendment is triggered. Under this rule, a data disclosure law would trigger First Amendment scrutiny no matter how narrowly the class of regulated data was defined.<sup>128</sup> A data disclosure law would interfere with the free flow of information by design. The law would compel platforms to turn over, to researchers and journalists, data that the platforms would rather not disclose.

The broad claim that “dissemination of information” is “speech” *per se* has tacit support in *Sorrell v. IMS Health*.<sup>129</sup> This case invalidated a restriction on the sale, disclosure, and use of certain records for “marketing” purposes.<sup>130</sup> The *Sorrell* majority recognized that an individual’s right to speak might be implicated “when information he or she possesses is subjected to ‘restraints on the way in which the information might be used’ or disseminated.”<sup>131</sup> In dicta, the Court recognized an even broader rule: “that the creation and dissemination of information are speech within the meaning of the First Amendment.”<sup>132</sup>

There are several problems with the *Sorrell* Court’s pronouncement. First, the majority claimed to find support for its rule in prior precedent. But the cases cited to support this “rule” are better understood as relating to various *specific* First Amendment commitments.<sup>133</sup> Second, such a rule would have dramatic practical consequences. Lower courts have been reluctant to follow similarly broad pronouncements—for example, that “code is speech”—to their practical conclusions.<sup>134</sup> Still, platforms could aggressively push this argument when

126. See Franklin et al., *supra* note 77. I define “data” as “any fixed record of fact.” See Jane Bambauer, *Is Data Speech?*, 66 STAN. L. REV. 57, 58–59, 65 (2014).

127. Even libertarian scholars dismiss this argument as absurd. See Bambauer, *supra* note 126, at 60; see also *id.* at 58–59.

128. See *id.* at 60–61 (“Data is not automatically speech in every context . . . [b]ut asking whether all data should be treated as speech misses the point: any time the state regulates information precisely because it informs people, the regulation [should rouse] the First Amendment.”).

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

130. *Id.* at 577.

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

132. Ultimately, the Court found it unnecessary to decide whether the transfer of prescriber-identifying information was speech. See *id.* at 570–71; see also *infra* text accompanying notes 294–316 (providing further discussion of *Sorrell*). Scholars have fiercely debated the implications and meaning of this “rule.” See Jorge R. Roig, *Can DNA Be Speech?*, 34 CARDOZO ARTS & ENT. L.J. 163, 170–76 (2016).

133. For example, the “commitment to disseminating and removing obstacles to distribution of matters of public importance.” See Caitlin Jokubaitis, Note, *There and Back: Vindicating the Listener’s Interests in Targeted Advertising in the Internet Information Economy*, 42 COLUM. J. L. & ARTS 85, 93–94 (2018).

134. Proclaiming that “code is speech” suggests “almost all regulation of software” should receive strict scrutiny, but courts rarely go so far in practice. Langvardt, *supra* note 18, at 1364. These courts

challenging a data disclosure law with some success. At the very least, this argument might have tactical use “as an opening bluff.”<sup>135</sup>

A stronger argument might be made under a narrower rule. Some lower courts hold that the communication of existing facts constitutes protected speech.<sup>136</sup> In *Trans Union Corp. v. FTC*, the D.C. Circuit scrutinized an FTC order prohibiting Trans Union from selling marketing lists containing the names and addresses of individual customers. The court upheld the regulation, but the D.C. Circuit never doubted the marketing lists were constitutionally protected speech.<sup>137</sup> *Trans Union* and like cases suggest the compelled disclosure of “activity data” would trigger the First Amendment, even if, broadly speaking, information is *not* “speech” for First Amendment purposes.<sup>138</sup>

The government’s strongest argument against First Amendment coverage would be that a data disclosure law regulates nonexpressive conduct, not speech.<sup>139</sup> But this claim is hard to make under modern precedent. For one, this argument was raised by the appellants and derided by the Court in *Sorrell*. In an attempt to defend the state’s law, lawyers for the state of Vermont argued that a regulation of the “sales, transfer, and use” of certain medical information merely regulated nonexpressive, commercial conduct.<sup>140</sup> The Court criticized this argument, but ultimately found it unnecessary to decide the issue.<sup>141</sup> Second, the reasoning in *Expressions Hair Design v. Schneiderman* strongly suggests that a data disclosure law regulates speech, not conduct. In *Schneiderman*, the Court considered a regulation of differential pricing for credit card users.<sup>142</sup> Unlike a typical price regulation, the challenged law regulated “the *communication* of prices rather than prices themselves.”<sup>143</sup> For that reason, the Court held that the law regulated speech and was subject to First Amendment scrutiny.<sup>144</sup> *Schneiderman* acknowledged that the First Amendment “does not prevent restrictions directed at commerce or conduct

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seem to recognize that the practical consequences of such a rule in our “technologically-advanced economy would be insane.” *Id.*

135. *See id.* at 1364, 1364 n.50.

136. *See* Bambauer, *supra* note 126, at 71–77 (collecting cases).

137. *See* *Trans Union Corp. v. Fed. Trade Comm’n*, 245 F.3d 809 (D.C. Cir. 2001), *cert. denied*, 536 U.S. 915 (2002). *Trans Union* scrutinized a law restricting the dissemination of information, not one compelling disclosure. Although this distinction may influence the level of scrutiny, it has little salience to the question of coverage. *See infra* Part II.A.3.

138. *See* Bambauer, *supra* note 126, at 71–77 (collecting cases).

139. *See* *Rumsfeld v. Forum for Acad. & Inst’l Rights, Inc.*, 547 U.S. 47, 60 (2006).

140. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011); *see also* Brief for Petitioners at 26, *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011) (No. 10-779) (“[C]ommercial use of nonpublic information is better described as commercial conduct than commercial speech.”).

141. *Sorrell*, 564 U.S. at 570–71.

142. 137 S.Ct. 1144, 1147 (2017).

143. *Id.* at 1151 (emphasis added). The law was “not like a typical price regulation.” *Id.* at 1150. The regulation told merchants “nothing about the amount they are allowed to collect” from credit card users, and instead concerned only “how sellers may communicate their [differential] prices.” *Id.* at 1151. Under the law, “[a] merchant who wants to charge \$10 for cash and \$10.30 for credit may not convey that price any way he pleases.” *Id.*

144. *See id.* at 1151.

from imposing incidental burdens on speech.”<sup>145</sup> But after *Schneiderman*, any regulation “directed at” the transmission of information would seem to regulate speech.

In the related context of data privacy regulation, scholars argue that limitations on the collection and use of personal data regulate *conduct*—and therefore, are not subject to First Amendment scrutiny. These scholars emphasize the economic character of data mining to make their case.<sup>146</sup> However, a data disclosure law would regulate data transmission not for its economic value, but for its informational content.<sup>147</sup> Moreover, such a law would compel disclosure of data to journalists and researchers working in the public interest. Thus, it would directly regulate the “communication” of factual information, and its effect on protected speech would not be “incidental.”<sup>148</sup>

After *Schneiderman*, it is difficult to argue that a law compelling or otherwise regulating the disclosure of facts regulates anything other than speech. This seems true even for laws directed at automatic data transmission, such as via cookies or between servers, with no human intermediary.<sup>149</sup> As discussed, any deliberate government interference with the free flow of information is arguably subject to First Amendment scrutiny. Under this rule, the compelled disclosure of functional data (that is, server data produced “in order to carry out a function or service”) would seem to compel protected speech.<sup>150</sup>

There is no clear consensus that data is speech. Nonetheless, the doctrinal shift in First Amendment expansionism suggests that data, like software, can be considered speech for First Amendment purposes.<sup>151</sup> And a data disclosure law seems “directed at” speech, rather than nonexpressive conduct. For that reason, a court is likely to subject a data disclosure law to First Amendment scrutiny. The following section analyzes the levels of scrutiny which might be applied, under the doctrine of compelled speech.

145. *Sorrell*, 564 U.S. at 567 (2011); accord *Schneiderman*, 137 S. Ct. at 1150–51. See also *Rumsfeld*, 547 U.S. at 62 (“[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language.”) (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)).

146. See Neil M. Richards, *Reconciling Data Privacy and the First Amendment*, 52 UCLA L. REV. 1149, 1192–94, 1217–21 (2005); Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373, 1408–23 (2000).

147. See, e.g., Cohen, *supra* note 146, at 1414 (data is a commodity which is not “sold for its expressive content at all”). In these contexts, “data is itself the subject matter of the transaction—the ‘goods’ exchanged.” *Id.* at 1417–18.

148. See *Sorrell*, 564 U.S. at 567.

149. See Bambauer, *supra* note 126, at 59–60 (arguing that a doctrinal distinction “between statements of fact that are observed and written by a human and those that are collected mechanically” is untenable).

150. See *id.* at 66. Whether free speech protections only attach to a human or corporate “person” is an open question. See Roig, *supra* note 132, at 177–81. The answer depends, in part, on the reasoning courts use when they hold that algorithmic outputs are protected speech. Some courts suggest that algorithmic outputs are protected because they express the protected opinions of their human coders. See *id.* at 180. This reasoning might not extend to machine-learning algorithms. Those outputs cannot be solely attributed to the decisions of human programmers. See Abdo, *Public Discourse*, *supra* note 24.

151. See Langvardt, *supra* note 18, at 1364.

### 3. Levels of Scrutiny

After a court determines a law regulates speech, it must determine the level of scrutiny to apply.<sup>152</sup> Judges apply different levels of scrutiny in different contexts.<sup>153</sup> Our analysis begins with a bedrock distinction between content-based and content-neutral regulations of speech.<sup>154</sup> Content-based regulations of speech are “presumptively unconstitutional” and subjected to strict scrutiny.<sup>155</sup> In contrast, content-neutral restrictions are given more deferential review.<sup>156</sup>

#### *a. Content-Based Regulations of Speech*

The logic of *National Institute of Family & Life Advocates v. Becerra*,<sup>157</sup> discussed below, suggests that *any* compelled disclosure law is inherently content-based. *Becerra* concerned a challenge to a California disclosure law directed at crisis pregnancy centers. Crisis pregnancy centers are pro-life, largely Christian organizations which advise against abortion.<sup>158</sup> The state law at issue in *Becerra* had two requirements. First, licensed centers were required to notify prospective clients that California offered free or low-cost medical care, including abortions.<sup>159</sup> Second, unlicensed centers had to disclose their unlicensed status to prospective clients.<sup>160</sup> Under either requirement, the centers were compelled to speak from “a government-drafted script.”<sup>161</sup> It was not up to the centers to decide what to say.<sup>162</sup>

152. Courts generally apply some form of “heightened scrutiny” to most regulations of speech. See 1 RODNEY A. SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH § 2.12 (Thomson Reuters, rev. ed.) [hereinafter SMOLLA & NIMMER ON FREEDOM OF SPEECH]; *Dist. of Columbia v. Heller*, 554 U.S. 570, 629 n.27 (2008) (contrasting rational basis review with the heightened scrutiny applied to “specific, enumerated right[s], like] the freedom of speech”).

153. See 1 SMOLLA & NIMMER ON FREEDOM OF SPEECH § 2.12 (“[T]he Court has erected what is essentially an absolute bar against ‘viewpoint discrimination,’ and a nearly absolute proscription against prior restraints. . . . In other contexts, however, the Court appears to lower the level of judicial scrutiny [when, for example] reviewing ‘commercial speech,’ or when reviewing content-based regulations in certain settings, such as the regulation of broadcasting.”).

154. See, e.g., *Reed v. Town of Gilbert, Ariz.*, 136 S. Ct. 2218, 2226 (2015) (citing *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)). The doctrinal roots of this distinction trace back to *Mosley*: “[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” 408 U.S. at 95.

155. *Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018) (quoting *Reed*, 135 S. Ct. at 2226); see also *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1666 (2015) (noting that “a speech restriction withstands strict scrutiny” only in “rare cases”).

156. See *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (upholding city ordinance designed to control the volume of amplified music at a park bandshell against a facial First Amendment challenge); see also Genevieve Lakier, *Reed v. Town of Gilbert, Arizona, and the Rise of the Anticlassificatory First Amendment*, 2016 SUP. CT. REV. 233, 233 (2016) (noting that content-neutral laws “are reviewed under a lesser, often quite deferential, standard” compared with content-based restrictions).

157. 138 S. Ct. 2361 (2018).

158. *Id.* at 2368. The centers also provide pregnancy-related counseling. *Id.*

159. *Id.* at 2369. Centers were also required to provide the contact information for state facilities.

160. *Id.* at 2370.

161. *Id.* at 2371, 2378.

162. Each requirement compelled “a particular message.” *Id.* at 2371. Cf. *Env’tl. Def. Ctr. v. EPA (EDC)*, 344 F.3d 832 (9th Cir. 2003). In *EDC*, the challenged EPA rule only required municipal storm

For that reason, the Court held that the licensed notice requirement was a content-based restriction on speech.<sup>163</sup>

After *Becerra*, a court seems likely to subject a data disclosure law to strict scrutiny. Under a data disclosure law, journalists and researchers would have significant authority to decide which data platforms must disclose. “Content based regulations ‘target speech based on its communicative content,’” and dictating what platforms *must* say “plainly ‘alters the content’ of [their] speech.”<sup>164</sup> For that reason alone, strict scrutiny may be justified.<sup>165</sup> In addition, a data disclosure law would target large social media platforms. This suggests the law imposes “a content- and speaker-based burden,” which justifies heightened scrutiny.<sup>166</sup>

It is worth considering whether *Becerra* might be limited to its facts. The case was decided in the “uniquely contested context of abortion counseling,”<sup>167</sup> and the majority’s views on strict scrutiny may be understood as “part of a larger battle over abortion rights.”<sup>168</sup> But it seems difficult to limit *Becerra* in this way. First, the Court’s reasoning did not depend on these political considerations. The fact that California’s law “alter[ed] the content” of petitioner’s speech was, in itself, enough to justify strict scrutiny. Second, the Court could have decided *Becerra* on the basis of viewpoint discrimination,<sup>169</sup> but chose not to render a decision on those grounds.<sup>170</sup>

The Court has long considered laws compelling speech and restricting speech to be “constitutional[ly] equivalent.”<sup>171</sup> Outside the commercial context, laws compelling statements of fact are subject to strict scrutiny.<sup>172</sup> In *Riley v. National*

sewer operators to provide “appropriate educational and public information.” *Id.* at 849. Sewer operators were free to choose the specific contents of their message. *See id.*

163. *Becerra*, 138 S. Ct. at 2371. The Court did not decide whether the unlicensed notice requirement was content-based. The Court found it irrelevant, because the requirement posed an “undue burden” on speech and was likely unconstitutional for that reason alone. *See id.* 2376–78.

164. *Id.* at 2371 (quoting *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2227 (2015)); *id.* (quoting *Riley v. Nat’l Fed’n for the Blind of N.C.*, 487 U.S. 781, 795 (1988)).

165. *Id.*

166. *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 570. The statute at issue in *Sorrell* “disfavor[ed] marketing, that is, speech with a particular content. More than that, the statute disfavor[ed] specific speakers, namely pharmaceutical manufacturers.” *Id.* at 568. Specified manufacturers could not obtain data used for direct marketing “even though the information [could] be purchased or acquired by other speakers.” *Id.* at 568. A data disclosure law would compel the disclosure of data from large social media platforms while exempting smaller platforms from these requirements. *See supra* notes 70–73 and accompanying text.

