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["Sorrell v. IMS Health: Details, Detailing, and the Death of Privacy"](#) □

[Vermont Law Review, 2012](#)

[UC Davis Legal Studies Research Paper No. 286](#)

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This article was written for a Symposium, jointly hosted by the University of New Hampshire School of Law and the Vermont Law School, exploring the implications of the Supreme Court's recent decision in *IMS Health v. Sorrell*, 131 S. Ct. 2653 (2011). In particular, I consider here an important issue that was raised, discussed, but ultimately avoided in *IMS Health*: what restrictions does the First Amendment place on the government's ability to limit or prohibit the disclosure of pure data, in order to protect personal privacy. The issue could be avoided in *IMS Health* because the specific Vermont statute at issue in that case did not, as it happens, impose a general restriction on data disclosure for privacy reasons, it rather

only restricted specific uses of regulated data, in order to advance state interests quite distinct from privacy concerns. The broader question of data regulation, however, is lurking in the wings of this and other litigation, and is likely to pose difficult challenges for courts in coming years, as the spread of the Internet drives legislatures to adopt increasingly stringent privacy laws.

While the IMS Health majority did not decide the data-disclosure issue posed in the case, it did address it in ways that strongly suggest the six justices in the majority would treat such disclosures as fully protected speech. Moreover, the analysis provided in this article demonstrates that the majority's hints are fully justified by current Supreme Court doctrine. As currently interpreted by the Court, the First Amendment provides full constitutional protection to disclosures of even personal data, and so restrictions on such disclosures must survive strict scrutiny, a standard that has proven almost impossible to satisfy in the First Amendment context. As a consequence, under current law most statutes seeking to protect privacy by prohibiting data disclosure are likely to be invalidated.

In the balance of the article, I suggest that this result reflects a serious weakness in current doctrine, which is the failure to recognize that factual speech is distinct from, and requires different constitutional analysis than, the sorts of political and cultural speech that have traditionally been the mainstay of First Amendment litigation. In particular, drawing on a number of areas of developed law, I argue that speech consisting purely of specific factual data regarding individuals should be considered to be fully protected under the First Amendment only if the speech meaningfully contributes to the process of democratic self-governance. Other data should remain protected, but under a lower standard of scrutiny, perhaps an intermediate standard incorporating an element of balancing. I also briefly explore how different kinds of privacy laws might fare under such an approach.

["Informing Consent: Voter Ignorance, Political Parties, and Election Law"](#) □
[UC Davis Legal Studies Research Paper No. 285](#)
[George Mason Law & Economics Research Paper No. 12-24](#)

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This paper examines what law can do to enable an electorate comprised of mostly ignorant voters to obtain meaningful representation and to hold elected officials accountable for the government's performance. Drawing on a half century of research by political scientists, we argue that political parties are both the key to good elections and a common cause of electoral dysfunction. Party labels can help rational, low-information voters by providing them with credible, low-cost, and easily understood signals of candidates' ideology and policy preferences. But in federal systems, any number of forces may result in party cues that are poorly calibrated to the electorate and issue space of subnational governments. Further, the geographic clustering of partisan voters can lead to persistently dysfunctional elections at subnational levels, however well calibrated the major-party cues, because in these communities the aggregation of votes will not neutralize (as it otherwise would) the ballots cast by citizens whose party ties reflect their upbringing and social milieu more than their observations about what the government has done. To date, these problems have largely been the province of political science and sociology. We argue that they are problems of, and for, election law. Statutes and court decisions govern what appears on the ballot, who selects a party's candidates, and any number of other variables that affect the meaning and utility of party labels. Our analysis challenges the focus of decades of political science and legal scholarship, and sheds new light on important questions about party regulation, ballot design, the choice between partisan and nonpartisan elections, and the constitutional law of party rights.

["What If Chief Justice Fred Vinson Had Not Died of a Heart Attack in 1953?: Implications for Brown and Beyond"](#) □
[Indiana Law Review, Vol. 45, p. 131, 2011](#)
[UC Davis Legal Studies Research Paper No. 283](#)

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This Essay, written for an Indiana Law Review symposium on counterfactuals in constitutional history, explores what might have happened if Chief Justice Fred Vinson had not died of a heart attack in September 1953.

