

THE REVISABILITY PRINCIPLE

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THE REVISABILITY PRINCIPLE

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Whether in insisting on secrecy in deliberations, control over personal information, security in persons, houses, papers, and effects, limits on what data can be collected, or how long it can be stored, we recognize a principle in our society that certain things should either remain unknown or fade from memory with the passage of time. This sensibility is not the same as a sense that individuals should have a right of privacy. Instead, it is the sense that individuals, to the greatest extent possible, should not be tied to something they said or did for the duration of their lives.

This is the “revisability principle” an essential aspect of what it means to be free and live with significant autonomy. The revisability principle is the principle that no person should be tied forever to her identity at a particular moment in the past. An individual’s identity should always, in principle, remain revisable. When certain social practices and technologies store information about individuals too sharply or permanently, or make it too accessible, or too public, it impinges on this principle and therefore on the right to revise one’s identity through successive decisions.

The purpose of this Article is to identify and explain the revisability principle. It shows that the principle is deeply embedded in the constitution and has long been recognized as essential to the right to freedom of expression. It also shows that the capacity to revise one’s identity is an essential strand of the Liberal justification for freedom. Personal autonomy is abridged when individuals lose the capacity to control, to some degree, their own destiny by fashioning a conception of themselves through successive decisions about who they wish to be through deliberate choices that they make. To the extent individuals must forever account for decisions in the distant past—people they in some sense no longer are—that freedom is powerfully constrained. Technologies and social practices that result in the permanent

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storage, ready access, and widespread dissemination of past mistakes or even prior identities that people in the present hope to leave behind impinge on the principle of revisability.

At various points the Supreme Court has selected against the revisability principle. But many modern scholars have argued that these cases—which placed the right to receive ideas and debate them in direct conflict with the revisability principle—imply there simply is no revisability principle, or that it plays no important role in the right to freedom of speech protected by the First Amendment. This Article’s ultimate aim is to explain the centrality of the right to revise to the liberty and freedom protected by the constitution. For the judge confronting a legal regulation meant to safeguard revisability, a critical aspect of any proper First Amendment analysis must be consideration of the degree to which the regulation achieves these aims.

INTRODUCTION

Imagine a world in which every person carried a tiny microphone in her pocket that was always switched on, constantly storing, recording and associating all the sounds and voices around it, putting voices to names, matching names to faces, and establishing the location and identity of each of the people within earshot for easy access and retrieval. Imagine a world in which every person wore glasses that recorded everything they beheld, identifying who they saw and where they saw them in real time, matching faces to names, and names to identities, permanently storing everything seen for later access and retrieval by anyone. Imagine a world where every decision to share something with one’s confidants, by virtue of the nature of the medium in which it was shared, risked its wider dissemination, recordation and permanent identification with that individual.

That world is nipping at our heels. The technologies are already here. The receiver on a cell phone can record at any time;¹ so can the webcam on a laptop or home computer. Google Glass promises a quiet, passive visual and audio recording device on every face. Any kind of sharing involving computers—from email, to social networks, to files in the cloud—can always be forwarded

¹ As Senator Ted Cruz oft quips before he speaks: “Leave your cell phones on. I want the President to hear this.”

or shared more widely, and once shared, is shared for keeps. For permanent. Forever.

Even if an individual were to take countermeasures, the traditional means of avoiding this kind of exposure will prove unavailing in the future. To the extent one can entirely avoid the use of modern technology while attempting to live and work in a world of modern technology, that individual surely faces unique challenges, risking isolation, even ostracization. Even if an individual does choose to face those challenges, run that risk, and forego the use of these technologies, he has no power to control their use by others. Even if all but one person in the room has opted for the more expensive cell phone that doesn't leave the microphone on, it only takes *one* mic to record everything that happens. The same will be true of Google Glass—even if only one in one hundred were to wear it, an enormous amount of everything that once would never have been recorded, will be. It may even be indexed and made searchable. It may already be.

This account of the world that is taking shape is not meant to paint a dystopian portrait. It simply *is* the world that is coming. It is a world where everything that happens will be known. But there is something about this new world that feels frightening. The aim of this Article is to explore the source of this response, and in so doing, shed light on an intuition widely shared but seldom named.

What is it about a world where everything that happens can be researched, resurrected, recalled, and recollected that strikes so many as troubling? This Article argues that the source of this discomfort is rooted in a deep cultural and constitutional commitment to what it calls the revisability principle. It is the principle that an individual's identity should always remain, to some significant extent, revisable. The revisability principle is the principle that no person should be tied forever to her identity at a particular moment in the distant past, and that to the extent individuals must forever account for who they were long ago, their individual freedom is powerfully constrained.²

² At the outset it should be noted that there are innumerable situations in which it is widely believed that individuals *should* account for the decisions that they have made—the people that they were—even for the whole duration of their lives. Those who commit sex crimes are perhaps the most powerful examples. Our society forever brands them sex offenders. But in these scenarios it is widely recognized that the limitations society has chosen to place on an individual's capacity to engage in revision are a kind of scarlet letter, an enormous and burdensome restraint on individual freedom.

In explaining the revisability principle and its interactions with law, this Article has five overarching aims. The first is to explain the revisability principle as morally valuable. Depending on one's intuitions, the notion that individuals should in general be free from accountability for many of their past decisions may strike some as morally repugnant rather than morally worthwhile. As a threshold matter, then, any account of the revisability principle must explain that allowing some things never to be discovered, or to quickly be forgotten, leads to a variety of morally valuable outcomes. Amongst the most important of these outcomes is that revisability allows individuals to retain the capacity to control, to some significant degree, their own destinies by fashioning a conception of themselves through successive deliberate choices that they make. In this way, a commitment to revisability flows from a commitment to significant autonomy. One important consequence of this link is that revisability benefits from the powerful sustained arguments in favor of significant autonomy already developed as part of the Liberal justification for freedom.

The second aim of this Article is to explain that the revisability principle is deeply embedded in American law and culture, though for much of American history revisability has been a self-enforcing constitutional value, preserved by the limits of technology. Revisability has been the legal default rule, rarely requiring explicit articulation, because the technology simply did not exist to easily and cheaply record and store everything that happened permanently and accessibly.³ As such, society has not been required to make a deliberate collective commitment to revisability. It was not a public value we were oft required to defend because it was a public value largely within the sovereign capacity of individuals themselves easily to control. The capacity to engage in significant revision, even within relatively small communities, remained robust because much of what happened was unrecordable, could be prevented from recordation, was naturally limited in its potential dissemination or would quickly fade from memory. Now, information over which individuals cannot exercise control can be gathered so readily, so pervasively, so permanently and be organized so accessibly that the capacity to

³ Anita L. Allen, *Dredging Up the Past: Lifelogging, Memory, and Surveillance*, 75 U. CHI. L. REV. 61 (2008) ("The limitations of memory combined with practical barriers to efficient dredging once made it rational to predict that much of the past could be kept secret from people who matter.").

preserve revisability is no longer within the power of individuals reasonably to self-regulate. As such, legislatures and judges will increasingly be called upon in articulating public values to express the underlying commitment to revisability in the laws that they pass and the decisions that they make.

The third aim of this Article is to defend the notion of the embeddedness of the revisability principle against prominent apparent counterexamples at the heart of First Amendment jurisprudence. The task is to give an account of those decisions where the Supreme Court has explicitly elevated the right to receive ideas and debate them over the revisability principle. Many scholars and courts read these cases broadly, understanding them to imply that there simply is no revisability principle, or that it plays no important role in the right to freedom of speech protected by the First Amendment. These conclusions infer too much. These cases can be read carve out what are ultimately appropriate exceptions to an otherwise deep and general cultural commitment to revisability.

The fourth aim of this Article is to explain how new technologies place significant unprecedented pressures on the revisability principle. The technological changes underlying these pressures are so different in degree from technological changes that have come before that they are in fact different in kind. In particular, it is the combination of pervasive passive information collection, information permanency, and easy access and retrieval, that threatens significantly to impinge on the capacity of individuals to revise who they are and what they believe. Because technological limitations will no longer serve to safeguard this important constitutional principle, the law will need to take account of these changes in an effort, at the very least, to preserve constitutional equilibrium.⁴

The final aim of this Article is to suggest the kinds of changes that will need to occur in judicial doctrines concerning privacy and freedom of expression to take account of the increasing strains new technologies and practices place on the revisability principle. This Article's ultimate aim is to explain the centrality of the right to revise to the liberty and freedom protected by the constitution. For the judge confronting a legal regulation meant to safeguard

⁴ See Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 480-81 (2011)

revisability, a critical aspect of any proper First Amendment analysis must be consideration of the degree to which the regulation achieves these aims.

The Article proceeds in five parts. Part I introduces the general notion of the revisability principle, and explains why it is morally valuable. Part II provides a range of examples of the revisability principle in American law. Part III defends the legitimacy of the revisability principle in the face of key First Amendment decisions that have been thought by many to hold that there simply is not one, or that it is not important to First Amendment analysis. Part IV explains how new technologies place significant pressures on the revisability principle as a self-executing constitutional principle. Part V builds on these insights in discussing how the revisability principle might be protected in a world where it will be possible for third parties to record, store, organize, and retrieve everything that happens all of the time.

I. THE REVISABILITY PRINCIPLE

The revisability principle is the notion that individuals should remain free to engage in significant revision of their identities throughout their lives, a principle instantiated in large measure by the fact that for much of human history much of what individuals do and have done has remained unknown or gone unrecorded. But any account of the revisability principle must carry the heavy burden of establishing that it is morally valuable as opposed to a morally objectionable. Ordinarily, across a wide range of human endeavors, we prefer accountability.⁵

⁵ See, e.g., David A. Anderson, *The Failure of American Privacy Law*, in PROTECTING PRIVACY 139, 140 (Basil S. Markesinis ed., 1999) (“[P]rivacy is not the only cherished American value. We also cherish information, and candour, and freedom of speech. We expect to be free to discover and discuss the secrets of our neighbours, celebrities, and public officials. We expect government to conduct its business publicly, even if that infringes the privacy of those caught up in the matter. Most of all, we expect the media to uncover the truth and report it—not merely the truth about government and public affairs, but the truth about people. The law protects these expectations too—and when they collide with expectations of privacy, privacy almost always loses.”); H. J. McCloskey, *The Political Ideal of Privacy*, 21 PHIL Q. 303, 308-09 (1971) (arguing that many relationships create obligations of accountability); Solveig Singleton, *Privacy Versus the First Amendment: A Skeptical Approach*, 11 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 97, 152 (2000) (“Throughout history, people have generally been free to learn about one another in the course of business transactions and other day-to-day contacts. Restrictions that alter this default rule sweep a potentially enormous pool of facts and ideas out of the shared domain.”).

The revisability principle places two freedoms into direct conflict—the right of individuals to change who they are by having things about them remain unknown or unknowable, be forgotten, or be limited in dissemination, and the right of other individuals to hold them accountable for who they once were, by knowing about or remembering what they have done. As Professor Bambauer has explained efforts “to preserve the information status quo . . . clash with the First Amendment” by “deliberately interfer[ing] with an individual’s effort to learn something new.”⁶ As Professor Volokh has described, “our right to use speech to pressure others into not speaking is a fundamental aspect of the First Amendment; recall that a recurring (and correct) argument of those who fight against advocacy of evil ideas . . . is that such speech should be deterred by social ostracism and condemnation.”⁷ This section must carry out the difficult task of setting forth the threshold case for the moral value of revisability.

Allowing individuals to engage in revision leads to a variety of morally valuable outcomes. First, it encourages individuals to share authentic versions of themselves. Second, it encourages intellectual innovation and experimentation. Third, it encourages individuals to engage sincerely with one another, and in that way promotes uninhibited, robust, and wide-open private speech. Fourth, it significantly reduces the price of persuasion. Fifth, it radically expands the realm of perceived and actual available choices an individual has. Sixth, it is essential to allowing individuals to possess and retain significant autonomy. Seventh, in the aggregate, it has a significant positive impact on deliberative democracy.

⁶ Jane Bambauer, *Is Data Speech?*, 66 STAN. L. REV. 57, 60 (2014).

