



CONFRONTING ONLINE PRIVACY REGULATION: TIME TO DEFEND THE FIRST AMENDMENT

by Thomas R. Julin

The drumbeat for new privacy laws restricting marketing-related uses of consumer commercial data grows louder every day. For the most part, those beating the drums have entirely ignored the First Amendment and the protection it provides for such data uses. This LEGAL BACKGROUNDER argues that because recent First Amendment jurisprudence has heightened the scrutiny courts apply when assessing commercial-speech restrictions, legislators and regulators must ensure that future online privacy rules do not tread on speech rights.

The push for online privacy protection intensified in the early days of the Obama Administration, led by the US Department of Commerce.¹ The White House² and the Federal Trade Commission (FTC)³ soon followed suit with advocacy for a Consumer Privacy Bill of Rights. More recently, agencies such as the Federal Communications Commission (FCC) and the Consumer Financial Protection Bureau (CFPB)⁴ have expanded their regulatory reach into oversight of commercial data. FCC is asserting sweeping authority over entities it has rebranded *common carriers* through its open Internet rule,⁵ and the Commission has proposed outlawing Internet service providers' (ISP) use of commercial data for most marketing purposes.⁶

As envisioned by government regulators, citizens should have a right "to exercise control over the personal data that companies collect from them and how they use it," to know companies' data-security practices, to request that data not be collected for purposes other than completion of a purchase, to sue when data is released to others, to force data to be "corrected."⁷ Regulators have argued that such laws are needed to protect consumers from the companies with which they elect to do business. They are concerned

¹ U.S. Dep't of Commerce Internet Policy Task Force, *Commercial Data Privacy and Innovation in the Internet Economy: A Dynamic Policy Framework* (Dec. 16, 2010) (<https://www.google.com/#q=commercial+data+privacy+and+innovation+in+the+internet+economy+a+dynamic+policy+framework>) (hereinafter *Commerce Department Report*).

² Executive Office of the President, *Consumer Data Privacy in a Networked World: A Framework for Protecting Privacy and Promoting Innovation in the Global Digital Economy*, (Jan. 2012) (<https://www.whitehouse.gov/the-press-office/2012/02/23/we-can-t-wait-obama-administration-unveils-blueprint-privacy-bill-rights>) (hereinafter *The White House Report*).

³ Federal Trade Commission, *Protecting Consumer Privacy in an Era of Rapid Change—Recommendations for Businesses and Policy Makers* (Mar. 2012) (<https://www.ftc.gov/news-events/press-releases/2012/03/ftc-issues-final-commission-report-protecting-consumer-privacy>) (hereinafter *FTC Report*).

⁴ Law360, *CFPB—The Newest Cop on the Data Privacy Beat*, Mar. 2, 2016, available at <http://www.law360.com/articles/772011/cfpb-the-newest-cop-on-the-data-privacy-beat>.

⁵ *In the Matter of Protecting and Promoting the Open Internet*, GN Docket No. 14-28 (FCC Mar. 12, 2015) (<https://www.fcc.gov/document/fcc-releases-open-internet-order>).

⁶ Cecelia Kang, *F.C.C. Proposes Privacy Rules for Internet Providers*, N.Y. TIMES (Mar. 10, 2016) (http://www.nytimes.com/2016/03/11/technology/fcc-proposes-privacy-rules-for-internet-providers.html?_r=0).

⁷ *The White House Report*, *supra* note 2 at 11.