167. Supplemental Brief for Appellees City of Berkeley and Christine Daniel at 1, CTIA - The Wireless Ass’n v. City of Berkeley, 928 F.3d 832 (9th Cir. 2019) (No. 16–15141).

168. Clay Calvert, *Is Everything a Full-Blown First Amendment Case After Becerra and Janus? Sorting Out Standards of Scrutiny and Untangling “Speech as Speech” Cases from Disputes Incidentally Affecting Expression*, 2019 MICH. ST. L. REV. 73, 123 (2019).

169. Arguably, the law impermissibly targeted and burdened the speech of abortion advocates. *See Becerra*, 138 S. Ct. at 2379 (Kennedy, J., concurring).

170. *See id.* at 2378 (“The Court . . . is correct not to reach [the] question.”).

171. *Riley v. Nat’l Fed’n for the Blind of N.C.*, 487 U.S. 781, 797 (1988); *accord Becerra*, 138 S. Ct. 2361, 2372 (2018) (majority opinion); *Janus v. Am. Fed’n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2464 (2018).

172. *See, e.g., Riley*, 487 U.S. at 797–98. The doctrine of compelled speech equally applies to expressions of value, opinion and “statements of fact the speaker would rather avoid.” *Hurley v. Irish-*

*Federation for the Blind*, the Court struck down a disclosure requirement directed at professional fundraisers hired by charities.<sup>173</sup> In North Carolina, some fundraisers would pocket over eighty percent of collected donations, and deliver only twenty percent of donations to the charities for which they worked.<sup>174</sup> The state enacted a disclosure requirement to address this problem. Although this law compelled only statements of fact, not opinion, it unmistakably “burden[ed] protected speech.”<sup>175</sup> As a content-based restriction on speech, the law was subject to strict scrutiny.<sup>176</sup>

A data disclosure law appears to be a content-based regulation of speech. Under such a law, platforms would not freely determine the contents of their disclosure; journalists and researchers would request specific data, and the platform would have to comply. Regulations which compel a “particular message” are, by definition, content-based.<sup>177</sup> Under a data disclosure law, platforms would be forced to make particular disclosures which they would rather avoid.

For these reasons, a court is likely to subject a data disclosure law to strict scrutiny. Nonetheless, there are exceptions to this general rule. Content-based regulations of speech are not subject to strict scrutiny if the speech, as a category, is entitled to lesser protection. The following subsection examines whether a data disclosure law would fit within some such exception.

#### *b. Exceptions to the Presumption of Strict Scrutiny*

Content-based regulations of speech are subject to strict scrutiny, unless the regulated speech falls into a rigid, narrow, and historically recognized category of speech entitled to lesser protection.<sup>178</sup> For example, *Becerra* recognized that content-based regulations of commercial speech are entitled to lesser scrutiny.<sup>179</sup> Moreover, some lower courts subject certain noncommercial disclosures to more lenient review. If a data disclosure law is entitled to anything less than strict scrutiny, then it must fit within one of these carve-outs.

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Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 573 (1995). Some lower courts apply lesser scrutiny to public, noncommercial factual disclosures. To do so, these courts must distinguish (or ignore) contrary precedent. *See, e.g.*, *United States v. Arnold*, 740 F.3d 1032 (5th Cir. 2014). In *Arnold*, the Fifth Circuit rejected plaintiff’s challenge to a sex offender registration law because the law did not require him to support an ideological message with which he disagreed. *See id.* at 1035 (ignoring contrary precedents *Riley* and *Hurley*).

173. 487 U.S. at 784.

174. *Id.*

175. *Id.* at 797–98.

176. *Id.* at 795 (“Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech. We therefore consider the Act as a content-based regulation of speech.”); *id.* at 798 (subjecting the regulation to “exacting First Amendment scrutiny”).

177. *Becerra*, 138 S. Ct. at 2371. *Cf. id.* at 2380 (Breyer, J., dissenting) (“Virtually every disclosure law could be considered content-based, for virtually every disclosure law requires individuals to speak a particular message.”).

178. *Cf. id.* at 2372 (majority opinion) (“[This Court] has been especially reluctant to ‘exemp[t] a category of speech from the normal prohibition on content-based restrictions.’” (quoting *United States v. Alvarez*, 567 U.S. 709, 722 (2012) (plurality opinion))); *see also id.* at 2370–72.

179. *See id.* at 2372.

The defining characteristics of a data disclosure law might justify some form of lesser scrutiny.<sup>180</sup> Three characteristics come to mind. First, data would not be disclosed to the public at large. Second, a data disclosure law would facilitate research in the public interest. Finally, activity data is arguably commercial in character. Unfortunately for the government (and fortunately for platforms), none of these traits seem to justify lesser scrutiny.

Compelled nonpublic disclosures are arguably entitled to lower First Amendment scrutiny. The D.C. and Eighth Circuits subject regulations of speech to lesser scrutiny where the speech concerns “no public issue.”<sup>181</sup> Both circuits also suggest that nonpublic disclosures made to a government agency should be given deferential review. In *Full Value Advisors, LLC v. SEC*, the D.C. Circuit upheld a requirement that certain investment information be disclosed to the government for confidential review.<sup>182</sup> Similarly, in *United States v. Sindel*, the Eighth Circuit upheld a law requiring attorneys to disclose client information to the IRS.<sup>183</sup> Although the court relied on the nonpublic character of the disclosure, it suggested that “when essential operations of government” are at stake, private citizens have little, if any, right to remain silent.<sup>184</sup> The First Circuit has suggested the same.<sup>185</sup>

The First, Eighth, and D.C. Circuits’ rules find some support in defamation precedent. Speech that is solely in the private interest of the speaker is often subject to lower First Amendment protection from defamation suits.<sup>186</sup> The rules concerning government disclosures, in particular, find further support in the doctrine governing compelled commercial disclosures.<sup>187</sup> Nonetheless, the Court has never held

180. That a data disclosure law compels, rather than restricts, speech is not in itself a reason to apply lesser scrutiny. See *Riley v. Nat’l Fed’n for the Blind of N.C.*, 487 U.S. 781, 797 (1988). This is true even for user-generated content, such as photos, status updates, and likes. See *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 570 (1995) (“Cable operators, for example, are engaged in protected speech activities even when they only select programming originally produced by others.”).

181. See *Trans Union Corp. v. FTC*, 245 F.3d 809, 812 (D.C. Cir. 2001), *cert. denied*, 536 U.S. 915 (2002); *United States v. Sindel*, 53 F.3d 874, 878 (8th Cir. 1995) (rejecting compelled speech challenge to a law requiring a taxpayer to disclose information about his clients to the IRS because the law did not require the taxpayer “to disseminate publicly a message with which he disagrees”); see also *Pharm. Care Mgmt. Ass’n v. Rowe*, 429 F.3d 294, 310 (1st Cir. 2005) (per curiam) (holding a provision requiring pharmacy-benefit managers to disclose confidential information only to health-benefit providers was subject to deferential review); *Boetler v. Hearst Commc’ns*, 192 F. Supp. 3d 427, 444 (S.D.N.Y. 2016) (finding sale of demographic information about customers “to data miners and other third parties” was entitled to reduced protection, in part, because it was speech on a matter of “purely private concern”).

182. 633 F.3d 1101, 1109 (D.C. Cir. 2011), *cert. denied*, 564 U.S. 1005 (2011); *accord* *Seahill v. District of Columbia*, 909 F.3d 1177, 1185 (D.C. Cir. 2018).

183. 53 F.3d 874 (8th Cir. 1995).

184. See *id.* at 878 (quoting *W. Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624, 645 (1943) (Murphy, J., concurring)).

185. See *Rowe*, 429 F.3d at 316 (Boudin, C.J., and Dyk, J., concurring) (describing the appropriate scrutiny for government disclosures akin to rational basis review); see also *id.* at 297–98 (per curiam) (explaining that the concurrence is controlling on the First Amendment issue).

186. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761–63 (1984) (plurality opinion); see also *id.* at 759 (“[S]peech on matters of purely private concern is of less First Amendment concern.”); *id.* at 764 (Burger, C.J., concurring) (agreeing that *Gertz* is limited to circumstances where the alleged defamation “concerns a matter of general public importance”).

187. See *Full Value Advisors*, 633 F.3d at 1109 (citing *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985)); *Rowe*, 429 F.3d at 310 (same).

nonpublic disclosures are entitled to lesser scrutiny. For that reason, the rules embraced by the First, Eighth and D.C. Circuits may not survive *Becerra*.<sup>188</sup>

At a fundamental level, *Riley* and *Becerra* undercut the logic behind these exceptions. The Court's increased focus on speaker autonomy undermines any constitutional distinction between public and nonpublic disclosure.<sup>189</sup> Nonpublic disclosures may not infringe individual autonomy as seriously as disclosures made in the public eye, but that distinction is irrelevant. The *degree* which a law infringes upon a speaker's autonomy does not determine the level of scrutiny to be applied.<sup>190</sup> Journalists and researchers would have significant authority to dictate what data platforms must disclose and, for that reason, strict scrutiny is justified.

Compelled disclosures which facilitate the free flow of information are arguably entitled to lower First Amendment scrutiny. Data disclosed under our imagined law could expose algorithmic bias and misinformation campaigns.<sup>191</sup> Other phenomena, such as targeted advertising, cannot be meaningfully studied without access to that data.<sup>192</sup> In short, our law would serve a vital democratic function by promoting an awareness of how the "vast democratic forums of the Internet" shape public discourse and, thereby, enrich the "marketplace of ideas."<sup>193</sup>

In the commercial context, the consumer's interest in factual information justifies more lenient review of disclosure laws. In *Zauderer v. Office of Disciplinary Counsel*, the Court upheld a state law regulating attorney advertising.<sup>194</sup> By law, attorneys were required to tell potential clients that, even if the attorney took their case on contingency, the client "might be liable for significant litigation costs."<sup>195</sup> The extension of First Amendment protection to commercial speech was justified principally by the value to consumers in "the free flow of . . . information."<sup>196</sup> For that reason, "appellant's constitutionally protected interest in *not* providing any particular factual information in his advertising [was] minimal."<sup>197</sup>

188. See *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371–72 (2018) (stating that governments may not "impose content-based restrictions on speech without 'persuasive evidence ... of a long (if heretofore unrecognized) tradition' to that effect" (quoting *United States v. Alvarez*, 567 U.S. 709, 722 (2012) (plurality))). See also *infra* notes 198–200 and accompanying text.

189. The Court has solidly grounded the doctrine of compelled speech in the principle of individual autonomy. See *Lakier*, *supra* note 102, at 751; see also *Riley v. Nat'l Fed'n for the Blind of N.C.*, 487 U.S. 781, 798 (1988) (arguing that compelled factual disclosures "clearly and substantially burden" the speaker despite the obvious benefits of the disclosures to potential charity donors).

190. See *Wooley v. Maynard*, 430 U.S. 705, 715 (1977). In *Wooley*, the Court admitted that "the affirmative act of a flag salute," compelled under a law that it considered in an earlier case, "involved a more serious infringement upon personal liberties than the passive act of carrying the state motto on a license plate . . ." *Id.* However, the Court considered this difference to be "essentially one of degree" and applied strict scrutiny to the law at issue. *Id.* See also *Lakier*, *supra* note 102, at 747–49, 750–51.

191. See *supra* notes 42–48.

192. See *supra* note 47.

193. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017) (quoting *Reno v. ACLU*, 521 U.S. 844, 868 (1997)).

194. 471 U.S. 626 (1985).

195. *Id.* at 650.

196. See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 764 (1976); accord *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 563 (1980).

197. *Zauderer*, 471 U.S. at 651 (citation omitted).

The Court has not extended *Zauderer*'s holding outside the commercial context. At least one circuit has relied on *Zauderer*'s reasoning to hold that compelled disclosures meant to inform and educate the public are entitled to lesser First Amendment scrutiny.<sup>198</sup> After *Becerra*, no other court is likely to read *Zauderer* so broadly. *Becerra* narrowed the class of commercial disclosure laws entitled to differential treatment.<sup>199</sup> More than that, the Court in *Becerra* clearly signaled that *Zauderer* should not be extended “beyond the precise context in which it arose.”<sup>200</sup>

Society's interest in the free flow of information, outside the commercial context, does not justify more deferential review. In *Riley*, the Court invalidated a compelled disclosure law directed at charity fundraisers.<sup>201</sup> Arguably, this requirement furthered free speech values by providing access to otherwise inaccessible information, but the Court did not factor the interests of potential donors into its analysis.<sup>202</sup> And in *Becerra*, the Court's analysis “curiously ignore[ed]” the consumer “whose interest in access to timely, accurate information underlies the First Amendment protection of commercial speech.”<sup>203</sup> *Riley* and *Becerra* stand for a simple rule: Speakers have a fundamental right to say (or not say) what they want, when they want—listeners be damned.

After *Becerra*, commercial disclosures may be the only type of compelled disclosure entitled to lesser scrutiny. The Court first held that commercial speech falls within the First Amendment's scope in 1976.<sup>204</sup> The Court extended protection on the understanding that commercial speech deserved less than full protection, but, in recent years, commercial speech has assumed “a status almost equivalent” to that of political speech.<sup>205</sup> Confronted with a difficult problem of line drawing, the Court has “err[ed] on the side of striking down” regulations, applying heightened scrutiny

198. In *Environmental Defense Center v. EPA*, the Ninth Circuit upheld EPA rules requiring small municipal storm sewer providers to “distribute educational materials to communities . . . about the impacts of storm water discharges” and to “[i]nform public employees, businesses and the general public of hazards associated with . . . improper disposal of waste.” 344 F.3d 832, 848 (9th Cir. 2003) (quoting 40 C.F.R. § 122.34(b)(1)(i), 122.34(b)(3)(ii)(D)). The court applied *Zauderer*'s reasoning without determining whether the EPA rules compelled commercial speech. *See id.* at 849–50; *see also id.* at 851 n.27 (finding the EPA regulations to be “similar in substance” to commercial speech because the disclosures “informed the public”).

199. *See* Case Comment, *Becerra*, *supra* note 120, at 347; Andra Lim, *Limiting NIFLA*, 72 STAN. L. REV. 127, 142–48 (2020) (canvassing the commercial “regulations that occupy a constitutional gray area” post-*Becerra*); *see also id.* at 151–52, 158–59.

200. Supplemental Brief of Plaintiff-Appellant at 7, *Am. Beverage Ass'n v. City & Cty. of S.F.*, 916 F.3d 749 (9th Cir. 2019) (rehearing en banc) (Nos. 16–16072, 16–16073). For example, the Court “severely criticized” the doctrine of professional speech, recognized by some lower courts. 2 SMOLLA & NIMMER ON FREEDOM OF SPEECH § 20:37.40. While *Becerra* did not overrule the doctrine, according to one commentator, the Court's critique has “effectively ensur[ed] its demise.” *See id.*

201. *See Riley v. Nat'l Fed'n for the Blind of N.C.*, 487 U.S. 781 (1988). The law was intended to provide the donating public with information and “assist the potential donor in making the decision whether to donate.” *See id.* at 811 (Rehnquist, C.J., dissenting).