⁷ Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of A Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049, 1109 (2000).

A. *Revisability's Morally Valuable Consequences*⁸

First, a commitment to revisability encourages individuals to share authentic versions of themselves with others because they need not fear that they will be held to account for their authentic opinions, ideas, tastes or preferences in the future.⁹ Many people consider authenticity morally valuable. From the perspective of the individual who is free to behave authentically, that individual is freer than an individual who must carefully guard who it is they really are. From the perspective of the individual who interacts with authentic individuals, it can be argued that that she can form deeper and more meaningful connections with them, and rely more freely on their representations about what they actually think and believe. Authenticity, flowing from revisability, thus promotes a variety of goods traditionally linked to the First Amendment—helping individuals to find those of like and different minds to join with or persuade, and facilitating authentic relationships.

Second, a commitment to revisability encourages innumerable forms of expressively valuable innovation and experimentation.¹⁰ Most individuals live their lives simply as best they can, with only provisional beliefs about what should be done. They are uncertain and conflicted, but given all that they know, they make decisions, judgments or recommendations that, to the best of their knowledge, are good ones. Most individual lives consist of a constellation of these deliberate but imperfect acts. Experiments.

⁸ It must be remembered, however, that each of these morally valuable consequences might be met with a counterconsequence, one that is also morally valuable. Limitations on revisability might lead to decisions that are even *more* authentic because they must be made accountably. See Seth F. Kreimer, *Sunlight, Secrets, and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, 140 U. PA. L. REV. 1, 102 (1991) (“It is only by publicly avowing a position that we are able to make it our own.”). However, the task of this Part is to make a prima facie or affirmative case for revisability as morally valuable, and so counterarguments will not be addressed as fulsomely as perhaps they could be.

⁹ Julie E. Cohen, *What Privacy Is for*, 126 HARV. L. REV. 1904, 1906-07 (2013) (“All seem to agree, however, that the self possesses ‘an autonomous core—an essential self identifiable after the residue of influence has been subtracted.’”) (quoting JULIE E. COHEN, *CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE* 113 (2012)).

¹⁰ Cf. *id.* at 1918 (“Conditions of diminished privacy also impair the capacity to innovate.”); George Plimpton, *The Art of Fiction No. 21: Ernest Hemingway*, PARIS REV., Spring 1958, at ___, available at <http://www.theparisreview.org/interviews/4825/the-art-of-fiction-no-21-ernest-hemingway> (“The fun of talk is to explore, but much of it and all that is irresponsible should not be written. Once written you have to stand by it. You may have said it to see whether you believed it or not.”).

Risks. Choices for which individuals could be, but would rather not be, held to account. Much of this private expressive action is safeguarded by a commitment to revisability. These experiments may be merely small or petite freedoms: the expression of a present sense impression, an excited utterance, the telling of a joke, attendance at a party, swimming in a reservoir, asking someone else to dance, but in the aggregate they constitute a sphere of risky action of significant value. Expressively valuable experiments may also be far more substantial than these, bearing significant physical or emotional risk, for example, or relating more plainly to scientific innovation. In any event, however, a commitment to revisability enhances the volume of this sphere. The cost of undertaking a significant assessment of the risk and benefits of making an imperfect decision, recommendation, or judgment are significantly diminished where it is known or sincerely believed that it will not be remembered.

Third, a commitment to revisability encourages uninhibited, robust, and wide-open private dialogue and deliberation.¹¹ The revisability principle, in its concern with the capacity to shield some conversations or interactions from being long remembered or forever tied to an individual's identity, lays bare the distinction between free speech and speaking freely. A commitment to revisability allows individuals to speak freely. In everyday life this commitment manifests in myriad situations: those in which individuals attempt to engage with others anonymously, or without disclosing their identities, speak under special House Rules, or deliberate behind closed doors,¹² confer over the telephone, or

¹¹ *Cf. Bartnicki v. Vopper*, 532 U.S. 514, 537 (2001) (Breyer, J., concurring) (“The statutory restrictions before us directly enhance private speech The statutes ensure the privacy of telephone conversations much as a trespass statute ensures privacy within the home. That assurance of privacy helps to overcome our natural reluctance to discuss private matters when we fear that our private conversations may become public. And the statutory restrictions consequently encourage conversations that otherwise might not take place.”).

¹² *Cf. Estes v. Texas*, 381 U.S. 532, 545 (1965) (“[T]elevised jurors cannot help but feel the pressures of knowing that friends and neighbors have their eyes upon them. If the community be hostile to an accused, a televised juror . . . may well be led ‘not to hold the balance nice, clear, and true between the State and the accused’”; *id.* at 566-68 (Warren, C.J., concurring) (“The even more serious danger is that neither the judge, prosecutor, defense counsel, jurors or witnesses would be able to go through trial without considering the effect of their conduct on the viewing public. . . . No one could forget that he was constantly in the focus of the ‘all-seeing eye.’”); *id.* at 595 (Harlan, J., concurring) (“A trial in Yankee Stadium . . . would be a substantially different affair from a trial in a traditional courtroom [T]he witnesses, lawyers, judges, and jurors in the stadium would [not] be more truthful,

discuss in hushed voices or whispers, or send messages to the world through signposts, billboards, bulletin boards or bumperstickers. Beyond its capacity to encourage authenticity, a commitment to revisability promotes candor and exchange. This value is independent of the value of authenticity: it is the distinct and equally important value of *honesty*. In many ways the two overlap, but in many ways they do not. Being true to thyself does not always mean that one feels able to tell others what is true. A commitment to revisability promotes both authenticity and an arguably even more important First Amendment value: sincerity.

Fourth, a commitment to revisability significantly reduces the price of persuasion: the cost of joining or contributing to a cause or persuading another person to join or contribute to a cause. In myriad ways the values at the heart of the First Amendment depend on the notion that minds can be changed because of an idea's *merit* irrespective of extraneous considerations.¹³ The two most prominent judicial theories of speech—that ideas trade on a “market” (Justice Holmes)¹⁴ and that the remedy for speech that tends to lead us into error is “more speech” (Justice Brandeis)¹⁵—presuppose that individuals remain free to adopt or reject ideas on the merits of those ideas themselves.¹⁶ To the extent individuals are pressured to some significant degree to remain committed to ideas they once had because it is remembered or can easily be discovered that they once held them, this freedom to weigh and adopt ideas on their merits is significantly diminished. Where the price of persuasion rises too high, both of the most prominent justifications for robust protection of the freedom of speech come under significant threat.

Fifth, a commitment to revisability radically expands the range of actual and apparent choices an individual might have about who she will be and what she will believe. This has significant eudemonic consequences. Individuals have been shown time and again to place significant value on even the appearance that they

diligent, and capable of reliably finding facts and determining guilt or innocence.”).

¹³ Cf. RONALD BEINER, *POLITICAL JUDGMENT* 56-58 (1983) (explain that “[t]he autonomy of judgment requires that it exclude accommodation to the judgment of the public.”)

¹⁴ *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

¹⁵ *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

¹⁶ Cf. David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334 (1991) (“The government may not suppress speech on the ground that it is too persuasive.”).

have choices.¹⁷ “Research has shown that autonomy, agency and the freedom of choice enhance Americans’ intrinsic motivation and mental health, generate greater persistence, increase performance, and lead to higher satisfaction;”¹⁸ The feeling one is choosing or exercising choice, moreover, has expressive value all its own: every choice a person makes is an opportunity to affirm a set of commitments, and to tell the world what he cares about. Thus, to the extent we think that choices are good—even boring, uninteresting choices like which brand of jam we like to purchase—a commitment to revisability militates in favor of allowing them to go unrecorded or be forgotten.

B. *Revisability’s Link to Significant Autonomy*¹⁹

Among the most important values the revisability principle preserves is the capacity to exercise “significant autonomy,” by which is meant not only the freedom to make choices but choices of a particularly profound and personal kind. “(Significantly) autonomous persons are those who can shape their life and

¹⁷ Barry Schwartz, *Choice, Freedom, and Autonomy*, in MEANING, MORTALITY, AND CHOICE: THE SOCIAL PSYCHOLOGY OF EXISTENTIAL CONCERNS 271, 272, 281 (Phillip R. Shaver & Mario Mikulincer eds., 2012) (“[T]here is no denying that ‘choice is good.’”).

¹⁸ Tamar Kricheli-Katz, *Choice, Discrimination, and the Motherhood Penalty*, 46 LAW & SOC’Y REV. 557, 558 (2012); Sheena S. Iyengar and Mark R. Lepper, *When Choice is Demotivating: Can One Desire too Much of a Good Thing?*, 79 J PERSONALITY & SOC PSYCH 995, 995 (2000) (“[D]ecades of psychological theory and research . . . [have] repeatedly demonstrated, across many domains, a link between the provision of choice and increases in intrinsic motivation, perceived control, task performance, and life satisfaction.”).

¹⁹ Julie E. Cohen has argued that it is a mistake to link privacy (one means by which revisability is safeguarded) to liberal political theory because “conceptualiz[ing] privacy as a form of protection for the liberal self” contributes to the perception that “privacy is antiquated and socially retrograde.” See Cohen, *supra* note 9, at 1905. The idea seems to be that since no one in fact possesses significant autonomy, but rather is shaped only by what happens to them, privacy’s goal, “simply put is to ensure that the development of subjectivity and the development of communal values do not proceed in lockstep.” *Id.* at 1911 (quoting JULIE E. COHEN, CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE 150 (2012)). Even if this is so—and I hesitate to assign any single point or purpose to privacy—it is difficult to understand why privacy’s unpopularity has to do with its rootedness in a belief that individuals can exercise significant autonomy or not, and even if, in reality they cannot, why that makes a difference. See Jeremy Waldron, *Autonomy and Perfectionism in Raz’s Morality of Freedom*, 62 S. CAL. L. REV. 1097, 1113-14 (1989) (criticizing the emptiness of this critique of autonomy); Jeremy Waldron, *Particular Values and Critical Morality*, 77 CAL. L. REV. 561, 563-65 (1989) (same).

determine its course.”²⁰ An individual who possesses significant personal autonomy not only retains the freedom to make choices but to exercise that freedom to “adopt personal projects, develop relationships, and accept commitments to causes, through which their personal integrity and sense of dignity and self-respect are made concrete.”²¹

Every society understands a notion of significant autonomy. As Anthropologist Donald E. Brown explained in his seminal work *Human Universals*, every culture sees individuals as more than “wholly passive recipient[s] of external action They know that people have a private inner life, have memories, make plans, choose between alternatives, and otherwise make decisions (not without ambivalent feeling sometimes).”²² And indeed, in our own experience, every person can recall some point in her life where she fundamentally reassessed her beliefs. Whether this reflection resulted in an emphatic reaffirmation of the rightness of her past choices, or instead resulted in an a conscious and deliberate decision to take on new beliefs, and new causes, to sever connections with past associations, or to form new relationships and become, in some sense, a new person, it is widely recognized that this sort of freedom is worthwhile and worth preserving.²³

A commitment to revisability is in many senses profoundly intertwined with the capacity to live with significant autonomy. Significant autonomy requires that individuals possess not merely choice in the sense of the opportunity to rationally weigh outcomes, but that individuals possess choices that are meaningful.²⁴ These choices must reflect a “choice of goods.”²⁵ Prisoners have many choices, but no one would think they possess significant autonomy. Nor do individuals whose choices are limited to black and white choices between good and evil.²⁶ Rather—

A person is autonomous only if he had a variety of

²⁰ JOSEPH RAZ, *THE MORALITY OF FREEDOM* 154 (1986).

²¹ *Id.*

²² DONALD E. BROWN, *HUMAN UNIVERSALS* 135 (1991).

²³ Waldron, *supra* note 19, at 1122 (implicitly endorsing the view that one could “say simply that autonomy is unequivocally good and that the growth of the social circumstances that make it both possible and important is to be celebrated unconditionally as one of the advances of modern life.”)

²⁴ RAZ, *supra* note 20, at 300.

²⁵ *Id.* at 379.