Thomas R. Julin is a Partner in the Miami, FL office of Hunton & Williams LLP. He served as lead trial counsel and co-appellate counsel for the plaintiffs in *Sorrell v. IMS Health Inc.*

that companies will share data, develop detailed consumer profiles, and then tailor advertising to individual consumers on the basis of those profiles. This, they have asserted, could result in violation of “individual rights, cause injury or discrimination based on sensitive personal attributes, lead to actions and decisions taken in response to misleading or inaccurate information, and contribute to costly and potentially life-disrupting identity theft.”⁸

What has been largely missing from the US government’s approach to data privacy is any serious consideration of whether proposed new laws will violate the First Amendment. When the Commerce Department generated its 78-page data privacy report in 2010, the First Amendment was mentioned only in two footnotes.⁹ The White House’s 52-page consumer data privacy report mentioned the First Amendment once to assert, without citation to authority and with barely contained antipathy for the commercial use of data, that the “law has long recognized that privacy interests co-exist alongside fundamental First Amendment rights,” and that the proposal “should therefore be interpreted with full respect for First Amendment values, especially for *non-commercial* speakers and individuals exercising freedom of the *press*.”¹⁰ The FTC’s 112-page call for sweeping new privacy legislation acknowledged that one comment claimed the proposal “might be unconstitutional under the First Amendment.” The report also asserted that “[o]f course, First Amendment protections would apply to *journalists’ sources*, among other things, and the Commission recommendations are not intended to apply in *that area*.”¹¹ It further grudgingly admitted “there *may* be First Amendment constraints to requiring third parties to delete” information from social media sites.¹²

None of these reports, however, addressed whether the First Amendment does, in fact, restrict government authority to enact privacy laws. The failure of the latter two studies to conduct such an analysis is striking when one considers that the US Supreme Court had held in 2011 in *Sorrell v. IMS Health Inc.*¹³ that the First Amendment imposes formidable limits on government power to enact closely analogous laws.¹⁴ In that case, three companies sought to invalidate a Vermont law that prohibited the sale and use of data for targeted marketing to doctors. The state argued its law protected doctors from the same possible ill effects of targeted marketing that the Obama Administration had identified as warranting the adoption of broad new federal privacy laws.

The Supreme Court viewed the Vermont law as unjustifiable governmental interruption of the free flow of information to consumers about new products. “A consumer’s concern for the free flow of commercial speech,” Justice Anthony Kennedy explained in his opinion for a six-member majority, “often may be far keener than his concern for urgent political dialogue.”¹⁵ “That reality has great relevance in the fields of medicine and public health, where information can save lives.”¹⁶

The opinion noted that “the creation and dissemination of information are speech within the meaning of the First Amendment” and that “[f]acts, after all, are the beginning point for much of the speech that

⁸ *Id.* at 6.

⁹ One footnote pointed out the popular federal Do-Not-Call legislation had been upheld against First Amendment attack in *Mainstream Marketing Services, Inc. v. FTC*, 358 F.3d 1228, 1232-33 (10th Cir. 2004). *Commerce Department Report, supra* note 1 at 15, n.13. The other related that a commenter recommended that the Commerce Department provide further guidance to states on “First Amendment issues.” *Commerce Department Report, supra* note 1 at 62, n. 173.

¹⁰ *The White House Report, supra* note 2 at 20 (emphases added).

¹¹ *FTC Report, supra* note 3 at 67, n. 339 (emphases added).

¹² *Id.* at 71, n. 358 (emphasis added).

¹³ 564 U.S. 552; 131 S. Ct. 2653 (2011).

¹⁴ Even earlier than that a district court had reached the same conclusion in reviewing a similar New Hampshire law. *IMS Health Inc. v. Ayotte*, 490 F. Supp. 2d 163 (D. N.H. 2007), *rev’d*, 550 F.3d 42 (1st Cir. 2008), *reinstated on remand*, No. 1:06-cv-00280-PB, 2011 BL 260291 (D. N.H. Oct. 7, 2011).

¹⁵ *Sorrell*, 131 S. Ct. at 2664.