202. *See id.* at 789 (majority opinion). For example, fundraisers had to disclose the percentage of collected funds which they pocketed for themselves before accepting money from a potential donor. *Id.*

203. *See* Case Comment, *Becerra*, *supra* note 120, at 353.

204. *See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 761–70 (1976).

205. *See Post & Shanor*, *supra* note 104, at 169–70; Redish & Voils, *supra* note 119, at 765.

even when the regulations at issue arguably regulate purely commercial speech.<sup>206</sup> The one exception to this trend seems to be compelled commercial disclosures, which still seem to receive lenient First Amendment review.<sup>207</sup>

The Court has never provided “a coherent definition of what qualifies as commercial speech.”<sup>208</sup> Despite this ambiguity, one thing is clear. In recent years, the Court has narrowed the definition of commercial speech.<sup>209</sup> Activity data would not seem to fit under a narrow definition of commercial speech. Compelled disclosure of activity data would not “propose a commercial transaction.”<sup>210</sup> Nor would it “relate[] solely to the economic interest” of a regulated platform.<sup>211</sup> Some courts hold that data privacy laws, which regulate the collection of activity data, regulate commercial speech.<sup>212</sup> Platforms collect most—if not all—activity data in order to target advertisements to users.<sup>213</sup> Nonetheless, compelled *disclosure* of activity data would have no commercial purpose, as far as the platforms were concerned. The compelled disclosure of activity data would not seem to qualify as commercial speech.

Even if a data disclosure law were found to regulate commercial speech, there are further hurdles to securing deferential review. For *Zauderer* to apply, a regulation must satisfy three criteria. First, the compelled disclosure must provide “information about the terms under which . . . [the speaker’s] services will be available.”<sup>214</sup> Second, it must be “purely factual.”<sup>215</sup> Third, it must be “noncontroversial.”<sup>216</sup> If a commercial disclosure law meets these criteria, it should be upheld unless it is “unjustified or unduly burdensome.”<sup>217</sup>

206. See *Leading Cases*: Tam, *supra* note 119, at 247–49.

207. But see Lim, *supra* note 199, at 148 (finding that *Becerra* can be read to require “heightened scrutiny” for commercial disclosures); Note, *Repackaging Zauderer*, 130 HARV. L. REV. 972, 973 (2017) (“In a number of cases, [lower] courts have either excluded otherwise-permissible disclosures from *Zauderer*’s reach for fear that they would encroach too significantly on commercial actors’ speech, or else relied on the hitherto relatively unused requirement that a disclosure be ‘factual and uncontroversial’ to strike these regulations down.”). See also *infra* notes 229–237 and accompanying text.

208. See Jennifer M. Keighley, *Can You Handle the Truth? Compelled Commercial Speech and the First Amendment*, 15 U. PA. J. CONST. L. 539, 589 (2012). One scholar believes “commercial speech” encompasses any speech protected for its informational function. See ROBERT C. POST, *DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM* 41 (2012) (characterizing commercial speech as “speech which is not itself public discourse, but which disseminates information to the public sphere that is useful for the conduct of public discourse”). Under this definition, a data disclosure law would regulate commercial speech, but after *Becerra*, this definition is untenable. See *supra* notes 198–200 and accompanying text.

209. See, e.g., *Matal v. Tam*, 137 S. Ct. 1744, 1765 (2017) (expressing a fear that “affixing the commercial speech label” may permit the suppression of political speech and endanger free expression).

210. See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 762 (1976).

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

212. See *Jokubaitis*, *supra* note 133, at 108–10 (collecting cases).

213. See *id.* at 100.

214. *Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2372 (2018) (quoting *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985)).

215. *Id.* at 2372.

216. *Id.*

217. *Id.*

Compelled activity data would seem to relate to the “services” or “products” social media platforms provide.<sup>218</sup> Platforms collect user data as a condition of use and the compelled disclosure of data would facilitate research into platforms and the services they provide. A data disclosure law is intended to “better inform consumers” about the platforms they use, and, for that reason, the law is arguably subject to *Zauderer*’s more forgiving standard.<sup>219</sup>

Compelled activity data would seem to be “purely factual” information. The Court has not clarified the meaning of “purely factual,” but has indicated that, at the very least, compelled disclosures cannot be false, misleading, or statements of opinion.<sup>220</sup> Activity data meets these minimum requirements. Activity data is a record of user behavior.<sup>221</sup> Any data compelled under a data disclosure law would be a “fixed record of fact”; in other words, it would be “literally true.”<sup>222</sup> It seems silly to ask whether this data could be misleading. The disclosures most likely to be misleading “are those—like restaurant sanitation grading—that reflect the aggregation and simplification” of collected information.<sup>223</sup> In contrast, a data disclosure law would deliver raw data to journalists and researchers. Similarly, it seems silly to ask whether this data might constitute a statement of opinion. At bottom, the distinction between fact and opinion asks whether the speaker is plainly “expressing a subjective view” rather than presenting “objectively verifiable facts.”<sup>224</sup> For example, in *United States v. United Foods, Inc.*, United Foods objected to being forced to subsidize advertising about the benefits of mushrooms in general.<sup>225</sup> The company held the opinion that its mushrooms were superior and

218. See *id.* at 2376.

219. See *Grocery Mfrs. Ass’n v. Sorrell*, 102 F. Supp. 3d 583, 632–33 (D. Vt. 2015) (quoting *Nat’l Elec. Mfrs. Ass’n v. Sorrell*, 102 F.3d 104, 115 (2d Cir. 2001)). *Becerra* did not “decide what type of state interest [might] sustain a disclosure requirement,” 138 S. Ct. at 2377, but every circuit to reach the issue has held that that *Zauderer* is “broad enough to encompass nonmisleading disclosure requirements.” *Sorrell*, 102 F.3d at 133; see *CTIA - The Wireless Ass’n v. City of Berkeley*, 928 F.3d 832, 843 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 658 (2019) (collecting cases). The government’s interest in increasing the flow of information about social media platforms would seem to sustain a data disclosure law. Nonetheless, a court could hold that *Zauderer* only applies to disclosures connected to commercial advertising. See *Nat’l Ass’n of Mfrs. v. SEC*, 800 F. 3d 518, 522–23 (D.C. Cir. 2015), *reh’g en banc denied*, No. 13-5252 (D.C. Cir. Nov. 9, 2015; see also *Am. Beverage Ass’n v. City & Cty. of S. F.*, 916 F.3d 749, 759 (9th Cir. 2019) (en banc) (Ikuta, J., concurring in the result). In *National Association of Manufacturers v. SEC*, the D.C. Circuit reviewed the SEC’s “Conflict Minerals Regulation,” which requires companies whose products contain certain minerals to disclose, on their websites and in SEC reports, whether those minerals originated in the war-torn Democratic Republic of the Congo. See *id.* at 546–47. The court distinguished *Zauderer* because the case did not involve “voluntary commercial advertising.” *Id.* at 523–24; see also *id.* at 522 (noting the disclosure was directed at achieving “overall social benefits,” rather than “the economic or investor protection” goals the SEC ordinarily strives for (quoting 77 Fed. Reg. 56,274, 56,350 (Sept. 12, 2012))).

220. See *Lim*, *supra* note 199, at 175; see also *id.* at 175–86 (canvassing case law).

221. See *Franklin et al.*, *supra* note 77.

222. See *Bambauer*, *supra* note 126, at 65; *CTIA*, 928 F.3d at 847.

223. *Lim*, *supra* note 199, at 183. For example, “one study showed that college students were deeply fractured over the meaning of” a ‘C’ restaurant rating. See *id.*

224. *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1227 (7th Cir. 1993) (citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 17–21 (1990)).

225. 533 U.S. 405 (2001).

thought the advertising campaign communicated a contrary message.<sup>226</sup> Platforms, on the other hand, would only be required to disclose objective facts. For that reason, our law seems to meet *Zauderer*'s second requirement.

Compelled activity data may be “controversial” and, therefore, not subject to *Zauderer*'s more lenient standard of review. *Becerra* makes clear that the *subject* of disclosure—as distinct from the precise speech compelled on the subject—must be “uncontroversial” for *Zauderer* to apply.<sup>227</sup> The regulation of big-tech platforms remains a controversial, sometimes partisan subject. Moreover, the compelled disclosure of users' data is likely to stir a controversy itself. The law could compel the release of sensitive, personal information. That might raise fears of another Cambridge Analytica-type scandal.<sup>228</sup> For that reason, a data disclosure law may fail *Zauderer*'s third requirement.

Even if a data disclosure law were subject to review under *Zauderer*, the law might be struck down. Under *Zauderer*, a disclosure requirement should be upheld unless it is “unjustified or unduly burdensome.”<sup>229</sup> For decades, this test was deferentially applied.<sup>230</sup> For example, the Second Circuit upheld a city ordinance requiring that restaurant chains display calorie counts on their menus.<sup>231</sup> Under *Zauderer*, proof that customers would make healthier choices was not necessary to uphold the law. The court found it sufficient that the city reasonably believed the ordinance would help consumers make “informed [and] healthier choices” and thereby reduce obesity.<sup>232</sup> After *Becerra*, that seems to have changed. Now

226. *See id.* at 410–11.

227. In *Becerra*, the Court considered whether *Zauderer*'s lenient standard of review applied to a notice requiring licensed crisis pregnancy centers to notify prospective clients that the state offered free or low-cost medical care, including abortions. *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2369 (2018). The Court distinguished *Zauderer* because the notice at issue required disclosure of “information about *state-sponsored services*” unrelated to the services the licensed clinics provide. *Id.* at 2372. But the Court went on to add, in dicta, that abortion was “anything but an ‘uncontroversial’ topic.” *Id.* This statement makes clear that the “uncontroversial” prong concerns the subject matter of disclosure. *See* Lim, *supra* note 199, at 139; Case Comment, *Becerra*, *supra* note 120, at 352–53.

In contrast, the Ninth Circuit interprets the “uncontroversial” requirement as a limited check on viewpoint discrimination. *See CTIA*, 928 F.3d at 845 (“We do not read the Court [in *Becerra*] as saying broadly that any purely factual statement that can be tied in some way to a controversial issue is, for that reason alone, controversial. . . . While factual, the compelled statements [mandated in *Becerra*] took sides in a heated political controversy, *forcing the clinic to convey a message fundamentally at odds with its mission*. Under these circumstances, the compelled notice was deemed controversial [under *Zauderer*.”) (emphasis added). Because the Court's comments were made in dicta, the Ninth Circuit's holding is defensible. However, the Ninth Circuit's reading of *Becerra* contravenes the plain language of the opinion, *see* 138 S. Ct. at 2372 (referring to the “topic” of abortion), and is unpersuasive, given that the case could have been decided on viewpoint-discrimination grounds, but was not. *See id.* at 2379 (Kennedy, J., concurring).

228. *See* Lomborg & Bechmann, *supra* note 8, at 261.

229. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985).

230. *See* Note, *Repackaging Zauderer*, *supra* note 207, at 972, 972 n.9. Recognize, however, that even before *Becerra*, some circuits applied *Zauderer*'s test more strictly. *See, e.g.*, *Nat'l Ass'n of Mfrs. v. SEC*, 800 F. 3d 518, 5242–27 (D.C. Cir. 2015), *reh'g en banc denied*, No. 13-5252 (D.C. Cir. Nov. 9, 2015) (finding that, even if *Zauderer* applied to the case at hand, the regulation would be “unjustified” because there was no concrete evidence that disclosures would actually achieve the agency's stated goal).

231. *N.Y. State Rest. Ass'n. v. N.Y.C. Bd. of Health*, 556 F.3d 114, 134-36 (2d Cir. 2009).

232. *See id.* at 134-6.

*Zauderer* may require that a law satisfy heightened scrutiny if it is to be upheld.<sup>233</sup> In the circuit's first application of *Becerra*, the Ninth Circuit granted a preliminary injunction to plaintiffs challenging a disclosure ordinance.<sup>234</sup> The ordinance, which required sugar-sweetened beverage ads to contain a health warning, was unduly burdensome under *Zauderer*.<sup>235</sup> That is because the record established "that a smaller warning—half the size—would accomplish [the city's] stated goals."<sup>236</sup> After *Becerra*, other courts seem likely to follow the Ninth Circuit's lead. Going forward, commercial disclosures may be subject to heightened scrutiny.<sup>237</sup>

Although there are arguments for subjecting a data disclosure law to lenient review, a court is far more likely to impose strict scrutiny. Any other standard is hard to justify under *Becerra*. Whether the law would survive strict scrutiny is taken up in the next section.

#### 4. Surviving Strict Scrutiny

Content-based restrictions of speech rarely survive strict scrutiny.<sup>238</sup> This "demanding standard" requires the government to identify an actual problem and prove that any infringement on speech is "actually necessary to the solution."<sup>239</sup> To survive, the law must be narrowly tailored to serve a "compelling" government interest.<sup>240</sup> Whether a data disclosure law would survive strict scrutiny depends on the validity of the government interest asserted to defend the law.

The government might assert three interests to defend a data disclosure law. First, a data disclosure law could balance out what is arguably a one-sided public debate. Although there are many critics of social media, the public lacks the data necessary to understand how social media works. Therefore, social media companies can control the conversation by doling out data to researchers and reporters of their choosing. Second, a data disclosure law would facilitate social science research and public interest reporting generally. Research need not focus on the workings of social media platforms, but could instead be directed at studying usage patterns, social behavior, and "semantic patterns in social media communication."<sup>241</sup> Finally, facilitating research into social media platforms could serve a crucial democratic

233. See *Lim*, *supra* note 199, at 148 ("[*Becerra*]'s application of *Zauderer* was hardly akin to rational basis review."); *id.* at 141, 148–150.

234. See *Am. Beverage Ass'n v. City & Cty. of S.F.*, 916 F.3d 749 (9th Cir. 2019) (en banc).

235. See *id.* at 757 (holding the law was "unduly burdensome when balanced against its likely burden on protected speech" because the city had not shown that the warning does not drown out plaintiff's message and effectively rule out the possibility advertising (quoting *Becerra*, 138 S. Ct. at 2378)).

236. See *id.*

237. See *Lim*, *supra* note 199, at 150 ("Reading the [*Becerra*] tea leaves, the Ninth Circuit may have essentially imported part of the [*Central Hudson*] intermediate scrutiny test into *Zauderer*.").

238. See *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 799 (2011) (quoting *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 818 (2000)); *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1666 (2015) (noting that "a speech restriction withstands strict scrutiny" only in "rare cases").

239. *Brown*, 564 U.S. at 799.

240. See *id.*

241. See *Lomborg & Bechmann*, *supra* note 8, at 257–58 (canvassing social media research).

function. Disclosed data would lead to a better public understanding of the platforms which have fundamentally reshaped our politics and personal lives.