²⁶ *Id.*

acceptable options available to him to choose from, and his life became as it is through his choice of some of these options. A person who has never had any significant choice, or was not aware of it, or never exercised choice in significant matters but simply drifted through life is not an autonomous person.²⁷

To deprive an individual of the capacity to engage in revision is to impinge in a significant way on his capacity to decide whether a goal, plan, project, relationship, or commitment that he once pursued should be abandoned or reaffirmed.

The most frequent manner in which an individual is deprived of significant autonomy is through manipulation and coercion, two conscious means of “distort[ing] the normal processes of decision and the formation of preferences”²⁸ Coercion and manipulation, however, require conscious action—a coercer or manipulator—and while vulnerability to these harms are both increased when everything is known and remembered, it can also easily be seen that the revisability principle concerns itself with more than these harms alone. After all, revisability is impinged where the choices individuals have about who they can be in the present are restricted because of who they have been in the past, even if those choices are not being consciously used against them by anyone at any particular moment. As such, one might contend that not everything that impinges on revisability impinges on significant autonomy.

But restraints on who an individual can be today because of who she has been in the past are inconsistent with significant autonomy, because “[t]o be autonomous, one must identify with one’s choices and one must be loyal to them.”²⁹ Fear of coercion and manipulation can be just as powerful as actual coercion and manipulation, and this is the key link between revisability and

²⁷ *Id.* at 204. While I am using Joseph Raz’s explanation of autonomy, both Robert Nozick and John Rawls endorsed similar conceptions. See ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 49-50 (1974); JOHN RAWLS, A THEORY OF JUSTICE (1971) (“[A] person may be regarded as a human life lived according to a plan . . . [and that] an individual says who he is by describing his purposes and causes, what he intends to do in his life.”); *id.* at 92-93 (“We are to suppose, then, that each individual has a rational plan of life drawn up subject to the conditions that confront him. This plan is designed to permit the harmonious satisfaction of his interests. It schedules activities so that various desires can be fulfilled without interference. It is arrived at by rejecting other plans that are either less likely to succeed or do not provide for such an inclusive attainment of aims.”).

²⁸ RAZ, *supra* note 20, at 378.

²⁹ *Id.* at 382.

significant autonomy. Where an individual cannot engage in revision she becomes increasingly alienated from and disloyal to her own life plans, goals, and projects even as she continues to pursue them. This is a significant restraint on freedom. “A person who feels driven by forces which he disowns but cannot control, who hates or detests the desires which motivate [her] or the aims that [she] is pursuing, does not lead an autonomous life.”³⁰

Preserving a broad place for revisability therefore provides space for the exercise of significant personal autonomy by preserving the possibility of a life lived according to one’s best understanding of how it should be lived, given all the facts that an individual has in the present.³¹ For “the ideal of personal autonomy is not to be identified with the ideal of giving one’s life a unity;” the “autonomous life may consist of diverse and heterogenous pursuits. And a person who frequently changes his tastes can be as autonomous as one who never shakes off his adolescent preferences.”³² The key is that a life lived with significant autonomy is a life of “choices;” a “life freely chosen.”³³

But to the extent that social practices and technologies significantly curtail an individual’s ability to engage in reflection and revision, because he must give an account of decisions he has made in the distant past that have been recorded permanently and accessibly, this capacity to form and pursue plans in the present might be significantly diminished. The capacity for significant autonomy is therefore, to some potentially significant extent, lost.

C. *Revisability’s Link to Democracy*

Without belaboring the point, it is worth at least noting that democracy itself depends in no small measure on the revisability principle, on the idea that people’s minds can be changed, that they can be convinced to join and embrace a cause with which they once disagreed. Whole societies have been paralyzed by an

³⁰ *Id.*

³¹ This is, in some sense, the dream of “empiricism without the Dogmas” explained by W.V.O. Quine, who argued that all notions must always remain, in principle, revisable, because “[t]he totality of our so-called knowledge or beliefs, from the most casual matters of geography and history to the profoundest laws of atomic physics or even pure mathematics and logic, is a man-made fabric which impinges on experience only along the edges.” Willard Van Orman Quine, *Two Dogmas of Empiricism*, in *FROM A LOGICAL POINT OF VIEW* 20, 42 (3d rev. ed. 1980).

³² RAZ, *supra* note 20, at 370-71.

³³ *Id.* at 371.

unwillingness or inability to move beyond events in the distant past. In Northern Ireland’s pubs, “discussions of the 1690 Battle of Boyne can still be heard ‘like it was last week’s hurling match,’ with flags representing each side continuing to decorate and demarcate the different neighborhoods.”³⁴ “Abkhaz and Georgians both view Abkhazia as their homeland, just as Serbs and Albanians see parts of Kosovo as theirs.”³⁵ These and other stories of persistent intergenerational ethnic and territorial conflict are stories of revision’s failure.

Nearly every statement about the value of speech as a means of trading in ideas quietly assumes the premise that these ideas trade in a society strongly devoted to the revisability principle. As has already been noted, both Justice Holmes’ “marketplace” theory and Justice Brandeis’ “more speech” theory, are founded, at root, on the premise that men can realize that “time has upset many fighting faiths” and so “believe even more than they believe the very foundations of their own conduct” that their faith too, could be mistaken.³⁶ As one critic accurately described John Stuart Mill’s theory of the power of unfettered trade in ideas, it depends on our willingness to believe that “repeated effort to defend one’s convictions serves to keep their justification alive in our minds and guards against the twin dangers of falsehood and fanaticism.”³⁷ But an individual can only revise what she believes if she is free to do so. As such, essential to democracy is that individuals remain free to revise their ideas.

II. EXAMPLES OF THE REVISABILITY PRINCIPLE IN LAW

Below the surface of American law are many unarticulated but nonetheless crucial and identifiable values and commitments. One might think of these values and commitments as America’s “deep constitution,” the nine-tenths that hover just beneath the waterline. For example, the constitution’s commitment to “aesthetic neutrality” could be thought of as among these commitments—

³⁴ Dominic D.P. Johnson & Monica Duffy Toft, *Grounds for War: The Evolution of Territorial Conflict*, 38 *Int’l Security* 7, 7 (2014) (quoting Dennis Pringle, *Separation and Integration: The Case of Ireland*, in *Shared Space, Divided Space: Essays on Conflict and Territorial Organization*, at xxv (Michael Chisholm & David M. Smith, eds., 1990)).

³⁵ *Id.* (citing MONICA DUFFY TOFT, *THE GEOGRAPHY OF ETHNIC VIOLENCE: IDENTITY, INTERESTS, AND THE INDIVISIBILITY OF TERRITORY* (2003)).

³⁶ *See Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)

³⁷ Robert Paul Wolff, *THE POVERTY OF LIBERALISM* 11 (1968)

rarely explicitly stated, it is the widely shared belief that each person should remain, to some significant degree, free to develop and express her own idea of beauty.³⁸

The revisability principle has long played a similarly quiet but foundational role across a range of legal doctrines, especially those governing privacy—of the Reasonable Expectations, Propertarian and Personhood kinds—but also doctrines as diverse as those governing individual liberty and freedom of expression, property, criminal law, criminal procedure, and contracts. Like many deep constitutional principles, it does not frequently appear as the holding of the case, but instead surfaces briefly, as the justification for the holding, or the insistent theme, ornament or leitmotif lurking behind it. The goal of this section is to highlight the revisability principle’s many forms and guises in American law.

A. *Revisability as a General Legal Principle*

A commitment to revisability—to the fundamental notion that the best decision *now* should trump whatever seemed to be the best decision *then*—permeates American law. Everywhere one looks there is a general tendency to disfavor precommitment and to favor revisability.

The writ of habeas corpus is always theoretically available, no matter how much time has passed or how many prior petitions have been brought.³⁹ The Constitution requires that every prisoner have “a meaningful opportunity to demonstrate that he is being held pursuant to ‘the erroneous application or interpretation’ of relevant law,”⁴⁰ in theory no matter who or where he is.

Contracts may not prohibit future amendments, no matter what the parties might attempt to agree to, and even if the parties want to tie their hands today. The reason courts have given is that “parties would not change their minds regarding the deal’s substance [at a later date] without good reasons, so parties can have no good

³⁸ Andrew Tutt, *Blightened Scrutiny*, 47 U.C. DAVIS L. REV. (forthcoming 2014).

³⁹ See, e.g., *Antiterrorism and Effective Death Penalty Act of 1996 - Actual Innocence Gateway - McQuiggin v. Perkins*, 127 HARV. L. REV. 318, 318 (2013) (“Last Term, in *McQuiggin v. Perkins*, the Supreme Court created an exception to a statutory barrier—a statute of limitations—for the actually innocent. Though the purpose of habeas relief is to correct constitutionally significant procedural defects, the Court properly allowed concerns for substantive justice to guide its decision.”).

⁴⁰ Gerald L. Neuman, *The Habeas Corpus Suspension Clause After Boumediene v. Bush*, 110 COLUM. L. REV. 537, 542-43 (2010) (quoting *Boumediene v. Bush*, 553 U.S. 723, 779 (2008)).

reason to prevent themselves from changing their minds regarding the deal's substance [at the outset]."⁴¹

The very notion of bankruptcy “reveals our acceptance of the fact that beyond a certain point, the sheer magnitude of a person’s debt may be demoralizing”—unbearably so—and thus, “[o]ne reason for giving the debtor a fresh start is to counteract the self-hatred he may feel, having mortgaged his entire future in a series of past decisions he now regrets.”⁴²

The right of individuals to pursue their chosen professions and occupations is deeply rooted in the common law, which is why noncompete agreements are so often held to be unenforceable or narrowly construed. “Even in states that allow such clauses, they are ‘looked upon with disfavor, cautiously considered, and carefully scrutinized’ by courts,”⁴³ for “courts are aware these restrictions place a heavy burden upon the ability of agents to pursue their careers and practice their skills.”⁴⁴

In property, restraints on alienability are highly disfavored: “[o]ften, statutes prohibit and courts invalidate outright restraints on alienability; when faced with more moderate restraints, courts may impose time limits or otherwise protect an individual’s right to exit.”⁴⁵ This limitation on the capacity of individuals to tie up property forever is most famously captured by the rule against perpetuities, “one of the oldest and most important social policies embraced by Anglo-American law.”⁴⁶

The right of individuals to change fundamentally the character of the use of his property has long been a cherished right, giving rise to a variety of other rights against regulations that would circumscribe the capacity of an individual to demolish, alter, repair

⁴¹ Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 611 (2003).

⁴² Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763, 785 (1983).

⁴³ David Lincicum, *Inevitable Conflict?: California’s Policy of Worker Mobility and the Doctrine of “Inevitable Disclosure”*, 75 S. CAL. L. REV. 1257, 1269 (2002).

⁴⁴ Phillip J. Closius Henry, *Involuntary Nonservitude: The Current Judicial Enforcement of Employee Covenants Not to Compete—A Proposal for Reform*, 57 S. CAL. L. REV. 531, 540 (1984).

⁴⁵ Hanoch Dagan & Michael A. Heller, *The Liberal Commons*, 110 YALE L.J. 549, 569 (2001).

⁴⁶ Stephen A. Siegel, *John Chipman Gray, Legal Formalism, and the Transformation of Perpetuities Law*, 36 U. MIAMI L. REV. 439, 440 n.8 (1982); *see also id.* at 440-46 (describing the sixteenth century toward “the use of future interests to control the devolution of wealth, usually in an attempt to keep it within the family indefinitely”).

or revise his property.⁴⁷ As Margaret Jane Radin explained, one reason why certain regulatory takings involving merely pecuniary losses do not require compensation, but physical occupations no matter how minor do, is that “exclusion may correspond to the picture, at the core of liberal ideology, of the individual’s right to use property to express her individual liberty, which means using property to fend off intruders into her space.”⁴⁸

On the other hand, once one dies, it is an equally cherished American tradition for those still living to challenge the reasonableness of the decedent’s wishes regarding the disposition of the estate: “When the control exerted by a testator reaches too far and seeks to influence or proscribe choices in a beneficiary’s life as personal and intimate as whom he should marry, principles of ‘public policy’ often come to the rescue and invalidate many such dispositions.”⁴⁹

In criminal law, the model penal code provides that a coconspirator can come into the light, give up on the conspiracy, and absolve himself of guilt: “[R]epudiation of criminal purpose is said to indicate lack of firm antisocial intent, and hence the absence of any real public danger . . . [moreover] ‘the law should provide a means for encouraging persons to abandon courses of criminal activity which they have already undertaken.’”⁵⁰ In the law of attempts, moreover, even at its harshest, one must at the very least take a “*substantial step* in a course of conduct planned to culminate in commission of the crime”—which is probably more of a nod to the needs of police than it is consistent with the preferred standard, which would look to the defendant’s proximity

⁴⁷ See, e.g., Lior Jacob Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781, 794 (2005) (“The right to destroy is also an extreme version of the right to use; by destroying a piece of jewelry, I do not merely use it—I use it up.”).

