PRIVATE FREE SPEECH

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I. INTRODUCTION

Although not expressly protected by the Constitution, the concept of privacy has been judicially incorporated into a variety of constitutional rights. For example, the Fourth Amendment protects reasonable expectations of privacy in personal space from warrantless inspection by the government.[1] Fourteenth Amendment substantive due process insulates private decision-making on matters of family structure,[2] individual health care,[3] and child-rearing[4] from state interference. Expanding Second Amendment jurisprudence suggests there may be a right of privacy in asserting the individual right to bear arms.[5] And the list goes on.

Too little attention has been paid, however, to the right of privacy created by the First Amendment free speech clause. In fact, at first blush, the right of privacy and the right to free expression seem mutually exclusive.[6] The First Amendment guarantees the right to speak one's mind on a variety of topics and to disseminate speech of both great and inconsequential value to those who wish to hear it, while the right of privacy protects the ability to keep discrete personal facts away from public view. But the First Amendment free speech clause has been applied, although not explicitly so, to protect private

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[1] U.S. CONST. amend. IV; Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

[2] *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2599 (2016) (describing private decision-making rationale for extending constitutional protection to marriages by persons of the same sex).

[3] *See, e.g.*, Roe v. Wade, 410 U.S. 113, 153 (1973) ("This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.").

[4] Meyer v. Nebraska, 262 U.S. 390 (1923).

[5] Cases addressing the contours of the individual right to bear arms focus, at least in part, on the self-defense justification for the Second Amendment, in particular where a gun owner is protecting his home. *See, e.g.*, United States v. Chester, 628 F.3d 673 (4th Cir. 2010); *but see* Doe No. 1 v. Putnam County, 344 F. Supp. 3d 518 (S.D.N.Y. 2018) (rejecting the claim that public disclosure of names and addresses of handgun owners violated Fourteenth Amendment right of privacy).

[6] Scholars and courts have long observed that there is tension between the notion that speech should be free and accessible and the desire to keep one's communication, thoughts, and identity private. *See, e.g.*, Neil M. Richards, *The Puzzle of Brandeis, Privacy, and Speech*, 63 VAND. L. REV. 1295, 1296–97 (2010) ("Important litigation has also examined the constitutionality of privacy rights under the First Amendment, with the First Amendment usually prevailing. An important theme running throughout these cases and commentary is that privacy and speech are in irreconcilable conflict.").

communication in a variety of contexts. In this vein, the Supreme Court has employed free speech principles to strike down laws criminalizing the private possession of obscenity,[7] to establish a right of anonymous communication,[8] and to protect the identities of those who participate in political parties and organizations.[9] Thus, there is an implicit privacy component to First Amendment free expression doctrine. Indeed, the First Amendment does not guarantee an audience, but it does guarantee that the audience can remain unknown.[10]

Moreover, when privacy concepts are applied to speech, privacy can be speech-enhancing and can therefore promote the free marketplace of ideas the First Amendment desires to create. Particularly when speech is communicated in the context of private relationships—between attorneys and clients,[11] therapists and patients,[12] or police and confidential informants,[13] for instance—protection against disclosure of the expression actually enables the expression to occur. The relationship between free speech and privacy is therefore symbiotic and mutually reinforcing.

This Article will explore the notion that free speech can in fact be private. It begins in Part II with a discussion of the historical underpinnings for the protection of free expression and a summary of First Amendment cases that embrace the concept of private free speech. The Article then moves in Part III to a discussion of how privacy, as a normative ideal, promotes the goals of self-realization and a free expression marketplace that the First Amendment exists to serve. The Article then concludes that, as privacy jurisprudence and theory is developed, the First Amendment free speech clause ought to be considered alongside the Second, Fourth, and Fourteenth

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[7] Stanley v. Georgia, 394 U.S. 557, 568 (1969).

[8] McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 342 (1995) ("[A]n author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.").

[9] Buckley v. Valeo, 424 U.S. 1, 15 (1976).

[10] *See* NAACP v. Ala. ex rel. Patterson, 357 U.S. 449, 460 (1976).

[11] Upjohn, Co. v. United States, 449 U.S. 383, 389 (1981) ("The attorney–client privilege is the oldest of the privileges for confidential communications known to the common law. Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client." (internal citations omitted)).

[12] Jaffee v. Redmond, 518 U.S. 1, 10 (1996) ("Effective psychotherapy, by contrast, depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. . . . For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.").

[13] Roviaro v. United States, 353 U.S. 53, 59 (1957) ("The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.")

Amendments as a source of privacy protection, particularly where speech and expressive conduct are at issue.