Arguments that the government can regulate one person's speech to enhance the speech of another are unlikely to win support from the Court.<sup>242</sup> Therefore, the government is unlikely to have a substantial interest in correcting a one-sided public debate. In substance, that argument is rooted in a vision of "market failure."<sup>243</sup> Advocates of a data-disclosure law emphasize how online platforms exclude research that "may be adverse to their interests."<sup>244</sup> They recognize an information asymmetry and seek to correct it by giving data access to independent researchers.<sup>245</sup> Unfortunately, this is not a salient issue under the First Amendment. Understood as a negative right, the First Amendment is "almost completely unconcerned . . . with imbalance among speakers, their resources, and their persuasive power."<sup>246</sup>

Platforms could also make a strong argument that the government's market failure theory is really a pretext for viewpoint discrimination. A data disclosure law would let the government grant data access to journalists and researchers who were denied such access by platforms. Many of these researchers were likely denied access because they were critical of the platforms they hoped to study. A data disclosure law would likely facilitate research critical of social media, but platforms could argue that the law was enacted not just to facilitate, but to *promote* such research. *Sorrell v. IMS Health* makes clear that the government cannot burden speech by particular speakers in order to "tilt" public debate, even if the debate primarily relates to commercial activity.<sup>247</sup> Subsidizing one party's speech can burden the speech of another.<sup>248</sup> To the extent that this subsidy "tilts" public debate in favor of particular speakers, such as critics of large social media platforms, a data disclosure law might discriminate against platforms on the basis of viewpoint.<sup>249</sup>

The government's more general interest in facilitating social science research is arguably substantial. A data disclosure law would help to inform the public about

242. See, e.g., *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 723 (2011) (syllabus) ("[B]urdening the speech of some . . . to increase the speech of others is a concept 'wholly foreign to the First Amendment.'" (quoting *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976))); see also Langvardt, *A Divided Court*, *supra* note 119, at 852–56.

243. See Frederick Schauer, *Facts and the First Amendment*, 57 UCLA L. REV. 897, 917 (2010) [hereinafter Schauer, *Facts and the First Amendment*].

244. See WARNER, *supra* note 13, at 10; see also Weise & Frier, *supra* note 13.

245. See WARNER, *supra* note 13, at 10.

246. Schauer, *Facts and the First Amendment*, *supra* note 243, at 917.

247. See *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 577–79 (2011).

248. Cf. *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 747 (2011) ("All else being equal, an advertisement supporting the election of a candidate that goes without a response is often more effective than an advertisement that is directly controverted.")

249. Whether a data disclosure law actually discriminates on the basis of viewpoint is taken up in the following section. See *infra* Part II.B.1.b. In any case, platforms would be smart to raise the specter of speaker-based and viewpoint-based discrimination. This might motivate a court to be even more searching in its review. For example, in *Becerra*, the Court took notice of the fact that the law at issue covered "a curiously narrow subset of speakers." *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2377 (2018). For this reason, among others, the Court held the unlicensed disclosure law could not satisfy even rational basis review. See *id.*

the powerful forces shaping our social and political lives.<sup>250</sup> Platforms would be hard pressed to argue this interest is wholly unconvincing. However, they might argue the interest is “not as weighty” as the government asserts.<sup>251</sup>

Assuming the government’s general interest in promoting research is substantial, platforms could argue that a data disclosure law is not narrowly tailored to serve that interest. There are other means for promoting research which pose a lesser burden on platform’s speech. For example, the government could create a “safe harbor” for journalists and researchers who pull publicly available data from social media platforms.<sup>252</sup> The government could also provide stipends or other monetary incentives to platforms to share data with researchers in order to facilitate public interest research. The Court has found similar alternatives sufficient to prove that a disclosure law is not narrowly tailored.<sup>253</sup>

The government might respond in at least three ways. First, the government could emphasize the limited scope of a “safe harbor.” Advocates of a “safe harbor” have admitted such a measure is insufficient to facilitate the breadth of research necessary to understand social media platforms.<sup>254</sup> Nonetheless, a court is unlikely to accept either argument unless it is backed with concrete evidence.<sup>255</sup> Even if Congress passed a “safe harbor” and found the program ineffective, a court might still reject the government’s argument that a “safe harbor” was an insufficient alternative to disclosure.<sup>256</sup>

Second, the government could point to Facebook’s track record with Social Science One to argue that attempting a partnership with social media platforms is

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250. Professor Richard Briffault argues that this general purpose is served by campaign disclosures. See Richard Briffault, *Updating Disclosure for the New Era of Independent Spending*, 27 J.L. & POL. 683, 718 (2012) (emphasizing the “important salutary role” played by campaign finance disclosures “in informing the public generally about the powerful economic forces that shape our elections, our politics, and ultimately, our public policy”). Like these “powerful economic forces,” social media platforms shape our politics and social lives. See Abdo, *Black Boxes*, *supra* note 12.

251. See, e.g., *Riley v. Nat’l Fed’n of the Blind of N.C.*, 487 U.S. 781, 798 (1988) (“Although we do not wish to denigrate the State’s interest in full disclosure, the danger the State posits is not as great as might initially appear.”). Platforms could point to the success independent reporters have had investigating and exposing abuses of social media, all on their own, but this argument is easily deflected. First, journalists and researchers cannot obtain certain types of data, such as targeted ad data, without partnering with platforms. The near failure of Facebook’s partnership with Social Science One suggests that partnerships are unlikely. See *infra* text accompanying note 257. Second, Facebook’s Terms of Service, which prohibit the use “basic tools of digital investigation,” undeniably chill independent research. See Letter from Jaffer to Facebook, *supra* note 10, at 2–3.

252. See Letter from Jaffer to Facebook, *supra* note 10, at 4.

253. See *Becerra*, 138 S. Ct. at 2375–77; *Riley*, 487 U.S. at 800–01.

254. See Letter from Jaffer to Facebook, *supra* note 10, at 1 (“The safe harbor is limited by design, and adoption of the proposed amendment would not substitute for disclosure of information to journalists, researchers, and the general public through other channels.”); see also Ghonim & Rashbass, *supra* note 47; Burns, *supra* note 7.

255. *Becerra*, 138 S. Ct. at 2376.

256. In *Becerra*, California argued that the “tepid response” to its advertising campaign publicizing state-provided abortions demonstrated the program was an insufficient alternative to disclosure. See *id.* The Court disagreed. According to the majority, “individuals might not have enrolled in California’s services because they do not want them, or because California spent insufficient resources on the advertising campaign.” *Id.*

futile. After announcing its partnership with Facebook, Social Science One believed it would have data access within two months. Instead, it took twenty.<sup>257</sup> Nonetheless, the failure of one private partnership does not mean that a government partnership would inevitably fail. And, now that Facebook has granted data access, its initiative with Social Science One may become a success.

Third, the government could argue that the law is narrowly tailored and distinguish *Riley* and *Becerra* based on the unique circumstances in this case. In *Riley* and *Becerra*, the Court reviewed state laws which “co-opted” private speakers to “deliver [the government’s] message.”<sup>258</sup> In each case, the state government mandated disclosure as the most effective way to disseminate information, but in each case the states had alternative means to “deliver [their] message.”<sup>259</sup> Our case is different. A data disclosure law targets activity data under the regulated platforms’ exclusive control. With the exception of publicly available data, it is impossible to communicate this information unless platforms are compelled to speak.<sup>260</sup> This simple fact will help the government to argue a data disclosure law is narrowly tailored. It is, in fact, impossible for the government to disseminate activity data “without burdening [platforms] with unwanted speech.”<sup>261</sup>

Nonetheless, if a data disclosure law is drafted in an “imprecise” manner, compels disclosure of more data than necessary to facilitate research, or imposes an “undu[e] burden” on platforms, a data disclosure law would not be narrowly tailored.<sup>262</sup> At this point, our imagined data disclosure law is only loosely defined.<sup>263</sup> Until one is drafted with more precision, it is impossible to say for certain if the law is unduly burdensome or otherwise overbroad.

Finally, the government might argue that it has a substantial interest in facilitating democracy which is served by a data disclosure law. Similar arguments were raised, and rejected, in *Arizona Free Enterprise Freedom PAC v. Bennett*.<sup>264</sup> In Arizona, anyone running for office could choose to have the state fund their campaign. Participating candidates received a lump sum to start. In addition, every time

257. See King & Persily, *supra* note 52. Over the course of protracted negotiations, Facebook’s partnership with Social Science One nearly dissolved. See Abdo, *Black Boxes*, *supra* note 12.

258. See *Becerra*, 138 S. Ct. at 2376; *Riley*, 487 U.S. at 800–01.

259. *Becerra*, 138 S. Ct. at 2376. See *id.*; *Riley*, 487 U.S. at 800.

260. Arguably, there is a distinction between compelling data disclosure and granting a right of access to platform servers. If there is a meaningful distinction, and a right of access regime does not compel platform speech, the regime might be challenged under the Takings Clause. See, e.g., *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 80–81 (1980) (rejecting claim that requiring a private shopping center to provide access to persons exercising a state constitutional right to free speech violates the Takings Clause); see also Anna M. Taruschio, Note, *The First Amendment, the Right Not To Speak and the Problem of Government Access Statutes*, 27 *FORDHAM URB. L.J.* 1001 (2000) (exploring First Amendment challenges to government access statutes).

261. See *Riley*, 487 U.S. at 800.

262. See *id.* (“In contrast to the prophylactic, imprecise, and unduly burdensome rule the State has adopted to reduce its alleged donor misperception, more benign and narrowly tailored options are available.”).

263. See *supra* Part I.B.3.

264. 564 U.S. 721 (2011).

privately funded opponents spent above a threshold amount on their own campaigns, participating candidates received a small, additional subsidy from the state.<sup>265</sup>

Justice Kagan argued that Arizona's speech subsidy law should be upheld.<sup>266</sup> The scheme, Kagan argued, "advanced such democratic benefits as more overall speech for the electorate, a greater number of potentially viable candidates, . . . and more trust that successful candidates would not enter office beholden to special interests," to name a few.<sup>267</sup> Each of these interests was disregarded by the majority, which struck down the law. According to the Court, Kagan's concerns missed the mark. The crux of the case "was the burden placed on a privately financed candidate" by the law's subsidy-triggering provision.<sup>268</sup>

A dispute over a data disclosure law, like the dispute over campaign subsidies, is likely to be "governed by a fundamental principle of individual liberty that takes priority over [considerations] relating to democratic functioning."<sup>269</sup> If the government attempts to justify a data disclosure law based on society's interest in a well-functioning democracy, the government is likely to lose. A data disclosure law would, almost certainly, burden protected speech.

As explained in Parts II.A.2 and II.A.3, a data disclosure law seems to be a content-based regulation of protected speech, subject to strict scrutiny. For the reasons laid out above, a data disclosure law is likely to be struck down under this level of review.

## B. FURTHER ARGUMENTS

As discussed, the most natural and most effective challenge to a data disclosure law would be made under the doctrine of compelled speech. But there are further arguments platforms might deploy to invalidate the law.<sup>270</sup>

The purpose of this section is twofold. First, this section surveys the range of First Amendment challenges available to social media platforms. Second, this section further illustrates a point made in Part II.A: By grounding free speech jurisprudence in the principle of individual autonomy, the Court has dramatically curtailed the ability of federal and state governments to regulate.

Part II.B.1 explores two theories based on the platforms' speech rights. Part II.B.1.a explores whether compelled disclosure of activity data would burden a platform's "editorial" content moderation decisions, under *Miami Herald Publishing Co. v. Tornillo*. Part II.B.1.b analyzes how selective data disclosure might "tilt" public debate and unconstitutionally discriminate on the basis of viewpoint, under *Sorrell v. IMS Health*. Both theories have been successfully deployed by technology

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265. *Id.* at 728–29.

266. *Id.* at 756 (Kagan, J., dissenting).

267. See Blasi, *supra* note 103, at 30.

268. *Id.*; see *Bennett*, 564 U.S. at 740–48 (majority opinion) ("Arizona [and amici] offer several arguments attempting to explain away the existence or significance of any burden imposed by matching funds. None is persuasive.")

269. Blasi, *supra* note 103, at 31.

270. These arguments are, admittedly, ancillary. For that reason, a casual reader might skip ahead.

companies in the past to avoid legal liability and to invalidate government regulations. However, neither theory is easily applied to a data disclosure law.

Part II.B.2 explores the ways a data disclosure law could burden the speech of platform users. Platforms could base their challenge to a data disclosure law on the threat to third parties under the First Amendment overbreadth doctrine.<sup>271</sup> Part II.B.2.a provides a more detailed exploration of “activity data” and divides this broad term into smaller analytical categories. These categories are analyzed in the remaining subsections.

## 1. The Platforms’ Speech Rights

### a. *The Tornillo Argument*

In *Miami Herald Publishing Co. v. Tornillo*, the Court struck down a state law that required local newspapers to offer political candidates a “right of reply.”<sup>272</sup> When candidates were criticized in a local paper, the newspaper editors could be forced to set aside column space for the candidate to respond.<sup>273</sup> The Court invalidated the law for two distinct reasons.<sup>274</sup> First, the law punished newspapers for engaging in certain political speech.<sup>275</sup> Second, the law restricted the editorial freedom of newspaper editors.<sup>276</sup> In *Tornillo*, the Court made clear that these two rationales were distinct.<sup>277</sup> Over time, these two arguments were subsumed into a single argument under the doctrine of compelled speech.<sup>278</sup>

In a series of district court cases, search engines have successfully argued that decisions concerning their platforms are analogous to the editorial decisions of newspaper publishers.<sup>279</sup> For example, in *Zhang v. Baidu.com*, a district court found search engine results are protected from government regulation and civil liability under the First Amendment.<sup>280</sup> Search engines “retrieve relevant information” and “organize it in a way that would be most helpful to the searcher.”<sup>281</sup> According to the district court, search algorithms “inevitably make editorial judgments” in the process of collecting and organizing data.<sup>282</sup>

271. See *United States v. Stevens*, 559 U.S. 460, 473 (2010).

272. 418 U.S. 241 (1974).

273. See *id.* at 244.

274. See Lakier, *supra* note 102, at 745–46.

275. See *Tornillo*, 418 U.S. at 256–57. The law imposed a financial penalty on newspapers who engaged in certain political speech, by forcing them to give up scarce and valuable column space to political candidates. See *id.*

276. See *id.* at 258.

277. See *id.* (finding the “intrusion into the function of editors” to be sufficient grounds for invalidating the law, even if the intrusion imposed no financial costs on newspapers).

278. See *Wooley v. Maynard*, 430 U.S. 705, 714 (1976); see also Lakier, *supra* note 102, at 746–47.

279. See Heather Whitney, *Search Engines, Social Media and the Editorial Analogy*, KNIGHT FIRST AMEND. INST. (Feb. 27, 2018), nn.15–34 and accompanying text, <https://perma.cc/7UPS-BKZN> (collecting cases).

280. 10 F. Supp. 3d 433 (S.D.N.Y. 2014).

281. *Id.* at 438.