⁴⁸ Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1678 (1988); see Charles Reich, *The New Property*, 73 YALE L.J. 733, 774 (1964) (arguing property provides “a small but sovereign island of [one’s] own”).

⁴⁹ Ronald J. Scalise Jr., *Public Policy and Antisocial Testators*, 32 CARDOZO L. REV. 1315, 1317 (2011). As John Stuart Mill explained, while “bequest is one of the attributes of property,” it “might be limited or varied, according to views of expediency.” JOHN STUART MILL, PRINCIPLES OF POLITICAL ECONOMY 226-27 (W.J. Ashley ed., Longmans, Green, & Co. 1909) (1848). As Thomas Jefferson wrote to James Madison “the earth belongs in usufruct to the living. . . . [T]he dead have neither powers nor rights over it.” *Letter from Thomas Jefferson to James Madison* (Sept. 6, 1789), in 6 THE WORKS OF THOMAS JEFFERSON 3, 3-4 (Paul Leicester Ford ed., G. P. Putnam’s Sons 1904).

⁵⁰ Peter Buscemi, *Conspiracy: Statutory Reform Since the Model Penal Code*, 75 COLUM. L. REV. 1122, 1168 (1975).

to the commission of the crime as a proxy for his probability of actually committing it.⁵¹

In evidence law, in negligence cases the fact that an individual took measures to repair whatever defect gave rise to the tort injury cannot be introduced against him⁵²—because, as the notes to the rule explain, we should favor and encourage safety improvements, and the idea that repairing a defect might be used against an individual at trial would deter him from pursuing this aim.⁵³

In criminal sentencing, remorse and acceptance of responsibility weigh in a criminal defendant's favor: "Many state courts have found remorse to be an appropriate mitigating factor to consider when assigning criminal punishment" and "many states have found the absence of remorse to be an appropriate aggravating factor when calculating an appropriate criminal punishment."⁵⁴ A similar principle obtains under the federal sentencing guidelines where "a downward adjustment is made if the defendant accepts responsibility for his or her offense."⁵⁵ Moreover, "surveying state parole release decisions demonstrates that a prisoner's willingness to 'own up' to his misdeeds—to acknowledge culpability and express remorse for the crime for which he is currently incarcerated—is a vital part of the parole decision-making calculus."⁵⁶

Our law, in other words, has always favored take-backs. Do-overs. Road to Damascus conversions. Changes of heart. Turnabouts. Our law is a reflection of us, and what, fundamentally, we believe. The foregoing are only a thin slice what are many examples of the ways in which our law subtly but importantly favors the idea that there must be freedom to revise.

⁵¹ Ira P. Robbins, *Double Inchoate Crimes*, 26 HARV. J. ON LEGIS. 1, 14-16 (1989).

⁵² Randolph L. Burns, Note, *Subsequent Remedial Measures and Strict Products Liability: A New - Relevant - Answer to an Old Problem*, 81 VA. L. REV. 1141, 1141-42 (1995).

⁵³ FED. R. EVID. 407 advisory committee's note ("The other, and more impressive, ground for exclusion [of evidence of subsequent remedial measures] rests on a social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety.").

⁵⁴ Bryan H. Ward, *Sentencing Without Remorse*, 38 LOY. U. CHI. L.J. 131 (2006).

⁵⁵ R. Barry Ruback & Jonathan Wroblewski, *The Federal Sentencing Guidelines*, 7 PSYCHOL. PUB. POL'Y & L. 739, 747 (2001); see Laura Waters, *A Power and A Duty: Prosecutorial Discretion and Obligation in United States Sentencing Guideline S 3e1.1(b)*, 34 Cardozo L. Rev. 813, 815 (2012); see also U.S. Sentencing Guidelines Manual § 3E1.1 (2012) ("If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels.").

⁵⁶ Daniel S. Medwed, *The Innocent Prisoner's Dilemma: Consequences of Failing to Admit Guilt at Parole Hearings*, 93 IOWA L. REV. 491, 493 (2008).

B. Revision and Privacy

But aside from the law's general commitment to the revisability principle, the exposition of an explicit commitment to revisability appears and reappears in the law of privacy. The law of privacy could be thought of as one unified whole or as many tiles in a greater mosaic, but for purposes of this Section, it will be broken up loosely into three categories: Reasonable Expectations privacy, Propertarian privacy, and Personhood privacy. Each discrete area of constitutional privacy law seems repeatedly to invoke the notion that revisability is a central constitutional value.

1. Reasonable Expectations Privacy

An official notion of Reasonable Expectations privacy divorced from a Propertarian conception of privacy begins with *Katz v. United States* where the Court determined that the “[t]ime-honored rules of trespass need[ed] to be supplemented to deal with new technology like wiretapping.”⁵⁷ The test in *Katz* has become the Fourth Amendment's trigger, and thus marks the beginning of the era of a unique conception of Fourth Amendment privacy where the Amendment comes into play whenever government action implicates an individual's “reasonable expectation of privacy.”⁵⁸

“Reasonable expectation of privacy” privacy has always been

⁵⁷ Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 798 (1994). This era was foreshadowed in a series of cases criticizing the purely Propertarian conception of privacy which had before prevailed. *See, e.g.*, *Silverman v. United States*, 365 U.S. 505, 513 (1961) (Douglas, J., concurring) (“The concept of ‘an unauthorized physical penetration into the premises,’ on which the present decision rests seems to me beside the point. Was not the wrong . . . done when the intimacies of the home were tapped, recorded, or revealed? The depth of the penetration of the electronic device—even the degree of its remoteness from the inside of the house—is not the measure of the injury”); *Goldman v. United States*, 316 U.S. 129, 139 (1942) (Murphy, J., dissenting) (“[T]he search of one's home or office no longer requires physical entry, for science has brought forth far more effective devices for the invasion of a person's privacy than the direct and obvious methods of oppression which were detested by our forebears and which inspired the Fourth Amendment”); *Olmstead v. United States*, 277 U.S. 438, 478-79 (1928) (Brandeis, J., dissenting) (noting it was “immaterial where the physical connection with the telephone wires was made” what the Fourth amendment prohibits is “every unjustifiable intrusion by the government upon the privacy of the individual.”).

⁵⁸ *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring). Although the phrase comes from Justice Harlan's concurring opinion, later Court opinions have taken it to distill the essence of the *Katz* majority. *See, e.g.*, *Terry v. Ohio*, 392 U.S. 1, 9 (1968).

subtly concerned with revisability, for one of the most critical measures of whether someone has a reasonable expectation of privacy is whether *what* that individual seeks to protect is something whose dissemination would significantly impinge upon her capacity to revise. Often this notion has been enmeshed with the question of whether an individual took appropriate steps to actually safeguard those expectations. But whether an individual reasonably has certain expectations turns on our shared notions of what it is, fundamentally, that we think should not be revealed because it might tell the world too much about us, or tie us too closely to something with which we would rather not forever be associated.

The difference between whether an individual took appropriate measures to safeguard a thing's privacy and whether an individual actually has an expectation of privacy in a thing because *the thing itself* is in its nature private,⁵⁹ has now been clearly disentangled in two recent lines of Fourth Amendment cases, both involving the dangers posed by significant data collection and retention, *United States v. Jones* and *Maryland v. King*. These cases reveal that the Court is apt to conclude something—be it information about someone, a particular place, or a particular object—is in its nature private where that thing implicates revisability.

The first case, *United States v. Jones*,⁶⁰ and in particular Justice Sotomayor's separate opinion in that case, reveal the Court's increasing comprehension of the interplay between individuals'

⁵⁹ The distinction appears overtly in the cases. *Compare* *California v. Greenwood*, 486 U.S. 35, 40 (1988) (no reasonable expectation of privacy in trash because someone who has put something in the trash has not acted in a manner reasonably calculated to keep it private) *and* *Rawlings v. Kentucky*, 448 U.S. 98, 105-06 (1980) (no reasonable expectation of privacy in items in a friend's purse because someone who puts something in a friend's purse has not acted in a manner reasonably calculated to keep it private) *with* *Smith v. Maryland*, 442 U.S. 735, 742 (1979) (no reasonable expectation of privacy in phone number dialed because this information is not in its nature private), *and* *Oliver v. United States*, 466 U.S. 170, 178-79 (1984) (open fields beyond the curtilage are not protected by the Fourth Amendment because open fields are not in their nature private). Many cases straddle this distinction, weighing the nature of the information that might be disclosed against the nature of the measures taken to shield it from view. *See, e.g.*, *Illinois v. Caballes*, 543 U.S. 405, 409 (2005) (no reasonable expectation privacy against canine sniff of exterior of vehicle because such a sniff does not affect an individual's reasonable expectation of privacy in the contents detectable by a dog sniff that could conceivably be within a car's interior); *Kyllo v. United States*, 533 U.S. 27, 31-32 (2001) (thermal imaging directed at a home is a search because a home is by its nature shielded from visual inspection).

⁶⁰ 132 S. Ct. 945 (2012).

concerns with maintaining revisability and individuals' expectations of privacy. *Jones* involved the fixing of a small GPS device on an individual's vehicle without a warrant, allowing the police to track its whereabouts of every moment of every day for weeks.⁶¹ Four Justices joined by Justice Sotomayor ultimately held that a warrant was required because the police had trespassed to affix the GPS device on the vehicle.⁶² Four other Justices would have held that it was a combination of the duration of the surveillance and the amount and nature of the data acquired that would have called for a warrant.⁶³ Justice Sotomayor joined both opinions, but also wrote for herself.

In writing her separate opinion in *Jones*, Justice Sotomayor touched on issues deeply enmeshed with the notion of revisability. She explained that individuals do not "reasonably expect that their movements will be recorded and aggregated in a manner that enables the Government to ascertain, more or less at will, their political and religious beliefs, sexual habits, and so on."⁶⁴ She explained that the capacity to know or readily ascertain so much about a person, would "chill[] associational and expressive freedoms" and even "alter the relationship between citizen and government in a way that is inimical to democratic society."⁶⁵

The omitted link between the "chill" on "associational and expressive freedoms" Justice Sotomayor identified in *Jones* and the information the government can infer about an individual by simply recording, storing, and cross-referencing a great deal about them, is that knowing so much about a person impinges on an individual's capacity to revise who they are. It makes that person vulnerable, and exposes her to the possibility of manipulation and coercion. Even if she is never manipulated and coerced, she may fear that one day they will be. In this way, Justice Sotomayor's explicit link between expression and expectations of privacy is bridged by an unspoken commitment to revisability.

In the same spiritual line of cases as *United States v. Jones*, concerned with expectations of privacy because some things are private by their very nature, is the recently decided *Maryland v. King* where the Supreme Court held that police take and cross-

⁶¹ *Id.* at 954 (Sotomayor, J., concurring).

⁶² *Id.* at 949 (Opinion of Scalia, J., for the majority).

⁶³ *Id.* at 964 (Opinion of Alito, J., concurring in the judgment).

⁶⁴ *Id.* at 956 (Sotomayor, J., concurring).

