**"Why Data Privacy Law is (Mostly) Constitutional"**
**Neil M. Richards Adapted from Intellectual Privacy, Chapter Five**
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Because the law banned the use of data for speech by the marketers, but allowed it for speech by their political opponents, it discriminated on the basis of viewpoint, and was thus unconstitutional.[35] Such a conclusion is a straightforward application of basic free speech law – the government can't tell human speakers what arguments they can and can't make, and what data they can and can't rely on. And it can't discriminate between speakers, letting some but not others rely on a particular piece of information.

The second significant element of the opinion in *Sorrell* was a suggestion that the sale of a database was somehow "speech" protected by the First Amendment. Vermont had made the argument that the Prescription Confidentiality Act did not regulate speech, but merely conduct: the sale of information as a commodity. (The First Circuit in the New Hampshire case had upheld New Hampshire's anti-detailing law on this exact basis). As the Supreme Court put it:

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

But though the Court hinted that the sale of a database might be "speech," it stopped short of that sweeping conclusion, because the regulation's discrimination against marketers was a content- and viewpoint-based restriction.[37] In this respect, the Court continued its tradition of moving carefully and slowly in cases involving the conflict between privacy rules and freedom of speech.

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## What *Sorrell* Means

What is the significance of *Sorrell* for data privacy law? The short answer is that it's not clear, because the opinion itself isn't clear. From a First Amendment perspective, the Vermont statute was clumsily drafted, but the Court's opinion is hardly a model of clarity either. Moreover, Justices Breyer, Ginsburg, and Kagan would have upheld the Prescription Confidentiality Act notwithstanding its poor drafting, on the ground that the law was merely lawful regulation of a commercial enterprise and threatened the First Amendment barely, if at all.[38]

Nevertheless, some observers have suggested that *Sorrell* might mean the end of privacy law, because it assumed that data flows are "speech." The inevitable result of this conclusion, these scholars argue, is that all laws regulating the flows of data are now constitutionally suspect. Ashutosh Bhagwat worries that "the Court's hints in this regard have dramatic, and extremely troubling, implications for a broad range of

existing and proposed rules that seek to control disclosure of personal information in order to protect privacy."[39] More generally, Jane Bambauer argues enthusiastically that "for all practical purposes, and in every context relevant to the privacy debates, data is speech. Privacy regulations are rarely (if ever) incidental burdens to knowledge. Instead, [they are] deliberately designed to disrupt knowledge-creation."[40] In their reading of *Sorrell* these scholars echo the earlier claim of Eugene Volokh that data privacy law under the FIPs are no more than "a right to stop people from talking about you."[41]

If this interpretation were to become the law, the implications would be striking, Information privacy law as we know it would be dead. If data is "speech," every restriction on the disclosure (not to mention the collection or use) of information would face heightened First Amendment scrutiny, and be presumptively unconstitutional. This would jeopardize not just medical privacy rules, but most likely financial privacy rules, reader privacy rules, and any hope of imposing the FIPs to internet data such as the logs ISPs and marketers keep of what web sites we visit. Arguably, even such venerable nondisclosure rules such as the attorney-client duty of confidentiality would also have to satisfy the demands of First Amendment scrutiny, for these rules also place nondisclosure obligations on lawyers not to speak confidences.

This reading of *Sorrell* has some support in dictum in Justice Kennedy's opinion, which suggested that regulation of information flows was indistinguishable from regulating "speech." But even Justice Kennedy was careful to make clear that the holding in *Sorrell* did not render privacy law unconstitutional in general. In particular, he suggested that if Vermont had addressed doctor confidentiality "through a more coherent policy" like the federal Health Insurance Portability and Accountability Act of 1996,[42] rather than (in his view) the haphazard methods it had used, the law would have been constitutional.[43]

There is thus another reading of both *Sorrell* and First Amendment law generally that is less menacing to data privacy law and to the FIPs. Under this reading, the problem with the Vermont law was not that it regulated data flows, but that it imposed viewpoint restrictions on "unprotected" speech. In other words, *Sorrell* is not the beginning of the end for data privacy law. Instead, like *RAV*, the case is a reminder that the government cannot impose viewpoint restraints on particular speakers like marketers. Under this view, *Sorrell* invalidated one particularly clumsy attempt to regulate marketing, but it does not follow from this that data privacy law is largely unconstitutional. In fact, as Justice Kennedy suggested, the statute would have been less problematic if it had imposed *greater* duties of confidentiality on the data, rather than just restricting marketing uses. This was the case because "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."[44]

I think that this narrower reading of *Sorrell* is the better one, but ultimately *Sorrell* is just one case with a poorly-explained holding.