282. *Id.*

The holding in *Zhang* is “all but compel[led]” under current doctrine.<sup>283</sup> In *Hurley v. Irish American Gay, Lesbian and Bisexual Group of Boston*, the Court extended *Tornillo*’s reasoning well beyond the newspaper context.<sup>284</sup> *Hurley* specifically recognized the speech rights of parade organizers, but the Court’s reasoning seems to encompass any entity which could plausibly call itself a content curator.<sup>285</sup> Moreover, *Hurley* clarified that a “particularized” message is not a requirement for First Amendment protection.<sup>286</sup> Under an autonomy view of the First Amendment, the content moderation decisions of social media platforms should be considered “speech” *per se*.<sup>287</sup> Any interference with these decisions would infringe upon the First Amendment.<sup>288</sup>

By and large, search engines have used *Tornillo* to avoid liability in private tort suits.<sup>289</sup> In these cases, plaintiffs sued over the platforms’ decisions to delist search results. An adverse ruling would directly interfere with the platform’s content moderation decisions. Platforms would either be punished for their decision to delist or be forced to reverse their decisions under a court order. A data disclosure law would not mandate specific moderation practices. Instead, such a law would compel the disclosure of “the results of [moderation] algorithms.”<sup>290</sup> Platforms would not be forced to alter their “editorial” process; the government would merely require platforms to disclose those decisions.

A data disclosure law might *indirectly* interfere with the content moderation decisions of regulated platforms. The government could pressure platforms to tweak their algorithms and use a data disclosure law to monitor compliance. Alternatively, research into platform moderation policies could subject online platforms to public scorn. These theories are fundamentally speculative. When bringing a facial challenge, platforms could only guess as to whether the government would choose to use a data disclosure law in this way. Moreover, it is not entirely clear that public pressure would be sufficient to chill platforms’ editorial freedom. On the one hand, Facebook appears responsive to public opinion when deciding how to censor and

283. *Id.* at 436.

284. 515 U.S. 557 (1995).

285. *See id.* at 569–70; *see also* *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 636 (1994) (“Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment.”).

286. *See Hurley*, 515 U.S. at 569.

287. *See* Eric Goldman, *Of Course the First Amendment Protects Google and Facebook (and It’s Not a Close Question)*, KNIGHT FIRST AMEND. INST. (Feb. 26, 2018), <https://perma.cc/K46T-J6NH> (arguing that a platform’s decisions about what to publish are *per se* protected speech). This autonomy justification makes the multi-step reasoning in *Zhang* unnecessary. *See e-ventures Worldwide, LLC v. Google, Inc.*, No. 2:14-cv-646-FtM-PAM-CM, 2017 U.S. Dist. LEXIS 88650, at \*11–12 (M.D. Fla. Feb. 8, 2017) (finding Google’s right to decide for itself what content to publish is “absolutely protected by the First Amendment”).

288. *See Hurley*, 515 U.S. at 574 (“Petitioners’ claim to the benefit of this principle of autonomy to control one’s own speech is as sound as the South Boston parade is expressive.”).

289. *See, e.g., Zhang v. Baidu.com*, 10 F. Supp. 3d 433, 435 (S.D.N.Y. 2014); *e-ventures Worldwide*, 2017 U.S. Dist. LEXIS 88650 at \*3; *cf. Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241 (1974) (private suit seeking to compel defendant-newspaper to print plaintiff-politician’s reply to criticism).

290. Tom Wheeler, *How To Monitor Fake News*, N.Y. TIMES (Feb. 20, 2018), <https://perma.cc/6CV7-MA2W>.

curate user posts.<sup>291</sup> However, social media platforms are mostly insulated from market pressure.<sup>292</sup> Some commentators insist that platform users “are in no position to ‘vote with their feet’ by effecting a mass exodus” over a content moderation decision, “and if they could, there is no reason to expect that they would.”<sup>293</sup>

When a legislature or court directly interferes with platforms’ content moderation decisions, those platforms have a strong First Amendment argument under *Tornillo*. However, it is hard to see how a data disclosure law would cause such an interference. For that reason, it is difficult to use *Tornillo* to strike down a data disclosure law.

*b. The Sorrell Argument*

In *Sorrell v. IMS Health* the Court struck down a regulation restricting the use of “prescriber-identifiable information.”<sup>294</sup> The law banned pharmaceutical companies from using such data for “marketing” purposes, absent the prescriber’s consent.<sup>295</sup> This restriction prevented brand-name pharmaceutical companies from engaging in targeted advertising to doctors, and the law was enacted with that “express purpose and practical effect” in mind.<sup>296</sup> According to the state of Vermont, targeted advertising by brand-name companies led doctors to prescribe medication “based on ‘incomplete and biased information.’”<sup>297</sup> Because the law muted pharmaceutical advertising by certain speakers, it was a content-based and viewpoint-discriminatory regulation of speech.<sup>298</sup> Vermont’s effort to “tilt” public debate could not survive strict scrutiny.<sup>299</sup>

*Sorrell* makes clear that governments cannot burden speech by particular speakers in order to “tilt” public debate, even if the debate relates primarily to commercial activity.<sup>300</sup> By limiting the use of “prescriber-identifiable information,” Vermont

291. See Solon, *supra* note 27 (“The company’s commitment to [its censorship policies] appears to wax and wane depending on public sentiment.” (quoting UCLA professor Sarah T. Roberts)).

292. See Langvardt, *supra* note 18, at 1384 (“[T]he platform’s strong network effects not only lock out competition, but make competition undesirable.”).

293. See *id.*

294. 564 U.S. 552, 577 (2011).

295. *Id.* at 559. “Marketing” activities included “advertising, promotion, or any activity . . . used to influence sales or the market share of a prescribed drug.” *Id.* (quoting VT. STAT. ANN., Tit. 18, § 4631(b)(5)).

296. *Id.* at 561, 565 (quoting 2007 Vt. Laws No. 80, § 1(3)).

297. *Id.* at 561. Detailing also fostered further harms, such as increasing the costs of health care, undermining the market for more effective and less expensive generic alternatives, and subjecting doctors to “disruptive and repeated marketing visits tantamount to harassment.” *Id.*

298. *Id.* at 572; see also *id.* at 564 (“The statute thus disfavors marketing, that is, speech with a particular content. More than that, the statute disfavors specific speakers, namely pharmaceutical manufacturers.”).

299. See *id.* at 580.

300. See *id.* at 577–79. “In an attempt to reverse a disfavored trend in public opinion, a State could not ban campaigning with slogans, picketing with signs, or marching during daytime. Likewise, the State may not seek to remove a popular but disfavored product from the marketplace by prohibiting truthful, nonmisleading advertisements that contain impressive endorsements or catchy jingles. That the State finds expression too persuasive does not permit it to quiet the speech or to burden its messengers.” *Id.* at 577–78.

was attempting to fix what it saw as a failure in the “marketplace for ideas on medical safety and effectiveness.”<sup>301</sup> Vermont found the debate was “frequently one-sided” because of brand-name pharmaceutical companies’ use of “prescriber-identifiable information.”<sup>302</sup> Vermont enacted its statute with the “express purpose and practical effect” of muting pharmaceutical advertising, which was “often in conflict with the goals of the state.”<sup>303</sup> At the same time, Vermont left unburdened those speakers whose messages accorded with the state’s own views.<sup>304</sup> For this reason, the law targeted speakers based on viewpoint and imposed more than an incidental burden on protected speech.<sup>305</sup>

Platforms could argue that a data disclosure law is an attempt to tip the scales in a public debate over the role social media platforms should play in our society. As discussed, public debate regarding social media platforms is stifled.<sup>306</sup> Another way to say this is that the debate is “one-sided.”<sup>307</sup> One of the central goals of a data disclosure law would be equalizing the information imbalance between platforms and everyone else.<sup>308</sup> Advocates of a data disclosure law emphasize how online platforms exclude research which “may be adverse to their interests,” and seek to correct this information asymmetry by compelling data access for researchers.<sup>309</sup> This suggests the intended beneficiaries of a data disclosure law will be journalists and researchers whose work is adverse to the platforms’ interest.<sup>310</sup>

To bring a viewpoint discrimination claim under *Sorrell*, platforms would need to show a demonstrable burden to their speech in the public sphere. In *Sorrell*, pharmaceutical companies were deprived of data necessary to communicate persuasively and effectively with doctors.<sup>311</sup> But a data disclosure law would not prevent social media platforms from speaking. Nor would it prevent those companies from analyzing and collecting data on their platforms. Instead, the law would subsidize “public interest” research and reporting. All the law would do is facilitate “more speech.”<sup>312</sup> For that reason, a data disclosure law seems analogous

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301. *Id.* at 560–61.

302. *Id.*

303. *Id.* at 565 (quoting 2007 Vt. Laws No. 80, § 1(3)).

304. *Id.* at 580.

305. *See id.* at 567.

306. *See supra* Part I.A.

307. *See Sorrell*, 564 U.S. at 561.

308. *See WARNER*, *supra* note 13, at 10; Weise & Frier, *supra* note 13.

309. *See WARNER*, *supra* note 13, at 10.

310. Competing platforms could also benefit from a disclosure law. *See WARNER*, *supra* note 13, at 11. Under *Sorrell*, platforms could frame the forced disclosure of their proprietary data as a kind of subsidy to their competitors. *Cf. infra* note 314. Nonetheless, it is difficult to frame the economic injury, such as migration of users to a competitor platform, as a restriction on platforms’ protected speech. *See infra* notes 315–316 and accompanying text.

311. *See Sorrell*, 564 U.S. at 560–61.

312. *See Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721, 764 (2011) (Kagan, J., dissenting). The Court in *Bennett* subjected the alleged subsidy to strict scrutiny. Funds were provided “in direct response to the political speech of [opposing] candidates” and therefore punished nonparticipating candidates for speaking. *See id.* at 747 (majority opinion).

to campaign subsidies, which the Court has continued to uphold as constitutional under the First Amendment.<sup>313</sup>

Of course, subsidizing the speech of one speaker might burden the speech of another.<sup>314</sup> Today, platforms exercise a near-monopoly over their data. This gives them singular authority to dictate the type and slant of research into their platforms, the work of certain independent journalists notwithstanding.<sup>315</sup> Compelling data access would deprive platforms of their information monopoly. Depriving platforms of their monopoly might make their speech less persuasive. But a data disclosure law could have the opposite effect. By allowing independent research, platforms' claims regarding their technology and algorithms could be falsified and subject to scholarly critique. This arguably would make the platforms' claims more trustworthy, and therefore more persuasive.

In any case, because a data disclosure law would not punish platforms for speaking or deprive them of any resources necessary to effectively communicate in the public square, it is difficult to use *Sorrell* to strike down a data disclosure law. The disclosure of data is not easily linked to any concrete harm to platforms' speech in the public sphere. For that reason, a data disclosure law is likely to survive scrutiny under *Sorrell*'s viewpoint discrimination test because "all the law does [is promote] more speech."<sup>316</sup>

## 2. The Platform Users' Speech Rights

A data disclosure law would directly regulate platforms. The most natural and effective challenges to the law, under the First Amendment, are based on the *platform's* right to free expression. But a data disclosure law would also burden the free expression of platform users. If users knew their private messages could be disclosed to researchers or journalists, they might not use Facebook Messenger.<sup>317</sup> Disclosure of activity data could also disrupt economic activity on a platform. Companies might be less willing to target advertisements to specific users if those users knew why they were being targeted.<sup>318</sup>

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313. See *id.* at 765 (Kagan, J., dissenting) ("Under our precedent, [the] subsidy statute should easily survive First Amendment scrutiny."); but see *Leading Cases*, *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 125 HARV. L. REV. 202, 211 (2011) ("Only a small expansion of the logic of *Arizona Free Enterprise* is needed to argue that a lump sum grant of public funds to one candidate burdens that candidate's privately funded opponent.").

314. See *Bennett*, 564 U.S. at 747 (majority opinion) ("All else being equal, an advertisement supporting the election of a candidate that goes without a response is often more effective than an advertisement that is directly controverted.").

315. See *Weise & Frier*, *supra* note 13. See Letter from Jaffer to Facebook, *supra* note 10, at 2 (citing examples).

316. See *Bennett*, 564 U.S. at 764 (Kagan, J., dissenting).

317. This example is not hypothetical. Facebook disseminated users' private messages and calendar entries to third-party corporations and did so without its users' knowledge or consent. See *Dance et al.*, *supra* note 80.

318. See Louise Matsakis, *Online Ad Targeting Does Work—As Long As It's Not Creepy*, WIRED (May 11, 2018, 12:44 PM), <https://perma.cc/VLW3-H6LE> (discussing research suggesting consumers are "reluctant to engage with ads that they know have been served based on their activity on third-party websites" and platforms have financial incentives to obscure "how some [targeted] ads are served").

Under the doctrine of First Amendment overbreadth, platforms could challenge a data disclosure law based on the platform users' right to free expression. Ordinarily, to succeed on a facial challenge, a party must show that the rule is invalid under any and all circumstances.<sup>319</sup> Demonstrating that some imaginary third party could be injured by the law is insufficient to meet this burden. Plaintiffs cannot usually rely on the rights of parties not before the court to bring a facial challenge. However, under the First Amendment the Court recognizes a second type of facial challenge: First Amendment overbreadth.<sup>320</sup> Overbroad regulations of speech are constitutionally suspect and are facially invalid.<sup>321</sup> So long as "a substantial number of its applications are unconstitutional," a regulation of speech is overbroad.<sup>322</sup> For that reason, platforms can challenge a data disclosure law based on the infringement of their users' First Amendment rights.

Although a data disclosure law would not directly regulate platform users, the law might "chill" user expression. The First Amendment provides robust protection from laws which inhibit free expression without prohibiting it outright.<sup>323</sup> Laws "chill" speech when they significantly deter free expression but are not specifically directed at the protected activity.<sup>324</sup> Defining "when, why and how" a chilling effect "is constitutionally unacceptable is a central challenge for First Amendment jurisprudence."<sup>325</sup> Nonetheless, the threshold for a First Amendment chill seems significantly lower than that for other constitutional rights. Courts presume it is far more difficult (and more dangerous) to sever unconstitutional applications of a law regulating speech than other laws.<sup>326</sup>

The rest of this section articulates and probes arguments that compelled disclosure would significantly chill the free expression of platform users and advertisers.<sup>327</sup>

319. *United States v. Salerno*, 481 U.S. 739, 745 (1987); *accord* *United States v. Stevens*, 559 U.S. 460, 473 (2010).

320. *Stevens*, 559 U.S. at 473 (citing *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008)).

321. *See id.*

322. *See id.* (quoting *Wash. State Grange*, 552 U.S. at 449 n.6) (emphasis added).

323. Monica Youn, *The Chilling Effect and the Problem of Private Action*, 66 VAND. L. REV. 1473, 1495 (2013).

324. *See* Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the Chilling Effect*, 58 B.U. L. REV. 685, 693 (1978) [hereinafter Schauer, *Unraveling the Chilling Effect*] ("A chilling effect occurs when individuals seeking to engage in activity protected by the first amendment are deterred from so doing by [a regulation] not specifically directed at that protected activity."); *see also id.* at 689–93.

325. Youn, *supra* note 323, at 1483; *see* *Younger v. Harris*, 401 U.S. 37, 51 (1971) ("[T]he existence of a 'chilling effect,' even in the area of First Amendment rights, has never been considered a sufficient basis, in and of itself, for prohibiting state action.").

326. *See* SCHAUER, ENQUIRY, *supra* note 99, at 12 (finding speech is protected "despite the fact that speech causes harm" (emphasis added)); *see also* *Abrams v. United States*, 250 U.S. 616, 630 (Holmes, J., dissenting) ("Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. . . . [For that reason] we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country." (emphasis added)).

327. Users' real identities could easily be uncovered and linked to collected data, even if researchers took precautions, like scrubbing "personally identifiable" information. *See* Ohm, *supra* note 66, at 1704.