⁶⁵ *Id.* (quoting *United States v. Cuevas-Perez*, 640 F.3d 272, 285 (7th Cir. 2011) (Flaum, J., concurring)).

reference the DNA of arrestees for certain crimes against a DNA database without a warrant on arrest.⁶⁶ While the dissent in *King* itself—which went 5-4—does not tap into the case’s deeper revisability stakes, prior Ninth Circuit dissents in a case possessing similar facts do. In *United States v. Kincade*, a case involving an individual who refused to submit to compulsory DNA profiling in the absence of individual suspicion of having committed additional crimes,⁶⁷ two dissenting Judges—Reinhardt and Kozinski—invoked revisability concerns. Wrote Judge Kozinski dissenting—

The difficult question is whether the government may exploit Kincade’s diminished Fourth Amendment rights while he is still a probationer to obtain his DNA signature, so it can use it in investigating thousands of crimes nationwide, past and future, for the rest of Kincade’s life.⁶⁸

Judge Kozinski’s objection at its core is to the idea that once Kincade’s DNA is on file, he will never really be free again. As Judge Reinhardt wrote in his own dissent in *Kincade*—

The problem with allowing the government to collect and maintain private information about the intimate details of our lives is that the bureaucracy most often in charge of the information “is poorly regulated and susceptible to abuse. This [] has profound social effects because it alters the balance of power between the government and the people, exposing individuals to a series of harms, increasing their vulnerability and decreasing the degree of power that they exercise over their lives.”⁶⁹

Judge Reinhardt identifies the crucial connection between the loss of intensely intimate unalterable information about oneself and the fear that another’s exploitation of that information will forever diminish his capacity for change. As Professor Solove, from whose Article Judge Reinhardt quotes, explains, pervasive surveillance impinges on “aspects of our lives and social practices where people

⁶⁶ 133 S. Ct. 1958, 1965-66 (2013).

⁶⁷ 379 F.3d 813, 816 (9th Cir. 2004) (en banc).

⁶⁸ *Id.* at 872 (Kozinski, J., dissenting).

⁶⁹ *Id.* at 843-44 (Reinhardt, J., dissenting) (quoting Daniel J. Solove, *Digital Dossiers and the Dissipation of Fourth Amendment Privacy*, 75 S. CAL. L.REV. 1083, 1105 (2002)).

feel vulnerable, uneasy, and fragile” where “the norms of social judgment are particularly abrasive and oppressive” often relating to “our most basic needs and desires: finances, employment, entertainment, political activity, sexuality, and family.”⁷⁰ These seem to be issues bound up with revisability—concerns that an individual might have that some fact or facts about herself might be exposed for which she must forever account.

The foregoing are not the only cases one could cite for the proposition that Fourth Amendment privacy is concerned with intrusions that impinge on the revisability principle.⁷¹ As Justice Brandeis wrote in 1928, dissenting in *Olmstead v. United States*: “The makers of our Constitution . . . recognized the significance of man’s spiritual nature, of his feelings and of his intellect” and so through the Fourth Amendment “sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations.”⁷² These sentiments reflect a profound concern with allowing individuals an opportunity to create conceptions of themselves through decisions they consciously make about who they would like to be—decisions that depend significantly on the capacity to engage in revision and change. As the Court begins to confront the impacts of pervasive data collection, storage and access by the government, it will soon be required to meet the same challenges in the private sphere.

2. Propertarian Privacy

Propertarian privacy, as the name suggests, turns on the privacy people fashion for themselves, through legal entitlements combined with objects such as homes, curtilages, bedrooms,

⁷⁰ Daniel J. Solove, *Digital Dossiers and the Dissipation of Fourth Amendment Privacy*, 75 S. CAL. L. REV. 1083, 1122 (2002).

⁷¹ See, e.g., *Whalen v. Roe*, 429 U.S. 589, 605-06 (1977) (“We are not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files. The collection of taxes, the distribution of welfare and social security benefits, the supervision of public health, the direction of our Armed Forces, and the enforcement of the criminal laws all require the orderly preservation of great quantities of information, much of which is personal in character and potentially embarrassing or harmful if disclosed. The right to collect and use such data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures. Recognizing that in some circumstances that duty arguably has its roots in the Constitution . . .”).

⁷² *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

automobiles, open fields, and so on.⁷³ Propertarian privacy, probably the most familiar brand of privacy, involves actual concealment from view by use of objects, occlusions, walls, and barriers. Propertarian privacy has always shown an implicit concern for revisability. Even as far back as the seminal Article by Samuel Warren and Louis Brandeis on *The Right to Privacy*, the two commented that “[t]he right of property in its widest sense . . . affords alone that broad basis upon which the protection which the individual demands can be rested.”⁷⁴ Unlike “mere” expectation of privacy—which trades on extralegal norms and often depends on how one expects others to act—individuals have legal entitlement to control their property, and so possess a special additional sovereign power over it. The propertarian notion of privacy will not be overstressed, except to note that possession and ownership of traditional property only becomes *more* important in a world where almost anything that happens in a public place can be recorded and shared sharply and permanently.

Those who can afford to obtain privacy through property can do so often because they can withdraw from the sphere of public life. One who may retreat into private property obtains a measure of control over revisability immeasurably greater than one who cannot. Where one need not go to the public pool (because he can swim in a private lake), or can attend a private school (where cell phones and Google Glass are forbidden), can live in a comfortable home, or need not make frequent trips to the market or the park, that individual can obtain a measure of property-based privacy unavailable to most.

To the extent that it is believed that wealth should not dictate the degree to which one possesses the privilege to engage in revision, the fact that costly methods of preventing the collection and storage of information about oneself may become the principle means available for doing so may enhance or cement inequality.

3. Personhood Privacy

The final sphere of privacy law, the one most intensely bound-

⁷³ See, e.g. *Kyllo v. United States*, 533 U.S. 27, 31 (2001) (home); *Wilson v. Layne*, 526 U.S. 603, 610, 609-10 (1999) (home); *United States v. Dunn*, 480 U.S. 294, 300 (1987) (curtilage of a home); *Oliver v. United States*, 466 U.S. 170 (1984) (open fields); *Hester v. United States*, 265 U.S. 57, 59 (1924).

⁷⁴ Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 211 (1890).

up in identity and, not coincidentally, the area replete with statements closely reflecting a commitment to revisability involves privacy conceived as a right to personhood.⁷⁵ These cases, *Griswold*, *Eisenstadt*, and *Roe*, to name three, largely concern sexual, reproductive, familial, and relationship autonomy.⁷⁶ But in so doing, all express an overriding concern with revisability through their preoccupations with the development of an individual's unique personhood, conception of herself, or self-definition—what Brandeis and Warren termed an individual's "inviolable personality."⁷⁷

As Justice Douglas wrote, concurring in *Roe v. Wade*, the right to privacy grants to each person "autonomous control over the development and expression of . . . [her] intellect, interests, tastes, and personality."⁷⁸ His comments built upon his prior statement in *Griswold v. Connecticut* that the "penumbra" of the First Amendment demands "not only the right to utter or to print, but the right to distribute, the right to receive, the right to read and freedom of inquiry, freedom of thought, and freedom to teach — indeed the freedom of the entire university community."⁷⁹ As Justice Douglas explained, concurring in *Eisenstadt v. Baird*, "[o]ur system of government requires that we have faith in the ability of the individual to decide wisely, if only he is fully apprised of the merits of a controversy."⁸⁰

These sentiments are not limited to Justice Douglas. Relying on the personhood privacy cases, Justice Brennan in *Roberts v. U.S. Jaycees* wrote, "the constitutional shelter afforded" certain especially meaningful relationships "reflects the realization that individuals draw much of their emotional enrichment from close ties with others" and that "[p]rotecting these relationships from unwarranted state interference therefore safeguards the ability

⁷⁵ See Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 752 & n.93 (1989) ("Whatever its genesis, 'personhood' has so invaded privacy doctrine that it now regularly is seen either as the value underlying the right or as a synonym for the right itself."); *Contra id.* at 739 (arguing that conceiving of the privacy cases as about personhood "has invariably missed the real point").

⁷⁶ Rubenfeld, *supra* at 744 ("The great peculiarity of the privacy cases is their predominant, though not exclusive, focus on sexuality.")

⁷⁷ Warren & Brandeis, *supra* note 74, at 205 ("The principle which protects personal writings and all other personal productions, not against theft and physical appropriation, but against publication in any form, is in reality not the principle of private property, but that of an inviolable personality.")

⁷⁸ *Roe v. Wade*, 410 U.S. 179, 211 (1973) (Douglas, J., concurring).

⁷⁹ *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965).

⁸⁰ *Eisenstadt v. Baird*, 405 U.S. 438, 457 (1972) (Douglas, J., concurring).

independently to define one's identity that is central to any concept of liberty."⁸¹ As Justice Blackmun wrote, dissenting in *Bowers v. Hardwick*, those things protected by the right to privacy are protected "not because they contribute, in some direct and material way, to the general public welfare, but because they form so central a part of an individual's life."⁸² And as Justice Kennedy explained in *Lawrence v. Texas*, overruling *Bowers v. Hardwick* decades later, "[f]reedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."⁸³

Without wading deeply into the specifics of these cases—and too far afield of the thrust of this Article—they seem to reflect a concern for the capacity of individuals to exercise a kind of profound and deeply personal choice, the kind of choice reflected in a notion of significant autonomy. In this way they also reflect a concern for revisability, as revisability is an essential aspect of significant autonomy, for it is the capacity of individuals to choose one life and then, if necessary, another. To some significant, if indefinite, degree, these cases seem to stand for the proposition that individuals must remain free to revise who they are, to create a new conception of themselves and pursue new commitments, goals, plans and projects that have meaning to them.⁸⁴

C. Revision and Expression

The final jurisprudential field in which revisability has been strongly and explicitly endorsed is within the First Amendment itself. The Supreme Court has noted, and at times endorsed, within

⁸¹ *Roberts v. U.S. Jaycees*, 468 U.S. 609, 619 (1984).

⁸² *Bowers v. Hardwick*, 478 U.S. 186, 204 (1986) (Blackmun, J., dissenting) *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003).

⁸³ *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

⁸⁴ In this way, the principle of revisability is a more expansive reconceptualization of the "principle of the right to privacy" explained by Professor Rubenfeld in his Article *The Right of Privacy*. In Professor Rubenfeld's view "[t]he principle of the right to privacy is not the freedom to do certain, particular acts determined to be fundamental through some ever-progressing normative lens" but rather "is the fundamental freedom not to have one's life too totally determined by a progressively more normalizing state." Rubenfeld, *supra* note 75, at 784. Professor Rubenfeld could be describing the principle of revisability—except where Professor Rubenfeld would require that the state do the "normalizing," the principle of revisability rests on the idea that it does not matter where the "normalizing" comes from. Where technology and social practices become too totally determinative of who an individual may be or who they may become, the State may even have an affirmative role to play in protecting an individual's capacity to exercise significant autonomy.

a First Amendment framework, a concern for notions rooted in the capacity of individuals to engage in revision—by thinking as they wish, by severing or forming associations of their choosing, and by reaching conclusions on the merits of the arguments presented without concern for extraneous considerations.⁸⁵

The first broad category where a concept implicitly rooted in revisability appears and reappears in the First Amendment is in the innumerable judicial statements that the most cherished of all First Amendment freedoms is freedom of thought. The number of juridical statements proclaiming freedom of thought to be a paramount—even *the* paramount—constitutional value is truly astonishing.⁸⁶ So powerful and ingrained is the right to freedom of

⁸⁵ See, e.g., *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 641 (1994) (“At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence.”).