¹⁶ *Ibid*; see also David B. Agus, *Use Your Data to Cure Disease*, N.Y. TIMES at Sunday Review (SR) 8 (Feb. 7, 2016).

is most essential to advance human knowledge and to conduct human affairs.”¹⁷ Then, eliminating any uncertainty about whether it had fully evaluated the privacy consequences of its decision, the Court added: “Privacy is a concept too integral to the person and a right too essential to freedom to allow its manipulation to support just those ideas the government prefers.”¹⁸

Sorrell concluded the First Amendment required “heightened scrutiny” of the law in that case.¹⁹ It did not elaborate on how heightened that scrutiny must be. Rather, it found the Vermont law could not even survive the “intermediate scrutiny” that the Court traditionally has used for commercial-speech restrictions. The majority did, however, express real concern that Vermont had enacted a law that was directed both at the *content* of the message and the *viewpoint* of those delivering the content. The Court admonished Vermont that any objection it might have to promotion of new products should be expressed through its “own speech,” not suppression of marketers’ speech.²⁰

The decision arguably signaled that the Court may be ready to subject all commercial-speech regulations to strict scrutiny.²¹ Some lower court decisions have read *Sorrell* as requiring just that,²² or at least as requiring a more rigorous form of scrutiny than previously had been applied to commercial-speech regulations.²³ It is reasonable to expect, then, that government reports recommending new laws would have addressed how they could survive First Amendment review. As noted above, however, the Obama Administration simply ignored *Sorrell* in its advocacy of new privacy laws that would restrict marketers’ speech.

Legal academics have been more willing than government regulators to acknowledge that *Sorrell* “strengthened” the argument that “fair information practices” laws would violate the First Amendment.²⁴ One analysis conceded that the decision not only made the validity of new privacy legislation doubtful, she also concluded that it had the “potential ... to make a great deal of ordinary [existing] regulation unconstitutional.”²⁵ Another, citing *Sorrell*, commented that “The First Amendment jurisprudence privileges speech over privacy and imposes limits on privacy legislation.”²⁶ A third laid out in detail the full potential that the decision has to rein in government power to restrict private use of commercial data, confessing her view that “I think heightened scrutiny will likely just be the same as strict scrutiny.”²⁷

¹⁷ *Sorrell*, 131 S. Ct. at 2667.

¹⁸ *Id.* at 2672.

¹⁹ *Id.* at 2664.

²⁰ *Id.* at 2671.

²¹ Thomas R. Julin, Jamie Z. Isani & Patricia Acosta, *The Dog that Did Bark: First Amendment Protection of Data Mining*, 36 Vt. L. REV. 881 (2012).

²² *Wollschlaeger v. Farmer*, 880 F. Supp. 2d 1251, 1262 (S.D. Fla. 2012) (“*Sorrell v. IMS Health Inc.* . . . applied strict scrutiny”), *rev. en banc granted*, No. 12-14009 (11th Cir. Feb. 03, 2016).

²³ *Retail Digital Network, LLC v. Appelsmith*, 810 F.3d 638, 648 (9th Cir. 2016) (“we rule that *Sorrell* modified the *Central Hudson* test for laws burdening commercial speech”); *In re Simon Shiao Tam*, 808 F.3d 1321, 1339 (D.C. Cir. 2016) (en banc) (citing *Sorrell* for proposition that a content-based commercial-speech regulation “must satisfy strict scrutiny to be found constitutional;” *CTIA—The Wireless Ass’n v. City of Berkeley*, No. 15-cv-02529-EMC, 2016 WL 324283 at *2 (N.D. Cal. Jan. 27, 2016) (“*Sorrell* did not precisely define what heightened judicial scrutiny meant but indicated that it was something . . . more than intermediate scrutiny”). *See also Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2235 (2015) (“the Court has applied the heightened ‘strict scrutiny’ standard even in cases where the less stringent ‘commercial speech’ standard was appropriate”) (Breyer, J., dissenting, citing *Sorrell*).

²⁴ Neil M. Richards, *Why Data Privacy Law Is (Mostly) Constitutional*, 56 WILLIAM & MARY L. REV. 1501, 1506 (2015).

²⁵ Tamara R. Piety, *The Corporate First Amendment—Why Protection for Commercial and Corporate Speech Does Not Advance First Amendment Values*, White Paper for Corporate Reform Coalition (July 20, 2015), available at <http://www.citizen.org/documents/crc-corporate-free-speech-report.pdf>.