First, I describe several analytical categories of activity data. Second, I explore theories of harm related to each category, that is, I explain how compelled data disclosure would chill First Amendment protected activity.

*a. Defining “Activity Data”*

Senator Mark Warner’s proposed law would compel disclosure of a social media platform’s “activity data.”<sup>328</sup> Activity data, as conventionally defined, includes *any* electronic log of behavior.<sup>329</sup> The breadth of this category is hard to overstate. For that reason, it is helpful to create separate analytical subcategories of activity data. I propose the following: posted content, social graphs, digital trace records, and aggregated data.

I define “posted content” as content which users knowingly and voluntarily post to the platform. This includes messages, comments, pictures, and likes. It also includes any information entered into a user’s profile, such as their birthday or gender. Much of the data in this category either is “pure speech” or closely resembles communicative content.<sup>330</sup> Photos, emojis, and even “likes” are expressive on their face and, for that reason, seem to be protected expression.<sup>331</sup>

I define “social graph” as a record of connections between a user and the people, places, and things they interact with online. *Business Insider* explains it this way:

Say you are at a party, standing there in a circle with two friends. You reach out to touch your friend’s shoulder. Then he touches your shoulder. You all touch each other’s shoulders. You are creating connections between you and other people.

[T]hen you start to get hungry. Fortunately, there’s pizza in the middle of the circle. But only two of you like pizza. You and that other person become part of a network because both of you expressed your interest in pizza. . . . [W]hen you “like” something through Facebook, it becomes an edge. The edge is the connection point between you and other people, places, or things.<sup>332</sup>

The list of a user’s friends is an element of the social graph. The list of members of a Facebook group and the list of people who “like” Beyoncé on Facebook are also parts of the social graph. For First Amendment purposes, the social graph creates a list of associations—particularly associations between users—which might implicate certain protected interests. It helps to visualize the social graph, so an example is included below:

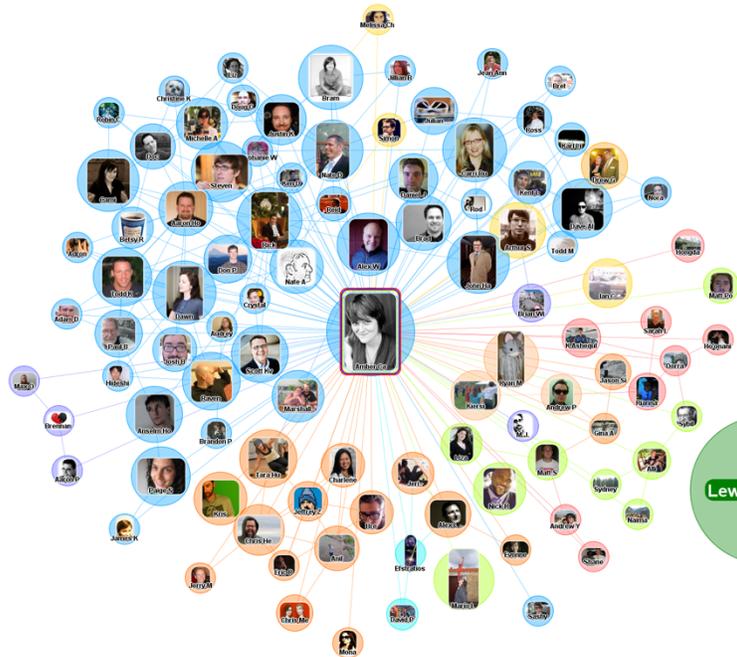
328. WARNER, *supra* note 13, at 10.

329. See Franklin et al., *supra* note 77.

330. See Shen v. Albany Unified Sch. Dist., No. 3:17-cv-02478-JD, 2017 U.S. Dist. LEXIS 196340, at \*14 (N.D. Cal. Nov. 29, 2017) (“Without question, the original posts and verbal comments” posted to Instagram are protected “speech.”).

331. See *infra* note 342.

332. Boonsri Dickinson, *So What the Heck Is the “Social Graph” Facebook Keeps Talking About?*, BUS. INSIDER (Mar. 2, 2012, 8:10 PM), <https://perma.cc/4RRF-E2FV>.



Amber Case, *Social Graph of @caseorganic (Facebook) (with top connections)*,  
FLICKR (Aug. 28, 2010), <https://perma.cc/CWJ4-SJSN>

The remaining analytical categories—“digital trace records” and “aggregated data”—are more abstract. “Everything we do, both on and offline, leaves digital traces,” which online platforms might collect.<sup>333</sup> This data, created “by virtue of interacting with web pages,” is not known to most platform users.<sup>334</sup> I call this data “digital trace records.” Digital trace records might be simple, like a recorded IP address, or complex, like a record of all the links a user has clicked through.<sup>335</sup>

The final category of data is “aggregated data.” Through the process of “datafication,” social media platforms can learn even more about their users by transforming “previously invisible” activities into data points.<sup>336</sup> Startlingly accurate and intimate inferences can be drawn from aggregated data.<sup>337</sup> Using shopping

333. Grassegger & Krogerus, *supra* note 79.

334. See Emilee Rader, *Awareness of Behavioral Tracking and Information Privacy Concerns in Facebook and Google*, USENIX ASS’N 10TH SYMP. ON USABLE PRIVACY & SECURITY 51, 60 (2014), <https://perma.cc/72NW-QBRV> (“Using the web discloses information simply by virtue of interacting with web pages, and then once the information is out of users’ control, they have little choice but to trust companies and other people to protect the information the same way they would.” (footnote omitted)).

335. See Kristen Korosec, *This Is the Personal Data That Facebook Collects—And Sometimes Sells*, FORTUNE (Mar. 21, 2018, 10:32 AM), <https://perma.cc/5DH5-4CMV>.

336. See Margarita Shilova, *The Concept of Datafication; Definition & Examples*, DATA SCI. CENTRAL (Feb. 6, 2018, 6:30 PM), <https://perma.cc/7PLB-LU63>.

337. See Lomborg & Bechmann, *supra* note 8, at 261 (finding a “high degree of access to user data patterns” may result in “unwanted and unforeseen exposure of private data”); see also *id.* (“[T]he

patterns alone, Target can accurately predict whether a shopper is pregnant, and even when she is in the second trimester.<sup>338</sup> Using a collection of Facebook “likes,” some algorithms can accurately predict a user’s sexual orientation, political ideology, and personality type.<sup>339</sup> I define “aggregated data” as any collection of data points with similar predictive potential. Because of its predictive power, the compelled disclosure of aggregated data might pose a unique threat to users’ protected expression.<sup>340</sup>

These analytical categories will guide our analysis going forward. The following subsections explore how compelled disclosure might chill different types of First Amendment protected activity. The final subsection explores the additional category of data related to advertisements.

### *b. Posted Content*

Posted content is clearly “speech” for First Amendment purposes. Much of it is expressive “pure speech” presumptively covered by the First Amendment.<sup>341</sup> The rest (including photos, videos, and “likes”<sup>342</sup>) are sufficiently expressive to warrant protection.<sup>343</sup> The most natural argument regarding the disclosure of posted content

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researcher does not know at the time of retrieval whether seemingly mundane data will come to contain highly sensitive information . . .”).

338. See Charles Duhigg, *How Companies Learn Your Secrets*, N.Y. TIMES MAG. (Feb. 16, 2012), <https://perma.cc/NM7Q-VKMJ>.

339. This was proven by Michael Kosinski, then a Ph.D. student at the Cambridge University Psychometrics Center. See Carole Cadwalladr, “I Made Steve Bannon’s Psychological Warfare Tool”: Meet the Data War Whistleblower, GUARDIAN (Mar. 18, 2018, 5:44 AM), <https://perma.cc/KR9S-2B7P>. With an average of sixty-eight Facebook page “likes,” Kosinski’s algorithm was able to predict sexual orientation and political leanings with roughly eighty-five percent accuracy. With three hundred “likes,” it was possible to predict a user’s personality type more accurately than their own spouse could. See *id.* See also Michael Kosinski et al., *Private Traits and Attributes Are Predictable from Digital Records of Human Behavior*, 110 PROC. NAT’L ACAD. SCI. 5802 (2013). Cambridge Analytica attempted to replicate this algorithm, see Cadwalladr, *supra*, and claims to have “predict[ed] the personality of every single adult in the United States of America.” See Grassegger & Krogerus, *supra* note 79 (quoting Alexander Nix, former CEO of Cambridge Analytica).

340. See Lomborg & Bechmann, *supra* note 8, at 261 (“[T]he researcher does not know at the time of retrieval whether seemingly mundane data will come to contain highly sensitive information at a later point in time.”).

341. Roig, *supra* note 132, at 182–83. The written and spoken word, so-called “pure speech,” are presumptively protected by the First Amendment, with some limited exceptions not relevant here. See *id.*; Ohralik v. Ohio State Bar Ass’n, 436 U.S. 477, 456 (1978) (citing regulations of corporate proxy statements, and other economic regulations, as exceptions to this general rule).

342. Facebook describes “likes” as a means of communication—by giving “positive feedback” and connecting with posted content. See *Liking Things on Facebook*, FACEBOOK, <https://perma.cc/2C6P-G4BD> (last visited Feb. 16, 2020). Courts confronted with the issue have largely agreed. See, e.g., Bland v. Roberts, 730 F.3d 368, 386 (4th Cir. 2013) (holding that “liking” a campaign page communicates support for the candidate and “is the Internet equivalent of displaying a political sign in one’s front yard, which the Supreme Court has held is substantive speech”).

343. See Roig, *supra* note 132, at 183–84. Nonverbal activity intended to communicate a message likely to be understood is protected speech under the First Amendment. *Spence v. Washington*, 418 U.S. 405, 410–11 (1974); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995) (appearing to modify the *Spence* test to eliminate the requirement of a particularized message). See, e.g., *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1060–62 (9th Cir. 2010) (concluding tattoos are

is that it compels platforms to speak.<sup>344</sup> Nonetheless, forcing platforms to disclose posted content would also punish users for speaking on a social media platform, assuming the disclosure was made without their informed consent.<sup>345</sup>

The mere disclosure of posted content to journalists and researchers is likely to chill protected expression. Most social media platforms protect the privacy of users' posts with privacy settings.<sup>346</sup> On Facebook, for example, users can see only what their friends choose to share with them, or with the public at large.<sup>347</sup> The doctrine of privacy torts shows how the public disclosure of intimate information can cause harm.<sup>348</sup> If users feel free to express themselves on social media only because their posts are private, disclosure of posted content to third parties would seem to chill user expression.<sup>349</sup> "Awareness that the government *may* be watching chills associational and expressive freedoms."<sup>350</sup> Similarly, awareness that journalists or researchers may be collecting posted content could make users more guarded in their online communications.

For the reasons above, compelled disclosure of posted content is likely to chill protected expression.

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protected under the First Amendment whether the tattoos are composed of words or are merely decorative); *see also* *Shen v. Albany Unified Sch. Dist.*, No. 3:17-cv-02478-JD, 2017 U.S. Dist. LEXIS 196340, at \*14 (N.D. Cal. Nov. 29, 2017) ("Without question, the original [Instagram] posts," including captioned pictures, are protected "speech.").

344. This is true even though the user first created the speech. *See Hurley*, 515 U.S. at 570 ("Cable operators, for example, are engaged in protected speech activities even when they only select programming originally produced by others.").

345. Requiring "informed consent" before collecting user data seems impracticable but should be seriously considered by any drafter of a data disclosure law. *See* Lomborg & Bechmann, *supra* note 8, at 262; *see also* Minoli Wijetunga, "I Have Read and Agree To the Terms and Conditions": *Informed Consent in the Age of Social Media*, GENDERIT.ORG (Aug. 28, 2019), <https://perma.cc/Y26C-XG5T>. If informed consent is secured, then any "chill" resulting from disclosure would seem to be self-inflicted and therefore insufficient to create a cognizable injury. *See* *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 418 (2013) ("[R]espondents' self-inflicted injuries are not fairly traceable to the Government's purported activities [and] their subjective fear of surveillance does not give rise to standing.").

346. *See* David Nield, *How To Make All Your Social Media Posts Truly Private*, POPULAR SCI. (Feb. 16, 2017), <https://perma.cc/86NP-JZQK> (explaining the concept of "privacy settings" and how they work on Facebook, Instagram, and Twitter).

347. *See id.*; Lomborg & Bechmann, *supra* note 8, at 261 (describing the content on Facebook as "semiprivate").

348. *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890); Danielle Citron, *The Roots of Sexual Privacy: Warren and Brandeis & the Privacy of Intimate Life*, 42 COLUM. J.L. & ARTS 383, 384–85 (2019).

349. *See* *ACLU v. Clapper*, 785 F.3d 787, 802 (2d Cir. 2015) ("When the government collects appellants' metadata, appellants' members' interests in keeping their associations and contacts private are implicated, and any potential 'chilling effect' is created at that point."); *cf.* Travis Wilkinson, Note, *Is Anyone Listening To Me?: Bartnicki v. Vopper*, 63 LA. L. REV. 589, 602 (2003) (noting that confidentiality "encourage[s] full and frank communication").

350. *United States v. Jones*, 565 U.S. 400, 416 (Sotomayor, J., concurring); *but see* *Laird v. Tatum*, 408 U.S. 1, 12–14 (1972) (finding the Army's surveillance system of civil political activity did not offend the First Amendment because any resulting "chill" was purely speculative); *Amnesty Int'l USA*, 568 U.S. at 402 (rejecting a First Amendment challenge to a federal surveillance program because plaintiffs' claim—that their communications were likely to be intercepted under the Foreign Intelligence Surveillance Act of 1978—was based on a speculative "chain of possibilities").

*c. Social Graph*

The First Amendment grants a limited right to associate “for the purpose of engaging” in protected, expressive activity.<sup>351</sup> The First Amendment does not protect informal “social associations,” like the casual connections made at a club.<sup>352</sup> Many “groups” on social media seem to fall into the category of unprotected social associations. The large size, informal character, and indiscriminate admissions criteria of many online groups makes them more analogous to a commercial dance hall than to an “organized” association.<sup>353</sup> For example, members of a Facebook group which compiles pictures of cute dogs do not seem to engage in more than a “kernel” of expressive activity.<sup>354</sup> Nonetheless, compelled disclosure of a users’ entire social graph may trigger First Amendment scrutiny. The number of associations captured in the social graph suggests that *some* obviously protected “expressive association” is likely to be exposed.<sup>355</sup> For this reason, the compelled disclosure of social graphs is likely to trigger some First Amendment review.

The compelled disclosure of user social graphs could infringe the First Amendment rights of users, especially those engaged with “dissident” groups. For example, government surveillance of #BlackLivesMatter activists, down to “minute-by-minute” surveillance of protester movements, has deterred those advocates from posting on social media for months at a time.<sup>356</sup> Disclosure to journalists and researchers does not necessarily pose the same risk, because researchers would have no direct authority over platform users.<sup>357</sup> Unlike a powerful government agency, such as the Department of Homeland Security, researchers could not sanction, investigate, or prosecute users in retaliation for their expressive activity.<sup>358</sup> Nonetheless, unscrupulous researchers would have the ability to publicize sensitive

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351. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617–18 (1984). Intimate associations, which involve the freedom to “enter into and maintain certain human relationships” are also protected. *Id.* at 617. People connect with friends and family on social media, but it is hard to see how disclosing a user’s list of friends could disrupt these intimate associations.