⁸⁶ See, e.g. *Lawrence v. Texas*, 539 U.S. 558, 562 (2003) (“Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002) (“The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought.”); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-35 (1977) (“[A]t the heart of the First Amendment is the notion that an individual should be free to believe as he will”); *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (“individual freedom of mind”); *United States v. Reidel*, 402 U.S. 351, 356 (1971); *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (“The right of freedom of speech and press includes . . . freedom of inquiry [and] freedom of thought”); *Mapp v. Ohio*, 367 U.S. 643, 672-74 (1961) (Harlan, J., dissenting); *Adler v. Bd. of Educ.*, 342 U.S. 485, 508 (1952) (Douglas, J., dissenting) (“The Constitution guarantees freedom of thought and expression to everyone in our society.”); *United States v. Ballard*, 322 U.S. 78, 86 (1944) (“Freedom of thought, which includes freedom of religious belief, is basic in a society of free men.”); *Schneiderman v. United States*, 320 U.S. 118, 158 (1943) (“[F]reedom of thought . . . is a fundamental feature of our political institutions.”); *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (“We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.”); *Id.* at 645 (Murphy, J., concurring) (“[T]he right of freedom of thought and of religion as guaranteed by the Constitution against state action includes both the right to speak freely and the right to refrain from speaking at all”); *Jones v. City of Opelika*, 316 U.S. 584, 594 (1942) (“[T]he mind and spirit of man remain forever free, while his actions rest subject to necessary accommodation to the competing needs of his fellows.”); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (stating that the freedoms of conscience and belief are absolute); *Palko v. Connecticut*, 302 U.S. 319, 327 (1937) (“[Freedom of thought] is the matrix, the indispensable condition, of nearly every other form of freedom. With rare aberrations a pervasive recognition of that truth can be traced in our history, political and legal.”); *United States v. Schwimmer*, 279 U.S. 644, 654-55 (1929) (Holmes, J., dissenting) (“[I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought-not free thought

thought that scholars have attempted to claim it for privacy. As Neil Richards has explained, “[t]he core of intellectual privacy is the freedom of thought and belief.”⁸⁷

But freedom of thought is not really about privacy. Linking freedom of thought to privacy connotes the strange supposition that individuals have freedom of thought to the extent they keep their thoughts private. But that cannot be right. Individuals have more than merely a right to have whatever thoughts they wish so long as they keep those thoughts within a carefully cultivated private sphere. A more Pickwickian understanding of what it means to possess freedom of thought might be to possess the freedom to think and consider in a tangible and meaningful manner: to exchange and debate others in a variety of public forums and mediums in which what is said and expressed cannot be recorded sharply, publicly or accessibly, or where what is said can be segregated from the identity of the individual who says it.

The second broad category where a concept implicitly rooted in revisability appears in the First Amendment is in the concept of freedom of association. Courts have long—though fitfully—held that implicit in the right to associate is to have some associations shielded from scrutiny. In *NAACP v. State of Alabama*, the Supreme Court protected both “freedom to associate and privacy in one’s associations,” explaining that the NAACP could not be compelled to disclose its membership lists where doing so “entail[e]d the likelihood of a substantial restraint upon the exercise by petitioner’s members of their right to freedom of association.”⁸⁸

And in a series of cases, the Supreme Court has affirmed and reaffirmed the right of individuals to form and sever ties to organizations and causes of varying degrees of intimacy.⁸⁹ In *Schwartz v. Board of Bar Examiners*, for example, the Supreme Court held that a lawyer could not be barred from the practice of law because he had once been a member of the Communist party,

for those who agree with us but freedom for the thought that we hate.”); see also 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 727 (Carolina Academic Press 1987) (1833) (“The rights of conscience are, indeed, beyond the just reach of any human power.”).

⁸⁷ Neil M. Richards, *Intellectual Privacy*, 87 TEX. L. REV. 387, 408 (2008).

⁸⁸ *Nat’l Ass’n for Advancement of Colored People v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 462 (1958).

⁸⁹ See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1400-09 (2d ed. 1988) (describing the “dual character of associational rights,” which include both the right to associate and to dissociate).

expressing as he had mere “political faith” in its cause.⁹⁰ Even in *Scales v. United States*, a case upholding a conviction for membership in an organization that advocated the overthrow of the government by force and violence, the Court held that the First Amendment required more than mere knowledge of the organization’s aims and moral support for its cause, but “specific[] inten[t] to accomplish (the aims of the organization) by resort to violence;”⁹¹ “guilt is personal” the Court wrote, and thus a “relationship must be sufficiently substantial to satisfy the concept of personal guilt”⁹² The cases concerning association seem to flow from a recognition that association’s value stems from a personal interest each individual has in the development of a concept of themselves—one that is shaped by which relationships they choose to form and to forego.

The third broad category where a concept implicitly rooted in revisability appears in the First Amendment is in the repeated judicial sentiments, sometimes explicit, sometimes implicit, that speech is valuable to the extent it attempts to have its ideas adopted because they are meritorious, and not for other reasons. Whether it is in regulating falsehoods and deception,⁹³ commercial advertising,⁹⁴ profanity,⁹⁵ secondary effects,⁹⁶ the time, place and manner of speech,⁹⁷ symbolic speech or expressive conduct,⁹⁸ the

⁹⁰ *Schwartz v. Bd. of Bar Exam. of State of N.M.*, 353 U.S. 232, 244-45 (1957).

⁹¹ *Scales v. United States*, 367 U.S. 203, 229 (U.S. 1961).

⁹² *Id.* at 224-25.

⁹³ *United States v. Alvarez*, 132 S. Ct. 2537, 2547, 183 L. Ed. 2d 574 (2012) (“Where false claims are made to effect a fraud or secure moneys or other valuable considerations, say offers of employment, it is well established that the Government may restrict speech without affronting the First Amendment.”).

⁹⁴ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557, 562-63 (1980) (“The Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression.”); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 758-70 (1976). At one point in time, commercial advertising was not entitled to First Amendment protection at all. *See Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) (“[T]he Constitution imposes no . . . restraint on government as respects purely commercial advertising.”).

⁹⁵ *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 747-51 (1978) (allowing greater regulation of “vulgar,” “offensive,” and “shocking” speech than other kinds of speech).

⁹⁶ *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986) (applying a lower standard of scrutiny where it can be established the “predominate concern” of a content-based zoning regulation is with the harmful secondary effects produced by the existence of the establishments, not the content produced by the establishments themselves).

⁹⁷ *Heffron v. Int’l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 650 (1981) (allowing restrictions on pamphleteering to help maintain the orderly movement of the crowd at a Fairground); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302–

Court has long subtly preferred speech that conveys its message in a certain manner—reserving the highest pantheon of protection to appeals to logic founded on evidence. This concern with the idea that speech is valuable that persuades because its ideas are better depends itself on a certain kind of freedom among individuals—namely freedom to adopt those ideas. It depends on the capacity to engage in revision.

III. OVERCOMING THE CASE AGAINST THE REVISABILITY PRINCIPLE IN FIRST AMENDMENT JURISPRUDENCE

A number of scholars see regulations aimed squarely or principally at preserving revisability by limiting what information can be collected or stored as inconsistent with the Supreme Court’s case law governing the freedom of speech.⁹⁹ As Professor Volokh has explained—

[I]s it constitutional for the government to suppress certain kinds of speech in order to protect dignity, prevent disrespectful behavior, prevent emotional distress, or to protect a supposed civil right not to be talked about? Under current constitutional doctrine, the answer seems to be no . . . Even offensive, outrageous, disrespectful, and dignity-assaulting speech is constitutionally protected.¹⁰⁰

Thus, “[w]hile privacy protection secured by contract is constitutionally sound, broader information privacy rules are not easily defensible under existing free speech law.”¹⁰¹ Similarly,

303 (1974) (permitting regulation of political advertising on buses where intrusive advertising could interfere with the city’s goal of making its buses “rapid, convenient, pleasant, and inexpensive”); *Kovacs v. Cooper*, 336 U.S. 77 (1949) (permitting regulation of sound trucks); *Schneider v. State of New Jersey, Town of Irvington*, 308 U.S. 147, 160-61 (1939) (holding that state may limit when, where, and how pamphleteering may be undertaken on public streets).

⁹⁸ *U. S. v. O’Brien*, 391 U.S. 367, 376, 88 S. Ct. 1673, 1678, 20 L. Ed. 2d 672 (1968) (“We cannot accept the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.”).

⁹⁹ See Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject As Object*, 52 STAN. L. REV. 1373, 1409 (2000) (explaining that “[t]he First Amendment argument against data privacy protection begins by assuming that the collection, processing, and exchange of personally-identified data are ‘speech,’ and then asserts that regulation of these activities cannot survive the requisite scrutiny.”).

¹⁰⁰ Volokh, *supra* note 7, at 1113.

¹⁰¹ *Id.* at 1112.

Professor Bambauer has argued, “the freedom of speech carries an implicit right to create knowledge” and, as such, “[w]hen the government deliberately interferes with an individual’s effort to learn something new, that suppression of disfavored knowledge is presumptively illegitimate and must withstand judicial scrutiny.”¹⁰²

These arguments are not insubstantial. While the law in this area is still evolving, there are several seminal First Amendment cases already decided that lend substantial support to the contention that data gathering, indexing, storage and sharing cannot be constitutionally regulated, even if, in the aggregate, it results in potentially substantial harms to revisability. Indeed, it is not at all implausible to think that under the law as it is, nearly all efforts to restrict the collection and free alienation of information are unconstitutional.

The leading case is a 2011 decision, *Sorrell v. IMS Health*, involving a Vermont law that “restrict[ed] the sale, disclosure, and use of pharmacy records that reveal[ed] the prescribing practices of individual doctors.”¹⁰³ The Court struck down the law as imposing content- and speaker-based restrictions on speech because it limited who could obtain prescriber identifying information largely on the grounds of what that entity would choose to do with it.¹⁰⁴ In reaching this conclusion, in a passage of breathtaking scope, the Supreme Court held that “the creation and dissemination of information are speech” for purposes of the First Amendment, indeed that “information is speech” for purposes of the First Amendment,¹⁰⁵ as “[f]acts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs.”¹⁰⁶ Thus, that the Vermont legislature sought to choose which entities could have access to information, in the Court’s view, struck at the First Amendment’s core concern with content-neutrality, favoring some entities over others because of what they wished to say.

Sorrell is not some jurisprudential pariah. Some of the most celebrated cases in First Amendment law endorse sweeping principles nigh indistinguishable from those embraced by the

¹⁰² Bambauer, *supra* note 6, at 60.

¹⁰³ *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2659 (2011).

¹⁰⁴ *Id.* at 2663.

¹⁰⁵ *Id.* at 2667; *see also* Andrew Tutt, *Software Speech*, 65 STAN. L. REV. ONLINE 73, 74 (2012) (“[A] holding so broad and potentially far-reaching that the Court could not possibly have literally meant what it said.”).

¹⁰⁶ *Sorrell*, 131 S. Ct. at 2667.

Sorrell Court: most of all that public debate should remain “uninhibited, robust, and wide-open”¹⁰⁷ even at substantial cost to the dignity or revisability of interests of those singled out for scrutiny.¹⁰⁸ These cases warrant serious attention—they give rightful pause to anyone too quick to embrace a world where the government might impose limits on what information can be captured, stored, or shared. Even prominent privacy scholars take this view. As Professor Richards has written, “[t]o the extent that it has considered privacy at all, traditional First Amendment theory has assumed it to be a conflicting and inferior value that has little place in free speech theory.”¹⁰⁹

But to understand why these claims are overstated, and how revisability figures into the First Amendment, one must understand that most of First Amendment law depends, to a remarkable degree, on framing.

Consider the First Amendment’s first principles. The First Amendment is designed to preserve the right of individuals to seek and spread ideas that the government wants obliterated. That is its fundamental role in society. The government might have many motives for attempting to curtail the free exchange of ideas¹¹⁰—protecting those in power from public scrutiny or accountability,¹¹¹ ensuring the adoption of a particular political, social or cultural orthodoxy,¹¹² rewarding a favored constituency or punishing a

¹⁰⁷ *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (“[W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”)

¹⁰⁸ *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (creating the “actual malice” standard for defamation of a “public official”).

¹⁰⁹ Richards, *supra* note 87, at 392.

¹¹⁰ See Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414 (1996) (explaining the relevance of motive in First Amendment law).

¹¹¹ See, e.g., Sedition Act ch. 74, 1 Stat. 596 (1798) (imposing a punishment of up to two years imprisonment for libeling the government); see also Paul Finkelman, Book Review, *Cultural Speech and Political Speech in Historical Perspective Free Speech in Its Forgotten Years* by David M. Rabban, 79 B.U. L. REV. 717, 722 n.25 (1999) (“In years following the expiration of the Sedition Act almost all Americans came to accept that the law was wrong and unconstitutional. As the Supreme Court noted in *New York Times v. Sullivan*, the Sedition Act has been overruled by ‘the court of history.’”).