²⁶ *See, e.g., Felix T. Wu, The Constitutionality of Consumer Privacy Regulation*, 2013 U. CHI. LEGAL F. 69.

²⁷ Tamara R. Piety, *The First Amendment and the Corporate Civil Rights Movement*, 11 J. OF BUS. & TECH. L. ____, art. 2 at n. 73 (2016).

While recognizing the impact of *Sorrell*, these commentaries assert the decision was incorrect or should be limited to its facts. Such academics disparage *Sorrell* and other commercial-speech rulings as part of a broader argument that the First Amendment provides protection of *political* speech only.²⁸ Their views, often couched as advocacy for privacy rights, are, in truth, rooted in distrust of capitalism and businesses' promotional activities.

Federal and state regulators who share these academics' bleak views of a market economy and product promotion should nevertheless pay heed to their assessments of *Sorrell* as it relates to privacy restrictions. Just as prescribing information and its commercial uses can be essential to public health, targeted and behavioral marketing is equally critical to the success of today's Internet-driven free-enterprise system. Limits on the use of commercial data apply to truthful information lawfully acquired in the course of a consumer's voluntary business transactions or visiting of websites. Some policies, such as Do-Not-Track laws, would impose content-based speech discrimination by allowing consumers to opt out of the use of their data for marketing purposes, while still allowing collection and use of such data for other purposes, such as research and government law enforcement.

The two aforementioned FCC actions are similarly vulnerable to First Amendment challenge because of their discriminatory treatment of truthful speech. The "Open Internet" rule, a legal challenge to which is currently pending, is arguably unconstitutional because it cannot be enforced unless a regulator controls the flow of data. As one ISP argued in its First Amendment challenge to the rule: "The FCC's approach opens the door to content regulation."²⁹ In response, FCC has argued that ISPs merit no First Amendment protection.³⁰ The Commission's proposal to prohibit ISPs' use of commercial data is also constitutionally suspect because it imposes higher limitations on service providers' commercial uses of personal data that it does on other uses.

Government's conscious indifference toward the First Amendment with regard to online privacy policies is unfortunately unsurprising. Legislators and regulators frequently view constitutional limits on their authority as minor irritants at best. Also, the targets of online privacy policies have not actively asserted their First Amendment rights in debate or discussion over such regulations. They must do so, and First Amendment challenges should be an integral part of their opposition strategies. Court decisions such as *Sorrell* and its progeny provide the tools to argue that regulations prohibiting the use of lawfully obtained commercial data for marketing are constitutionally suspect.

²⁸ E.g., Tamara R. Piety, "A Necessary Cost Of Freedom"? *The Incoherence of Sorrell v. IMS*, 64 ALA. L. REV. 1 (2012); Ashutosh Bhagwat, *Sorrell v. IMS Health: Details, Detailing, and the Death of Privacy*, 36 VT. L. REV. 855 (2012); but see Adam Thierer, *The Pursuit of Privacy in a World Where Information Control is Failing*, 36 HARV. J. OF LAW & PUB. POLICY 409 (2013).

²⁹ Jt. Reply Brief of Alamo Broadband, Inc. & Daniel Berninger, *United States Telecom Ass'n v. FCC*, No. 15-1063 (D.C. Cir.) at 5; see also Brief of Amici Curiae Former FCC Commissioner Harold Furchtgott-Roth and Washington Legal Foundation, *United States Telecom Ass'n v. FCC* at 29, available at <http://www.wlf.org/upload/litigation/briefs/USTA%20v%20FCC-WLF%20Amicus.pdf> ("Discriminatory speaker-based burdens on *truthful* commercial speech bear absolutely no relation to the underlying rationale for giving the Government more leniency to regulate that kind of speech.")

³⁰ Brief of Respondents, *United States Telecom Ass'n v. FCC*, available at <https://assets.documentcloud.org/documents/2423172/oifinalasfiled.pdf>.