352. *See Dallas v. Stanglin*, 490 U.S. 19, 25 (1989).

353. *See id.*

354. *See id.* at 24–25 (“The hundreds of teenagers who congregate each night at this particular dance hall are not members of any organized association; they are patrons of the same business establishment. Most are strangers to one another, and the dance hall admits all who are willing to pay the admission fee.”).

355. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 655 (2000) (noting people need not associate “for the ‘purpose’ of disseminating a certain message” in order to be protected as an expressive association). If a data disclosure law is drafted broadly enough, it might compel disclosure of a user’s “every associational tie.” That would certainly impair the user’s freedom of association. *See Shelton v. Tucker*, 364 U.S. 479, 486 (1960).

356. *See Amna Toor*, Note, “*Our Identity Is Often What’s Triggering Surveillance*”: *How Government Surveillance of #BlackLivesMatter Violates the First Amendment Freedom of Association*, 44 RUTGERS COMPUTER & TECH. L.J. 286, 320–26 (2018).

357. *Cf. Shelton*, 364 U.S. at 486 (“[T]he pressure upon a teacher to avoid any ties which might displease [members of the school board] who control his professional destiny would be constant and heavy.”).

358. *See Hartman v. Moore*, 547 U.S. 250, 256 (2006).

associations in a retaliatory manner.<sup>359</sup> In addition, social graphs might be publicly disclosed after a data breach. For this reason, the compelled disclosure of social graphs might chill protected associations.<sup>360</sup>

Fear that retaliation would follow the public disclosure of a user's social graph seems neither "theoretical nor groundless."<sup>361</sup> The Internet makes it easy for malicious actors to compel self-censorship through sustained online harassment.<sup>362</sup> People holding "dissident" beliefs are not the only ones at risk of vicious retaliation: GamerGate, an online culture war, made that clear.<sup>363</sup> As the public becomes more attuned to these risks, courts should become more willing to accept this probabilistic theory of harm.<sup>364</sup> Still, when bringing a facial challenge to a data disclosure law, platforms could only speculate as to whether nefarious researchers would choose to act outside their lawful authority. For this reason, a court might hold such a theory of harm is too simply attenuated to establish a constitutionally significant chill.<sup>365</sup>

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359. See, e.g., Adam K. Raymond, *ABC News Journalist Suspended for Comments Secretly Recorded by Project Veritas*, INTELLIGENCER (Feb. 26, 2020), <https://perma.cc/2WUV-SYXH>; Makena Kelly, *Controversial YouTuber Banned From Patreon After Alleged Doxxing*, THE VERGE (Nov. 26, 2019), <https://perma.cc/AE4E-QPAM> (describing how YouTuber Onision tweeted screenshots of private text messages between him and another YouTuber).

360. Courts have not formally extended First Amendment protection to "emerging associations formed on the Internet," such as #BlackLivesMatter, but there is a strong argument for extending such protection. Toor, *supra* note 358, at 313; see *id.* at 313–20. Until courts do so, the disclosure of users' social graphs will not implicate the First Amendment unless it chills a formal, in-person association.

361. See *Shelton*, 364 U.S. at 488; NAACP v. Alabama *ex rel.* Patterson, 375 U.S. 449, 462 (1958) (finding the public disclosure of NAACP members' names and addresses would subject those members to economic reprisal, threats of violence, "and other manifestations of public hostility").

362. See Wu, *supra* note 33; see also Kristine Phillips, *Founder of Neo-Nazi Site Daily Stormer Argues "Troll Storm" Against Jewish Woman Is Free Speech*, WASH. POST (Dec. 3, 2017, 6:32 PM), <https://perma.cc/24JC-QAPZ>.

363. Advocates for gender equality in the video game industry were subject to violence and harassment. See Evan Urquhart, *Gamergate Never Died*, SLATE (Aug. 23, 2019, 4:51 PM), <https://perma.cc/47F4-JBCK>; see also Jason Fagone, *The Serial Swatter*, N.Y. TIMES MAG. (Nov. 24, 2015), <https://perma.cc/P5SX-X267> (describing serial abuse of female "streamers," or people who broadcast their gameplay live to an online audience).

364. A similar change in public awareness of government surveillance seems to have undermined the persuasive weight of a major Supreme Court case regarding standing, *Clapper v. Amnesty Int'l*, 568 U.S. 398 (2013). In *Clapper*, the Court rejected a First Amendment challenge to a national surveillance law because it found plaintiffs' claim that their communications were likely to be intercepted under the Foreign Intelligence Surveillance Act of 1978 was too speculative. *Id.* at 401–02. A few months after the case was decided, Edward Snowden leaked documents detailing the scope of surveillance carried out under the challenged regime, vindicating the dissent's claim that the government was "likely" to intercept at least some of the plaintiff's private, foreign correspondence. *Id.* at 422 (Breyer, J., dissenting). Some lower courts have used the leaked documents to highlight factual differences in *Clapper*, and thereby distinguish their analysis. See, e.g., *Schuchardt v. President of the U.S.*, 839 F.3d 336, 339–40, 343 (3d Cir. 2016) (distinguishing plaintiff's factual challenge to NSA surveillance from the facial challenge made in *Clapper* and relying on information leaked by Snowden to make that distinction); *ACLU v. Clapper*, 785 F.3d 787, 801, 829 n.7 (2d Cir. 2015) (relying on documents leaked by Snowden to hold that appellants here "need not speculate" as to whether the government had in fact collected their call records).

365. See, e.g., *Laird v. Tatum*, 408 U.S. 1 (1972). In *Laird*, citizens alleged Army surveillance would chill their First Amendment expression because the Army *might* misuse gathered information. See *id.* at 13–14. The Court dismissed this as "purely speculative" and found it insufficient to establish a constitutionally significant chilling effect. *Id.*

For the reasons above, disclosure of users' social graphs is likely, but not certain, to chill expressive association.

*d. Digital Traces of User Activity*

Disclosing digital trace records might chill user engagement with a social media platform. Suppose a researcher requested a record of every link a user clicked and every page a user scrolled through. That would be unsettling to many users.<sup>366</sup> Still, a violation of privacy does not necessarily implicate a First Amendment interest. The act of disclosure would have to chill protected expression in order to trigger First Amendment scrutiny.<sup>367</sup>

The very acts of clicking, scrolling, and searching through social media pages might be protected activity. The Court has long recognized that the First Amendment protects the "right to receive information and ideas," even if the scope of this right is not clearly defined.<sup>368</sup> If reading can be analogized to perusing online platforms, then search records might be analogized to library records. Although case law is ambiguous, "it is reasonable to expect the privacy of library records is protected by the First Amendment."<sup>369</sup> Readers might not feel comfortable exploring certain books or certain authors if their reading choices were publicly available.<sup>370</sup> Publicly disclosing search records to researchers would seem to similarly chill intellectual freedom.<sup>371</sup> Disclosing click- and scroll-through records would seem even more invasive. Such records would sketch, in intimate detail, the way a user interacted with content on social media.

The reader might be skeptical that obsessive scrolling through Instagram, or other online activities,<sup>372</sup> deserve constitutional protection. However, the Supreme Court has said the Constitution protects the right to receive information and ideas "regardless of their social worth."<sup>373</sup> Moreover, Supreme Court precedent illustrates a deep judicial skepticism of overbroad speech regulations, even when those regulations are intended to censor or deter vile expression.<sup>374</sup> For this reason, click-

366. See, e.g., Key & Peele, *Browser History*, COMEDY CENTRAL (Sept. 18, 2013), <https://perma.cc/E2C6-L7NU>.

367. See *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978).

368. See David L. Hudson, Jr., *First Amendment Right to Receive Information and Ideas Justifies Citizens' Videotaping of the Police*, 10 U. ST. THOMAS J.L. & PUB. POL'Y 89, 91–92 (2016).

369. See Bruce S. Johnson, "A More Cooperative Clerk": *The Confidentiality of Library Records*, 81 LAW LIB. J. 769, 782–84, 801–02 (1989) (finding a constitutional basis for such protection under the "right of privacy").

370. See Neil M. Richards, *Intellectual Privacy*, 87 TEX. L. REV. 387, 387 (2008) ("[T]he protection of records of our intellectual activities . . . is essential to the First Amendment values of free thought and expression . . .").

371. See Johnson, *supra* note 369, at 780–81.

372. See Key & Peele, *supra* note 366 (illustrating the shame resulting from the revelation of a person's taste in pornography).

373. *Stanley v. Georgia*, 394 U.S. 557, 564 (1968) (finding a law criminalizing the mere possession of pornography unconstitutional).

374. See, e.g., *United States v. Stevens*, 559 U.S. 460 (2010) (invalidating federal statute criminalizing animal cruelty videos for overbreadth); *Virginia v. Black*, 538 U.S. 343, 360, 364–67 (2003) (rejecting a provision of a state law making cross burning prima facie evidence of an intent to intimidate);

through, scroll-through and search records seem entitled to First Amendment protection.

For these reasons, compelled disclosure of some digital trace records is likely to chill protected expression.

*e. Aggregated Data*

Some digital trace records are more obviously expressive than others. On its face, a detailed list of the web pages a user searched for communicates something about the user's reading habits. The same is not as easily said about a status update's time stamp. Nonetheless, the disclosure of aggregated data could pose a threat to users' freedom of expression.

The predictive power of aggregated data might pose a unique threat to users' protected expression if that data were disclosed.<sup>375</sup> Aggregated data can convey something about users' off-platform behavior and their personal characteristics.<sup>376</sup> Surprisingly accurate and intimate inferences can be made using this data, such as whether a person is pregnant and in their second trimester.<sup>377</sup> However, a violation of privacy does not necessarily burden protected expression. It is difficult to see how the disclosure of aggregated data would chill any particular protected activity, such as posting status updates. On the other hand, the fear that aggregated data would be misused by researchers might be enough to scare users off-platform entirely. That would certainly chill protected expression.

This theory suffers for at least two reasons. First, the theory is fundamentally speculative. Until a user's aggregated data was actually collected, platforms bringing a facial challenge to a data disclosure law could only speculate whether aggregated data would be collected and whether researchers would choose to misuse the data they collect.<sup>378</sup> Second, the actual behavior of Facebook users after the Cambridge Analytica scandal suggests that even an "objective" risk of data misuse would not

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R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (invalidating city's Bias-Motivated Crime Ordinance and overturning plaintiff's conviction for burning a cross on the lawn of an African-American family).

375. See Lomborg & Bechmann, *supra* note 8, at 261 ("[T]he researcher does not know at the time of retrieval whether seemingly mundane data will come to contain highly sensitive information at a later point in time.").

376. See Duhigg, *supra* note 338; Cadwalladr, *supra* note 339; Sidney Fussell, *How Facebook, Instagram, and Twitter Helped Police Target Black Activists*, SPLINTER (Oct. 12, 2016, 10:06 AM), <https://perma.cc/4RVX-3PYM> (discussing the use of aggregated social media data to track the movements of protesters); see also *supra* notes 336–340 and accompanying text.

377. See Duhigg, *supra* note 338 (discussing Target's "pregnancy prediction score," which is determined by analyzing shopping patterns, as well as the score's remarkable accuracy and Target's use of the score to micro-target women in their second trimester).

378. See *Clapper v. Amnesty Int'l*, 568 U.S. 398, 410 (2013) (holding that plaintiffs lacked standing to bring a constitutional challenge to a government surveillance practice when the plaintiffs' claim "[did] not satisfy the requirement that threatened injury must be certainly impending").

force users off social media entirely.<sup>379</sup> Nonetheless, the threat of a data breach might cause users who remain on-platform to engage less fully with social media.<sup>380</sup>

As the public becomes more informed about the inferences enabled by data aggregation, users could take more drastic action to protect their “information privacy.”<sup>381</sup> But a chilling effect cannot arise from the mere “knowledge” of a data disclosure regime “or from the individual’s concomitant fear” of a data breach.<sup>382</sup> Unless that fear has a discrete effect, such as deterring social media posts for extended periods of time, there is no constitutionally significant chill.<sup>383</sup> For this reason, the government has room to argue that disclosure of facially less expressive data would not chill users’ protected expression. At the very least, the difficulty of establishing a “specific” and “objective” harm makes it easier for the government to argue that the compelled disclosure of such aggregated data is narrowly tailored.<sup>384</sup>

For these reasons, compelled disclosure of aggregated data is unlikely to chill protected expression.

*f. Ad-Related Data: The Commercial Advertisers’ Speech Rights*

Disclosure of activity data could disrupt economic activity on a platform.<sup>385</sup> Advertisers might be less willing (or less able) to target ads to consumers if those consumers knew why they were targeted.<sup>386</sup> Increased transparency regarding advertisements may make them less persuasive. Evidence suggests that when users know why they are being served a particular ad, they are less likely to engage with the advertisement.<sup>387</sup> That in turn might burden the advertisers’ speech.

When a government regulation makes speech less persuasive, the regulation might burden protected expression. This argument has support in *Sorrell*.<sup>388</sup> There, the Court held that depriving pharmaceutical companies of the data necessary to engage

379. See Kristen Herhold, *How People View Facebook After the Cambridge Analytica Data Breach*, MANIFEST (Mar. 27, 2019), <https://perma.cc/G6V3-HE7F>; Madison Malone Kircher, *Turns Out the Whole Facebook Data Scandal Ended with People Using Facebook . . . More?*, INTELLIGENCER (May 7, 2018), <https://perma.cc/WTZ4-3VCB>.

380. See Julie Beck, *People Are Changing the Way They Use Social Media*, ATLANTIC (June 7, 2018), <https://perma.cc/FN8Q-SSQ3>.

381. See Rader, *supra* note 334, at 51–52.

382. See *Laird v. Tatum*, 408 U.S. 1, 11 (1972); see also *Clapper*, 568 U.S. at 410.

383. See *Younger v. Harris*, 401 U.S. 37, 51 (1971) (“[T]he existence of a ‘chilling effect,’ even in the area of First Amendment rights, [is not] a sufficient basis, in and of itself, for prohibiting state action.”).

384. See *Laird*, 408 U.S. at 13–14.

385. I do not discuss the constitutionality of compelled disclosure of data related to political advertising. Other scholars have already analyzed the constitutionality of regulating online political ads. See, e.g., Nunziato, *supra* note 60; Abby K. Wood & Ann M. Ravel, *Fool Me Once: Regulating “Fake News” and Other Online Advertising*, 91 S. CAL. L. REV. 1223 (2018); Irana Dykhne, *Persuasive or Deceptive—Native Advertising in Political Campaigns*, 91 S. CAL. L. REV. 339 (2018); Ira S. Rubinstein, *Voter Privacy in the Age of Big Data*, 2014 WIS. L. REV. 861 (2014).

386. See Matsakis, *supra* note 318.

387. See *id.*; Julia Carrie Wong, “It Might Work Too Well”: The Dark Art of Political Advertising Online, GUARDIAN (Mar. 19, 2018, 4:00 AM), <https://perma.cc/J9Q4-8BVU>.