¹¹² See, e.g., *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 396 (1992) (“[T]he only interest distinctively served by the content limitation is that of displaying the city council’s special hostility towards the particular biases thus singled out.”); *Consol. Edison Co. of New York, Inc. v. Pub. Serv. Comm’n of New York*, 447 U.S. 530,

disfavored constituency,¹¹³ preventing the spread of information that might cause alarm, anger, or panic,¹¹⁴ preserving existing hierarchies or power structures in society,¹¹⁵ or reinforcing certain taboos, norms, and expectations about how people should live their lives.¹¹⁶

Yet all of the impermissible motives described above can be flipped, counterbalanced, and often overcome by an enormous range of public-spirited motives—regulating the time, place, and manner of speech,¹¹⁷ ensuring promotion of certain ideals, beliefs,

536 (1980) (explaining that speech may not be restricted “merely because public officials disapprove the speaker’s views”); *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (“[N]o official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . .”).

¹¹³ *See, e.g.* *Dennis v. United States*, 341 U.S. 494, 517 (1951) (upholding the convictions of members of the Communist Party on the grounds of the “evil” they posed); *Schenck v. United States*, 249 U.S. 47, 52 (1919) (Holmes, J.) (developing and apply a “clear and present danger” test to uphold the convictions of socialist who opposed World War I); *Frohwerk v. United States*, 249 U.S. 204, 206 (1919) (same); *Debs v. United States*, 249 U.S. 211, 212 (1919) (finding Eugene V. Debs, a five time Socialist party presidential candidate, guilty under the Espionage Act of attempting to obstruct the recruiting and enlistment service of the United States). Under the *Debs* test, speech was unprotected if “one purpose of the speech, whether incidental or not does not matter, was to oppose [this] war . . . and that the opposition was so expressed that its natural and intended effect would be to obstruct recruiting.” *Id.* at 214-15.

¹¹⁴ *See, e.g.*, *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (holding that the government could not withhold release of the Pentagon Papers on the basis of harms to national security flowing from disclosure).

¹¹⁵ *See, e.g.*, *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 341 (2010) (“The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration.”); *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 641 (1994) (“Laws of this sort pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion.”); *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (explaining that “the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment”).

¹¹⁶ *See, e.g.*, *Ginsberg v. New York*, 390 U.S. 629 (1968) (holding that the government cannot restrict pornography for adults); *Miller v. California*, 413 U.S. 15, 24 (1973) (holding that obscenity laws must “be limited to works . . . which portray sexual conduct in a patently offensive way”).

¹¹⁷ *Compare, e.g.*, *Int’l Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 680-83, (1992) (upholding regulations that banned the solicitation of funds inside airport terminals because of the dangers inherent in solicitation and the inconvenience to passengers of the activity) *with* *Bd. of Airport Comm’rs of City of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 574-75 (1987) (striking down a regulation prohibiting any person “to engage in First Amendment activities within the Central Terminal Area at Los Angeles International Airport” because if read to mean what it actually said, the regulation “prohibit[ed] even talking and reading, or the wearing of campaign buttons or symbolic clothing”).

or causes thought to be consistent with the nation's core commitments or national ideals,¹¹⁸ prohibiting conduct that incites violence or causes public disturbance,¹¹⁹ prohibiting the desecration or destruction of certain property or symbols,¹²⁰ prohibiting attacks on individuals that are harmful to their dignity, emotional well-being, or reputations,¹²¹ prohibiting manipulation, coercion, fraud, and deception,¹²² prohibiting speech that can cause significant harm, by, for instance, facilitating crime,¹²³ or endanger the welfare of the nation,¹²⁴ limiting the disclosure of facts that occur during sensitive official proceedings or deliberation,¹²⁵ and,

¹¹⁸ See, e.g., *Rust v. Sullivan*, 500 U.S. 173, 194 (1991) (“When Congress established a National Endowment for Democracy . . . it was not constitutionally required to fund a program to encourage competing lines of political philosophy”); *In re Anastaplo*, 366 U.S. 82, 95 (1961) (finding it constitutional for a State to refuse to admit an individual to practice law who refused to affirm or deny whether he had ever been a member of the Communist Party).

¹¹⁹ See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (limiting prohibitions on speech advocating use of force or violation of law to situations “where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”); *Cohen v. California*, 403 U.S. 15, 18 (1971) (holding that a disturbing the peace conviction cannot be founded on hostility to constitutionally protected speech); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (same).

¹²⁰ *Virginia v. Black*, 538 U.S. 343 (2003) (upholding a ban on cross burning). *But see, e.g., Texas v. Johnson*, 491 U.S. 397, 414 (1989) (striking down prohibition on flag burning).

¹²¹ See, e.g., *Time, Inc. v. Firestone*, 424 U.S. 448, 460 (1976) (“States [can, consistent with the First Amendment] . . . base [tort] awards on elements other than injury to reputation” such as “personal humiliation, and mental anguish and suffering”); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245-46 (2002) (“The freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children.”); *New York v. Ferber*, 458 U.S. 747, 764 (1982) (holding State may criminalize possession and dissemination of child pornography because of its harm to victims).

¹²² *United States v. Alvarez*, 132 S. Ct. 2537, 2547, 183 L. Ed. 2d 574 (2012) (“Where false claims are made to effect a fraud or secure moneys or other valuable considerations, say offers of employment, it is well established that the Government may restrict speech without affronting the First Amendment.”).

¹²³ See, e.g., *United States v. Williams*, 553 U.S. 285, 297 (2008) (“Offers to engage in illegal transactions are categorically excluded from First Amendment protection.”); *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 388 (1973); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949).

¹²⁴ See, e.g., *Haig v. Agee*, 453 U.S. 280 (1981) (sustaining passport revocation based on disclosures of intelligence operations and names of intelligence personnel); *Snepp v. United States*, 444 U.S. 507 (1980) (sustaining requirement that past and present CIA employees submit anything they wrote about intelligence activities to the agency for review).

¹²⁵ See, e.g., *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984) (sustaining power of courts to restrain litigants from disclosing the contents of pretrial discovery); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (exclusion of press and public from courtroom during testimony of minor victim of sex offense violates first

most important for present purposes, limiting the disclosure of private facts and information about an individual.¹²⁶

From even a glance at the foregoing list of points and counterpoints, permissible and impermissible purposes, it becomes apparent why certain First Amendment questions are treated as easy. For instance, it becomes clear why the lower federal courts have been unanimous in determining that police officers may be recorded while undertaking their official duties in a public place.¹²⁷ None of the permissible public values line up in favor of restrictions on such recordings, while several of the impermissible motives for restricting speech freedom are easily found in such restrictions.

So it is that the First Circuit surefootedly explained in the 2011 case *Glik v. Cunniffe*: “[I]s there a constitutionally protected right to videotape police carrying out their duties in public? Basic First Amendment principles, along with case law from this and other circuits, answer that question unambiguously in the affirmative.”¹²⁸ And in 2012, the Seventh Circuit announced confidently in *ACLU v. Alvarez*:

The act of *making* an audio or audiovisual recording is necessarily included within the First Amendment’s guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording. The right to publish or broadcast an audio or audiovisual recording would be insecure, or largely ineffective, if the antecedent act of *making* the recording is wholly unprotected,

amendment); *Gannett Co. v. DePasquale*, 434 U.S. 368 (1979) (denial of access to pretrial hearing did not violate first amendment); *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978) (no right of access to Nixon tapes).

¹²⁶ See, e.g., *Bartnicki v. Vopper*, 532 U.S. 514, 525 (2001) (strongly implying that the federal wiretap act is constitutional in the classic case of a eavesdropping on a private call). *But see* *Smith v. Daily Mail Publ’g*, 443 U.S. 97, 103-04 (1979); *Okla. Publ’g Corp. v. Okla. County Dist. Court*, 430 U.S. 308, 311-12 (1977); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 494-95 (1975); *Time, Inc. v. Hill*, 385 U.S. 374, 394 (1967) (rejecting privacy-based challenges to the publication of personal information on First Amendment grounds).

¹²⁷ See Andrew Rosado Shaw, *Our Duty in Light of the Law’s Irrelevance: Police Brutality and Civilian Recordings*, 20 GEO. J. ON POVERTY L. & POL’Y 161, 175 (2012) (“The Federal Courts of Appeals have uniformly resolved this discrepancy in favor of First Amendment rights, holding that such applications of state wiretapping laws are unconstitutional.”).

¹²⁸ 655 F.3d 78, 82 (1st Cir. 2011).

as the State's Attorney insists. By way of a simple analogy, banning photography or note-taking at a public event would raise serious First Amendment concerns; a law of that sort would obviously affect the right to publish the resulting photograph or disseminate a report derived from the notes. The same is true of a ban on audio and audiovisual recording.¹²⁹

Of course, the language in these decisions, sweeping and self-assured as it is, might make it seem as though the case against privacy in any public place is an open and shut one—there simply isn't any. One could hardly fault Professors Volokh and Bambauer for so concluding. The justifications in these cases for allowing police officers to be videotaped are expounded so sweepingly they could be used to justify striking down restrictions on recording nearly anything that happens, anywhere it can be recorded.

But a note of caution is in order. First Amendment cases tend to invite a special sort of bombast and embroidery, a romanticism inconsistent with what the cases actually *do* when the chips fall. One need only recall Justice Jackson's line from *West Virginia v. Barnette* that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion,"¹³⁰ or Justice Harlan's from *Cohen v. California* that "one man's vulgarity is another's lyric,"¹³¹ or Justice Black's that "no law means no law"¹³² (even when Justice Black joined Justice Blackmun's dissent in *Cohen*)¹³³—to see that not everything that is said in a First Amendment case can be taken to mean what it says.

Indeed, as the dueling list of permissible and impermissible motives reveals, all that can really be concluded with confidence from the Court's intertwined and enmeshed concerns with public values, on one side, and protection of uninhibited, robust, and wide-open debate on the other, is that things are murkier than any

¹²⁹ 679 F.3d 583, 595-96 (7th Cir. 2012) *cert. denied*, 133 S. Ct. 651, 184 L. Ed. 2d 459 (U.S. 2012)

¹³⁰ *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

¹³¹ *Cohen v. California*, 403 U.S. 15, 25 (1971)

¹³² *See, e.g., New York Times Co. v. United States*, 403 U.S. 713, 717-18 (1971) (Black, J., concurring) ("The Solicitor General has carefully and emphatically stated: Now, Mr. Justice (BLACK), your construction of * * * (the First Amendment) is well known, and I certainly respect it. You say that no law means no law . . .").

¹³³ *Cohen v. California*, 403 U.S. 15, 27 (1971) (Blackmun, J., dissenting).

individual decision pretends them to be. The real concern going forward—for those who care deeply about retaining a space for revisability in the society that is coming—is context.

Revisability, as a distinct and emphatically important value only arises in cases where it forms a component of the compelling government interest underlying a law—but where it does form such a component, those cases often come out in favor of revisability, or at least often balance it strongly against the countervailing interest in the dissemination of truthful information. These cases, which range across a constellation of areas—some of which were already discussed in preceding Parts—include cases concerning government secrets, restrictions on disclosing sensitive deliberations to the public, restrictions on child pornography, regulating what may occur within particular “forums,” and protecting against defamation and harassment.

Professor Volokh has argued that the problem with recognizing countervailing constitutional values to be set against uninhibited, robust, and wide-open public debate, is that the list of such values could be limitless and pretextual. The government could conjure rights out of the blue, and just “declare it to be my ‘civil right; to prohibit others from saying the truth about me behind my back.’”¹³⁴

But that danger appears overblown, especially when the constitutional value identified—the revisability principle—is *in* the cases. It does not appear out of thin air. The Court has affirmed and reaffirmed it, treating it as a compelling counterargument to the notion that anything can be said about anyone, at any time. When it can be observed over and over that a coherent discernable constitutional value—a concern with preserving the capacity of individuals to engage in revision of their identities throughout their lives by having certain information about them unkept, unrecorded, or made inaccessible—it is difficult to agree with Professor Volokh’s conclusion that scholars, lawyers, and courts can just make them up as they go.