The Essay contends that Chief Justice Vinson's untimely death deprived him of the historical stature to which he otherwise would have been entitled. It concludes, contrary to many accounts, that Vinson would have authored a unanimous opinion of the Court in *Brown v. Board of Education* invalidating segregation in public schools. This conclusion is bolstered by Vinson's decisions in prior race cases, by his consistent support for the policies of the federal government, by his fervent anti-Communism, and by his close friendship with President Harry Truman. Authorship of *Brown* would have given Vinson instant historical immortality, guaranteeing his place among the nation's most significant chief justices.

Moreover, if Vinson had survived, Earl Warren would not have become Chief Justice. Vinson's more likely successors would have been John Marshall Harlan (under Eisenhower) or Byron White (under Kennedy). Depending on the timing of Vinson's ultimate departure from the court, certain key Warren Court precedents might have been decided by 5-4 votes in the other direction.

["CEDAW and Rural Development: Empowering Women with Law from the Top Down, Activism from the Bottom Up"](#) □
[Baltimore Law Review, Vol. 41, p. 263, 2011](#)
[UC Davis Legal Studies Research Paper No. 284](#)

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The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) is one of the most widely ratified human rights treaties in history, yet many view it as a failure in terms of what it has achieved for women. In spite of the lack of a meaningful enforcement mechanism and various other shortcomings, however, CEDAW has inspired feminist activism around the world and helped raise women's legal consciousness. While CEDAW itself is widely viewed as a product of feminist activism in the international arena, this essay explores the Convention's role as a source of — and tool for — grassroots feminist activism. Our focus is on such activism in rural areas of both developed and developing countries, places where law is often functionally absent.

CEDAW recognizes rural women as a particularly disadvantaged group in need of additional rights. Article 14 addresses rural women exclusively and specifically, stipulating that they — like their urban counterparts — should enjoy a panoply of rights: education, health care, and an array of civil and political rights. Moreover, Article 14 enumerates for rural women rights related to participation in agriculture and development more generally. It also includes the right for rural women to organize self-help groups and cooperatives for purposes of obtaining "equal access to economic opportunities through employment or self-employment," a right not mentioned elsewhere in relation to all women. Finally, Article 14 enumerates for rural women a wider range of socioeconomic rights than CEDAW elsewhere recognizes for all women. These include rights to various types of infrastructure, including water, sanitation, electricity, transport, and housing.

This essay first considers how Article 14 is consistent with contemporary feminism's greater focus on socioeconomic rights as a reflection of women's material concerns and lack of economic power. It considers these rights against a rural backdrop, where socioeconomic deprivations tend to be greater and where Member States face spatial and other distinct challenges to economic development, as well as to the provision of basic services such as healthcare and education. We examine Member States' responses to their Article 14 commitments to empowering rural women, with particular attention to how Member

States have encouraged and facilitated self-organization by women, as required by Article 14(2)(e). Member States' periodic reports to the U.N. Division for the Advancement of Women indicate that governments seek to achieve rural women's empowerment through the women's grassroots activism, including via local self-help groups (SHGs) and cooperatives as envisioned by 14(2)(e). Indeed, some evidence suggests that Member States benefit directly from rural women's self-organizing when women's SHGs and cooperatives go beyond facilitating women's economic empowerment to become vehicles for delivering health, education, and other services in rural areas. These women's organizations thus do a range of work under the ambit of rural empowerment.

The essay next considers local women's organizations in four Member States, two developed nations and two developing ones. We analyze how these organizations draw on and benefit from CEDAW's Article 14(2)(e) mandate (however weak a mandate it is, practically speaking) to encourage women's collective mobilization. Thus, the essay sketches a portrait of the potential and actual symbiosis between top-down lawmaking and bottom-up activism to empower women. In short, we focus not on CEDAW's role as an enforceable human rights treaty, but rather on its function as an expressive document that has fostered and facilitated applied feminism.

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