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

in persuasive targeted advertising burdened the companies' speech.<sup>389</sup> This argument has even stronger support in a Tenth Circuit case, *U.S. West v. FCC*. In *U.S. West*, a regional telecommunications company challenged FCC rules limiting the use of "customer proprietary network information" for marketing purposes.<sup>390</sup> The Tenth Circuit found that the regulations triggered First Amendment protections because they made the company's targeted communications less persuasive.<sup>391</sup> The fact that advertisers could still effectively advertise to a general audience would not justify an infringement on their "targeted" speech.<sup>392</sup> Under this precedent, platforms can plausibly argue that compelled disclosure of data related to targeted advertising would burden the speech rights of advertisers.

For these reasons, compelled disclosure of ad-related data may chill protected expression.<sup>393</sup>

### III. IMPLICATIONS: PRACTICAL RECOMMENDATIONS FOR LEGISLATORS

Part II.A explained why a data disclosure law is likely to be subject to strict scrutiny under the doctrine of compelled speech. The implications of this analysis are profound. If a data disclosure law unconstitutionally infringes a *platform's* speech rights, then other disclosure laws may also be unconstitutional. Securities disclosure laws might unconstitutionally infringe upon a *corporation's* speech rights. Labor laws compelling disclosure might unconstitutionally infringe upon an *employer's* speech rights.<sup>394</sup> The broad implications of my analysis are discussed in the Conclusion. Here, I lay out specific recommendations for legislators hoping to pass a data disclosure law which can survive constitutional muster.

As discussed above, a data disclosure law is unlikely to survive strict scrutiny. For this reason, any legislator considering a data disclosure law should craft a second, standalone law to facilitate access to publicly available data. This could be achieved in two ways. First, platforms might be compelled to disclose publicly available data. This option has the advantage of delivering data in a usable format but runs the risk of being struck down under the doctrine of compelled speech. Second, the legislature might provide researchers and journalists with a "safe harbor" for using automated data-retrieval processes.<sup>395</sup> A "safe harbor" provision seems difficult to invalidate

389. *Id.* at 578 ("That the State finds expression too persuasive does not permit it to quiet the speech or to burden its messengers.")

390. *See* *U.S. West, Inc., v. FCC*, 182 F.3d 1224 (10th Cir. 1999) (quoting 47 U.S.C. § 222(c)(1)).

391. *See id.* at 1232.

392. *Id.* (holding 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"); *see also Sorrell*, 564 U.S. at 579 (The State is not permitted to burden expression which it finds "too persuasive.").

393. *See* Ghonim & Rashbass, *supra* note 47 (arguing that platforms need to disclose "who is purchasing ads, which groups they are targeting, and the content of these ads").

394. *See* *Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947, 950 (D.C. Cir. 2013) (holding NLRB rules which require employers to post notices of employee rights in the workplace unconstitutionally infringe upon the employers' free speech rights).

395. The Knight First Amendment Institute has drafted a detailed proposal for just such a safe harbor. Letter from Jaffer to Facebook, *supra* note 10.

under the First Amendment. It would not compel disclosure (and so would not compel “speech”) but would merely require that researchers and journalists have access to platform data.<sup>396</sup>

A court is almost certain to apply strict scrutiny to a data disclosure law. Although this is a “demanding standard,” there may be a way to craft a law which is constitutionally sound or, at the very least, one which is less likely to be invalidated. A data disclosure law will survive strict scrutiny only if it is narrowly tailored. For that reason, the scope of data disclosure should be narrow and well defined.

To ensure this result, the drafter should take three steps. First, she should defer as little as possible to agency rulemaking. This will have the disadvantage of making a data disclosure regime less flexible and harder to amend over time; however, a broad grant of discretion to agency regulators seems more likely to fail strict scrutiny.<sup>397</sup> Second, the drafter should use the language of the law and any legislative history to distinguish between publicly available data and data which can be obtained only through compelled disclosure. This will emphasize what is perhaps the government’s strongest argument—that a data disclosure regime is *necessary* to facilitate certain research, such as research into targeted advertising.<sup>398</sup> Third, the drafter should produce substantial evidence that regulatory alternatives are inadequate to facilitate research into social media platforms. For example, the legislature might implement a “safe harbor” and observe the results for a few years. This or any similar strategy would help rebut the claim that the legislature had not fully explored less restrictive alternatives.<sup>399</sup>

Finally, the drafter should consider her conduct and statements when lobbying for a data disclosure law. If a court finds that “viewpoint discrimination is inherent in the [law’s] design and structure,” a data disclosure law is sure to be struck down.<sup>400</sup> The mere fact that a data disclosure law would target only large platforms is enough to suggest a discriminatory intent behind the law.<sup>401</sup> To avoid this result, legislators should carefully watch what they say regarding a data disclosure law.<sup>402</sup>

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396. *But see supra* note 260.

397. This is true even if the agency takes a narrow view of their statutory delegation. Limited and discretionary enforcement policies cannot save an overbroad regulation of speech. *See United States v. Stevens*, 559 U.S. 460, 480 (2010).

398. *See supra* notes 258–261 and accompanying text.

399. In *Becerra*, California argued that the “tepid response” to its advertising campaign publicizing state-provided abortions demonstrated the program was an insufficient alternative to disclosure; the Court disagreed. *See Nat’l Inst of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2376 (2018) (finding the “tepid response” might have been a reflection of insufficient demand or “insufficient resources” contributed by the state to the campaign).

400. *See id.* at 2379 (Kennedy, J., concurring); *Sorrell v. IMS Health, Inc.*, 564 U.S. 542, 571 (2011).

401. *See Becerra*, 138 S. Ct. at 2361 (majority opinion); *Sorrell*, 564 U.S. at 580; *but see McCullen v. Coakley*, 134 S.Ct. 2518, 2530–32 (2014) (holding a facially neutral law was not content-based for imposing a “buffer zone” only at abortion clinics, rather than broadly imposing such a zone on other facilities).

402. *See Sorrell*, 564 U.S. at 564 (“Any doubt that § 4631(d) imposes an aimed, content-based burden [on particular speakers] is dispelled by the [legislative] record and formal legislative findings.”).

#### IV. CONCLUSION: THE NEED FOR A STRUCTURAL FIRST AMENDMENT

Today the First Amendment stands as a nearly insurmountable barrier to government regulation. As many scholars have documented, the First Amendment poses a threat to many commercial regulations.<sup>403</sup> Floyd Abrams, a prominent First Amendment litigator, has declared that the constitutionality of the Securities and Exchange Act and the Federal Communications Act are both in doubt.<sup>404</sup> The same seems to be true of the National Labor Relations Act.<sup>405</sup>

Throughout this Note, I have examined the constitutionality of a data disclosure law. Under an expansive view of First Amendment coverage, platforms can persuasively argue that “data is speech.” Moreover, under *Becerra*’s expansive definition of “content-based,” platforms can argue that a data disclosure law is subject to strict scrutiny. Finally, the informational function of a data disclosure law and the government’s interest in facilitating research into the “vast democratic forums of the Internet” are insufficient to uphold the law.<sup>406</sup> In short, it seems remarkably easy to invalidate a data disclosure law.

But it should not be this easy. Our traditional conception of free speech was structural, and under that conception—where speech is protected not for its inherent worth, but for the democratic value it serves—it is *harder* to argue that nonsensical speech, false speech, and “data” deserve virtually unlimited First Amendment protection.<sup>407</sup> A structural view would require courts to perform a more nuanced parsing of the speakers’ and listeners’ interest.<sup>408</sup> Other scholars have cautioned

403. See generally Shanor, *supra* note 95; Frederick Schauer, *Every Possible Use of Language?*, in *THE FREE SPEECH CENTURY*, *supra* note 103, at 3; Mark Tushnet, *The Coverage/Protection Distinction in the Law of Freedom of Speech—An Essay on Meta-Doctrine in Constitutional Law*, 25 WM. & MARY BILL RTS. J. 1073 (2017); Post & Shanor, *supra* note 105.

404. See Adam Liptak, *Court’s Free-Speech Expansion Has Far-Reaching Consequences*, N.Y. TIMES (Aug. 17, 2015), <https://perma.cc/ZHG9-ASZA>.

405. See Ian Millhiser, *If You Are a Unionized Journalist, This Labor Ruling Should Worry You*, VOX (Nov. 12, 2019, 8:10 AM) <https://perma.cc/DWH9-UEKW> (“Two letters released by the National Labor Relations Board (NLRB) earlier this month suggest that requiring many employers to comply with federal labor law violates the First Amendment.”); *cf.* Nat’l Ass’n of Mfrs. v. NLRB, 717 F.3d 947, 950 (D.C. Cir. 2013) (holding NLRB rules, which require employers to post notices of employee rights in the workplace, unconstitutionally infringe upon the employers’ free speech rights).

406. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017) (quoting *Reno v. ACLU*, 521 U.S. 844, 868 (1997)).

407. “[T]he First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a *structural* role to play in securing and fostering our republican system of self-governance.” *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 587 (1980) (Brennan, J., concurring). See *Cohen v. California*, 403 U.S. 15, 24 (1971) (Harlan, J.) (finding that the First Amendment is designed to remove impediments to public discussion “in the hope that the *use* of such freedom will ultimately produce a more capable citizenry” (emphasis added)); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (“[D]ebate on public issues should be uninhibited, robust, and wide-open. . . .”); *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (“Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government.”); see also *The Supreme Court, 1979 Term*, 94 HARV. L. REV. 1, 151 n.9 (collecting cases and scholarly sources).

408. See Lakier, *supra* note 102, at 743 (noting Justice Jackson’s opinion in *Barnette* acknowledged the case would have been more difficult if “the Court had to resolve conflicting rights claims”).

against a “values based approach” to free speech, and such criticism should be taken seriously.<sup>409</sup> But that does not mean the Court should fall back on individual autonomy as the singular justification for “freedom of speech.”

The potency of the First Amendment as a tool to tear down regulations seems to stem from two aspects of modern jurisprudence. First, the First Amendment largely protects negative rights—that is, the right to be free from government regulation—rather than positive rights to the resources necessary to enjoy other freedoms.<sup>410</sup> Second, the Court has come to focus, almost single-mindedly, on the individual’s right to autonomy.

The First Amendment certainly protects individual autonomy and individual expression.<sup>411</sup> But, in recent years, this right has seemed to dominate the other interests protected by the First Amendment.<sup>412</sup> If we assume that autonomy is the only interest protected by the First Amendment, then the rapid expansion of First Amendment coverage and protection are almost compelled. Even a slight infringement of the individual’s right to speak is an affront to the speaker’s negative right—the right to be free from government interference in the content of his speech. What does it matter, for First Amendment purposes, if the speech is unintelligible or may not communicate much at all?<sup>413</sup>

The Court’s shifting understanding of free expression has drawn the attention of scholars. Many have focused on the expansion of protection for commercial speech which has been pushed by the Republican-appointed Justices in *Sorrell*.<sup>414</sup> Scholars have also focused on the politically charged First Amendment cases, like *Becerra* and *Janus*, which are often resolved along clearly ideological lines.<sup>415</sup>

What scholars have failed to recognize is that these are only the most recent, and most blatant, in a long line of cases which have radically expanded the First Amendment’s autonomy principle. The conservative majority has wielded the First Amendment as a “sword” in a number of high-profile cases.<sup>416</sup> But the *entire* Court

409. See Calvert, *supra* note 168, at 79–86.

410. See Frederick Schauer, *Hohfeld’s First Amendment*, 76 GEO. WASH. L. REV. 914 (2008); ISAIAH BERLIN, *Two Concepts of Liberty*, in LIBERTY 121–22 (Henry Hardy trans., Oxford Univ. Press 2002) (1969) (distinguishing between positive and negative rights).

411. See SCHAUER, ENQUIRY, *supra* note 99, at 60–73 (describing the First Amendment “argument from autonomy”).

412. See Lakier, *supra* note 102, at 742 (“This shift can be described in various ways: as a move away from a democracy-focused First Amendment towards an autonomy-focused one, as a turn away from a positive and towards a negative-rights model of the First Amendment, and as the *Lochnerization* of the First Amendment.”).

413. See Robert C. Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 487–88 (2011) (“The value of autonomy is potentially at stake whenever human beings act or speak, which implies that virtually all government regulation is potentially subject to constitutional review [under the First Amendment].”).

414. *Sorrell v. IMS Health, Inc.*, 564 U.S. 552 (2011). Justice Sotomayor, a Democratic appointee, joined the majority.

415. *Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) (5–4 decision); *Janus v. Am. Fed’n of State, Cty., & Mun. Emps., Council 13*, 138 S. Ct. 2448 (2018) (5–4 decision) (holding that a state law requiring nonconsenting public-sector employees to pay agency fees to their sector union, in order to cover the costs of collective bargaining, violates the First Amendment).

416. *Janus*, 138 S. Ct. at 2502 (Kagan, J., dissenting).

remains committed to First Amendment expansionism, to significant degree. For example, in *United States v. Stevens*, the Court partially eroded the coverage-protection distinction.<sup>417</sup> The only dissenter in *Stevens* was Justice Alito, a Republican appointee. And in *Expressions Hair Design v. Schneiderman*, the Court suggested that a regulation directed at any act carried out using language is subject to First Amendment scrutiny.<sup>418</sup> That would mean that the Securities and Exchange Act, the National Labor Relations Act, and other economic regulations are subject to First Amendment scrutiny. *Schneiderman*'s majority opinion commanded six votes and all the justices concurred in the result. The only justice who showed any concern with the breadth of the Court's reasoning was Justice Breyer.<sup>419</sup> Finally, in *Matal v. Tam*, the Court issued a split opinion, with *both* opinions demonstrating a willingness to protect commercial speech under essentially strict scrutiny.<sup>420</sup> *Tam* was unanimous.

This freedom to regulate is necessary to protect the individual's rights to speak, to listen, and to be heard online. But in its current iteration, the First Amendment provides no such freedom. Scholars have not reckoned with the fact that the entire Court, both liberal and conservative wings, have abandoned a structural view of free speech, to significant degree.<sup>421</sup> Until we do reckon with this shift—until we push back against the Court—it will be hard, if not impossible, to regulate technology platforms. In fact, it seems hard to regulate anything at all.

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417. 559 U.S. 460 (2011); see Tushnet, *supra* note 403, at 1081 (“*Stevens* appears to have sharply restricted the category of uncovered speech.”).

418. 137 S. Ct. 1144 (2017); see *supra* notes 142–148 and accompanying text.

419. See *id.* at 1152 (Breyer, J., concurring) (“I agree with the Court that New York’s statute regulates speech. But that is because virtually all government regulation affects speech.”). Justice Sotomayor, joined by Justice Alito, concurred only in the result, and chastised the majority for failing to order that a “complex” question of state law be certified to the New York Court of Appeals. See *id.* at 1153. Her opinion does not seem to take issue with the majority’s treatment of the First Amendment issue.

420. 137 S. Ct. 1744 (2017); see *Leading Cases: Tam*, *supra* note 119, at 251. The Court was split 4–4. Justice Gorsuch took no part in the consideration or decision of the case.

421. But see *Janus*, 138 S. Ct. at 2487 (Kagan, J., dissenting); *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721, 755 (2011) (Kagan, J., dissenting).