The same counterargument can be made to Professor Volokh’s contention that recognizing and enforcing a countervailing right or principle in opposition to unfettered speech freedom will lead to a slippery slope problem. After all, the principle of revisability has already functioned as a discrete and recognizable justification for placing limits on individuals’ capacities to engage in unfettered information gathering and collection throughout American history.

¹³⁴ Volokh, *supra* note 7, at 1114.

Thus, the argument that recognizing limits on the ability of individuals to record anything they choose whenever they choose to will make it “much easier for people to accept ‘codes of fair reporting,’ ‘codes of fair debate,’ ‘codes of fair filmmaking,’ ‘codes of fair political criticism,’ and the like”¹³⁵ is probably overstated. Revisability has been a value integral to the First Amendment since its instantiation and yet we have not slipped down the slope. To the extent more laws may need to be passed—and the State may need to take a more active role in preserving revisability going forward—that would be an effort to preserve a constitutional equilibrium we already have.¹³⁶ It would not necessarily be a slide down an incline.

This also provides a full answer to Professor Bambauer’s contention that efforts “to preserve the information status quo . . . clash with the First Amendment.”¹³⁷ This superficially reasonable-sounding claim is in fact highly contestable. Preservation of the information status quo cannot clash with the First Amendment unless the First Amendment is understood in a particular way, namely, to unilaterally favor a certain distribution of information in society. Yet, the society in which we now live came after the Amendment was drafted, and involves technology the “Framers of the First Amendment surely did not foresee.”¹³⁸ The First Amendment cannot, of its own force, dictate what the information balance of an information society it was never designed to operate within should be. To understand that efforts to preserve the information status quo clash with the First Amendment is to put forward a theory of the First Amendment. But to the extent Professor Bambauer draws on First Amendment principles in making her claim that the First Amendment unilaterally favors a society that does not care much for revisability, this Article is an effort to show that is an uncharitable view. The revisability principle forms an integral part of the same First Amendment tradition in which Professor Bambauer’s information-affine First Amendment also resides.

¹³⁵ *Id.* at 1116.

¹³⁶ Kerr, *supra* note 4 (arguing that Fourth Amendment law is best explained as a persistent intergenerational effort to preserve the nation’s privacy equilibrium).

¹³⁷ Bambauer, *supra* note 6, at 60.

¹³⁸ *Bartnicki v. Vopper*, 532 U.S. 514, 518 (2001).

IV. THE IMPACT OF TECHNOLOGICAL CHANGE ON THE REVISABILITY PRINCIPLE

There is good reason to suspect that the information technologies that are coming are so different in degree from those that have come before that they are in fact different in kind. There is no doubt that technology is becoming more scrutinizing and more granular in its capacity to record, store, index and make accessible everything that happens—

Every search, query, click, page view, and link are logged, retained, analyzed, and used by a host of third parties, including websites (also known as “publishers”), advertisers, and a multitude of advertising intermediaries, including ad networks, ad exchanges, analytics providers, re-targeters, market researchers, and more. Although users may expect that many of their online activities are anonymous, the architecture of the Internet allows multiple parties to collect data and compile user profiles with various degrees of identifying information.¹³⁹

As such, the claim that technological self-protection, coupled with robust property rights will result in a world “where much of our privacy can be [meaningfully] protected”¹⁴⁰ seems aspirational, at the very least inconsistent with the facts that are developing—which reveal a world in which individuals feel less and less in control over what they disclose about themselves (let alone what is known about them) in everything that they do, think, say, and communicate.

There is no doubt that individuals feel that revisability is frequently at stake already in their use of digital technologies. “Internet users routinely hide information by making it invisible to search engines, using pseudonyms and multiple profiles, and taking advantage of privacy settings. Individuals rely almost reflexively on the obscurity created by these techniques to protect

¹³⁹ Omer Tene & Jules Polonetsky, *To Track or “Do Not Track”: Advancing Transparency and Individual Control in Online Behavioral Advertising*, 13 MINN. J.L. SCI. & TECH. 281, 282 (2012).

¹⁴⁰ Volokh, *supra* note 7, at 1111.

their privacy in daily life.”¹⁴¹ An insistent question raised by the fact that so many individuals feel a desire, even a need, to make themselves obscure on the Internet is whether it is preferable to live in a world where they must do so. The intercession of law more deeply into the digital world could significantly reduce the need to engage in costly efforts to keep one’s activities private, and thereby preserve revisability without forcing individuals to operate fearing that they have taken insufficient precautions to ensure that their obscurity has in fact been preserved.

The problems of the Internet moreover, now stand poised to cross the threshold. They stand on the verge of making the critical leap to the physical world. Internet-connected devices are becoming integrally enmeshed in the physical objects around us. Everything will have a microphone soon: not just the cellular phone, but the refrigerator, the television and the kitchen sink. All of these devices will be networked together, and connected to the cloud. This will be the society’s default setting—and it should be, as it will improve modern life enormously. But it will mean that everything around us, all the time, will either be capturing or capable of capturing everything that happens, and storing it somewhere. This will be a feature of every public and private place. It will be built into the walls of the world.

Exposure by itself does not necessarily impinge on revisability. This is the difference between Brandeis’s worry about newspapers and cameras 115 years ago and the problems posed by the technology of the world today. Mere capture is not enough to significantly impinge on revisability. It is *permanence* and easy access which are powerful enough to largely subsume and replace the need for human memory, that stand to impinge on revisability in a new and incredibly significant way. In the modern world, individuals already feel these pressures knowing anyone anywhere could take out a cell phone, snap a photo, upload it to the internet, and tag them in it. But even that procedure is infinitely more costly than the procedure that is coming, where Google Glass and other passive data collection-retention-indexing devices will become so pervasive, so built into everything, that anyone who wishes to will be able to find images, voice samples, jottings, meanderings, mutterings, eye-rolls, slips, and spills that have been recorded somewhere.

¹⁴¹ Woodrow Hartzog & Frederic Stutzman, *The Case for Online Obscurity*, 101 CAL. L. REV. 1, 2-3 (2013)

To the obscurantists, the technological pessimist-optimists who argue that in a world of so much data everything will be obscure, it should be noted that this vastly underestimates the power of computers and their cleverness. Searching an individual's name alongside even a few search terms will make it easy enough to find what one is looking for. Imagine a search for "[name's] most embarrassing moment." The algorithm will come up with something. Almost certainly, it will be embarrassing.

The interesting question all of this raises, is of course, whether individuals being infinitely adaptable, they will adapt to this world as well. Probably they will, but this is not a full answer to whether or not an individual's capacity to engage in revision will be impinged by these technological advances, or whether therefore his capacity to exercise significant autonomy will in some significant way be destroyed. Human beings lived for thousands of years in near starvation conditions, managing nonetheless to find happiness and fulfillment in that existence, at least episodically, at least often enough to perpetuate themselves. But we would hardly argue that we would choose to return to that world, where individual choice was so greatly diminished.

The fast evolution of modern technology and its interaction with the First Amendment is forcing us to confront choices about what law requires and what values the law should express. And the great irony of the modern debate is that those who favor unfettered First Amendment protection for the collection, retention, and dissemination information about everyone all the time, seem to be arguing against autonomy in the name of freedom. Perhaps at least all sides could agree that revisability is, in principle, valuable.

V. OPERATIONALIZING THE REVISABILITY PRINCIPLE

Suppose it was taken as true that the revisability principle was something the government had a compelling interest in protecting. Two consequences might flow from that. First, under existing First Amendment scrutiny analysis its regulations narrowly tailored to protect revisability would be constitutional. Second, and more importantly, however, it might be found that revisability is so compelling and so difficult to protect through narrowly tailored laws that allowing the government a reduction in scrutiny for laws intended to safeguard revisability may be appropriate. In particular, a balancing analysis that weighs the State's asserted interest against the degree of imposition on the speech interests affected might be superior to strict scrutiny where the regulation is meant to

safeguard revisability—even if the regulation is content-based.

This second method is the one I favor, but it does raise serious juridical questions. A threshold issue is the notion that it is no meaningful to try to parse content-based versus content-neutral regulation. The First Amendment possesses manifold strict scrutiny triggers, grounded in whether statutes make certain kinds of distinctions, either between content, viewpoint, or speaker in undertaking a regulation. Content-neutral regulations, on the other hand, need meet a only lower scrutiny threshold.

Not only has it become exceedingly difficult in recent decades to disentangle the difference between content-based and content-neutral regulations, but the methodology is poorly tailored where content- and speaker-based restrictions on speech would be the most effective means of eliminating harms to revisability. Individuals should be able to take photos of their friends in public, and store and play-back video and audio of what they see around them. But major institutions—the intermediaries who can control, store forever, cross-reference, index, and aggregate everything that is known—pose the greatest threat to revisability for precisely the reasons Justice Sotomayor gave in her concurrence in *United States v. Jones*. It is the fact that institutional players—in *Jones* the government, in the rest of the word the large data institutions that will become the power-brokers and robber-barons of the digital gilded age—can put all the pieces of the mosaic together, and creating a binding, permanent and inescapable portrait of a person, that makes that institution capable of impinging so profoundly on an individual's capacity to engage in revision.

Second, a balancing of interests approach, rather than strict scrutiny, in cases implicating serious revisability concerns, appears to be an appropriate path forward. Technological change is happening too rapidly for the Court to wed itself to principles articulated at high levels of generality, levels of generality that are, in retrospect, far too broad (on this measure, consider the far-too-sweeping language quoted in an earlier Part in *ACLU v. Alvarez*). Balancing is the methodology of the common law. It is a minimalist, all-things-considered approach. Ordinarily, under traditional rational basis review, Courts would not even permit themselves to meddle this far into legislative policymaking. As such, balancing strikes a balance of its own—between transforming the Courts into an obstacle to sensible legislation meant to safeguard important First Amendment values, and retaining their role as a meaningful break and a check on overeager

legislators bent on protecting individual privacy without considering all of the possible consequences. This partnership model of First Amendment development in cases where a threshold showing has been made that the justification for the law is the preservation of revisability, could navigate between the Scylla of judicial obstruction and the Charybdis of legislative excess.

A final note is that this new test would not alter the First Amendment's core. The courts are amply capable of distinguishing between cases where sex offenders are banned from Twitter (strict scrutiny, clearly unconstitutional) and a law requiring Twitter to delete "Tweets" upon the request of their creators (currently strict scrutiny, but should not necessarily be), or banning Google from storing Google Glass video on its servers forever (currently strict scrutiny, but should not necessarily be). Line drawing problems will arise. They always do. But this seems a better way forward than to simply give up on the idea that revisability is a significant constitutional value, one that increasingly, only legislation can realize.

CONCLUSION

The overarching purpose of this Article was to name and explain a latent constitutional value, the revisability principle, which is the notion that no individual should be tied forever to her identity at a particular moment in the past. An individual's identity should always, in principle, remain revisable. When certain social practices and technologies store information about individuals too sharply or permanently, or make it too accessible, or too public, it impinges on this principle and therefore on the right to revise one's identity through successive decisions.

This Article strove to show that the revisability principle is embedded in the constitution and has long been recognized as essential to the right to freedom of expression. It also sought to show that the capacity to revise one's identity is an essential strand of the Liberal justification for freedom. Personal autonomy is abridged when individuals lose the capacity to control, to some degree, their own destiny by fashioning a conception of themselves through successive decisions about who they wish to be through deliberate choices that they make. To the extent individuals must forever account for decisions in the distant past—people they in some sense no longer are—that freedom is powerfully constrained. Technologies and social practices that result in the permanent

storage, ready access, and widespread dissemination of past mistakes or even prior identities that people in the present hope to leave behind impinge on the principle of revisability.

This Article's ultimate aim was to reveal the centrality of the revisability principle to the right to freedom of speech protected by the First Amendment. For the judge confronting a legal regulation meant to safeguard revisability, a critical aspect of any proper First Amendment analysis must be consideration of the degree to which the regulation achieves these aims.