II. AN OVERVIEW OF SPEECH AND PRIVACY

The concepts of free speech and privacy are generally conceived as creating competing constitutional norms.[14] The First Amendment, on the one hand, protects the right to expel one's thoughts, ideas, and opinions into the free speech marketplace, particularly where the press and public figures are concerned.[15] If accepted, this view of the right of free expression is necessarily outward-looking, defining in some sense the relationship between one person's internal machinations and the ongoing collective, societal, and political discourse. Nowhere is this view more apparent than in the work of Alexander Meiklejohn, who envisions the First Amendment in its entirety as protecting the democratic decision-making process.[16] In contrast, the notion of privacy is generally inward-looking, permitting individuals or groups of individuals to shield themselves from either society's curiosity or the government's watchful eye, or both. Simply put, the First Amendment protects the right to know, and privacy protects the right not to be known.[17]

But there are aspects of the right of free speech that function to shield individual or organizational thoughts, activities, and communication from external forces. Indeed, speech is not truly free if it can be seized, reviewed, cataloged, and disseminated by the government without sufficient cause. The threat of state surveillance measurably chills speech, either driving it underground or altogether out of existence.[18] For certain kinds of expression—unpopular political speech, intimate interpersonal disclosures, sexuality, and the like—the loss of autonomy in determining when, where,

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[14] *See, e.g.*, Jeffrey Rosen, *Free Speech, Privacy, and the Web that Never Forgets*, 9 J. TELECOMM. & HIGH TECH. L. 345, 345 (2011) ("[N]ew media technologies are presenting wrenching tensions between free speech and privacy."); 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, 1050–51 (2000).

[15] *See* Nadine Strossen, *Protecting Privacy and Free Speech in Cyberspace*, 89 GEO. L.J. 2103, 2103–04 (2001). In this important and visionary piece, published in the early days of the Internet, Prof. Strossen highlights the tensions between a free and robust information superhighway and the protection of private information. But she also notes that there are obvious situations—including those discussed in this paper—where the two sets of rights are "directly reinforcing" and that "all of us who value free speech have a real stake in preserving robust privacy as well." *Id.* at 2106.

[16] For a comprehensive discussion of Meiklejohn's ideas, and their ideological flaws, see Martin H. Redish & Abby Marie Mollen, *Understanding Post's and Meiklejohn's Mistakes: The Central Role of Adversary Democracy in the Theory of Free Expression*, 103 NW. U. L. REV. 1303 (2009).

[17] In a comparative vein, the European tradition extends the right of privacy beyond simply the right to keep certain facts about oneself or certain aspects of one's interpersonal life away from public disclosure and also includes the right to have certain private facts completely forgotten. *See, e.g.*, Ravi Antani, *The Resistance of Memory: Could the European Union's Right to Be Forgotten Exist in the United States?*, 30 BERKLEY TECH. L.J. 1173 (2015).

[18] Strossen, *supra* note 15, at 2106.

how, and to whom the speech is communicated is enough to destroy its creation in the first place.[19] Privacy, therefore, is in some sense a critical component of free speech: it contributes to a climate in which creativity, intimacy, innovation, and self-development are not only encouraged, but permitted to thrive.

A. Justifications for the Right of Free Speech

A panoply of purported rationales supports the protection of individual expression. Some of these justifications—like the "marketplace of ideas" concept—characterize free expression as an outward-looking ideal, meant to be shared by the collective citizenry.[20] But other justifications, including most prominently the self-fulfillment rationale advanced by Professor Thomas Emerson, expose the interconnectedness of privacy and speech.[21] Understanding the reasons that uphold our protection of free expression leads to significant insights about the relationship between the right to speak and the right to control dissemination of one's private thoughts and actions.

1. The Self-Fulfillment Rationale

In Emersonian terms, speech is conceived as the metaphysical genesis of human identity and the mechanism by which individuals become fully realized, functional, and relational beings:

> The right to freedom of expression is justified first of all as the right of an individual purely in his capacity as an individual. It derives from the widely accepted premise of Western thought that the proper end of man is the realization of his character and potentialities as a human being. Man is distinguished from other animals principally by the qualities of his mind. He has powers to reason and to feel in ways that are unique in degree if not in kind. He has the capacity to think in abstract terms, to use language, to communicate his thoughts and emotions, to build a culture. He has powers of imagination, insight and feeling. It is through development of these

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[19] *Id.*

[20] *See, e.g.*, Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821, 821 (2008) ("If any area of constitutional law has been defined by a metaphor, the First Amendment is the area, and the 'marketplace of ideas' is the metaphor. Ever since Justice Holmes invoked the concept in his Abrams dissent, academic and popular understandings of the First Amendment have embraced the notion that free speech, like the free market, creates a competitive environment in which the best ideas ultimately prevail.").

[21] Thomas Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 879–81 (1963).

> powers that man finds his meaning and his place in the world.[22]

Expanding upon Emerson's theory, Professor Martin Redish summarizes the idea that free expression promotes self-development as follows:

> [T]he constitutional guarantee of free speech ultimately serves only one true value, which I have labeled "individual self-realization." This term has been chosen largely because of its ambiguity: it can be interpreted to refer either to development of the individual's powers and abilities—an individual "realizes" his or her full potential—or to the individual's control of his or her own destiny through making life-affecting decisions—an individual "realizes" the goals in life that he or she has set. In using the term, I intend to include both interpretations. I have, therefore, chosen it instead of such other options as "liberty" or "autonomy," on the one hand, and "individual self-fulfillment" or "human development," on the other. The former pair of alternatives arguably may be limited to the decisionmaking value, whereas the latter could be interpreted reasonably as confined to the individual development concept.[23]

Emerson and Redish's argument that speech is integral to self-realization is not purely abstract. In fact, it has gained traction in the courts. For example, Justice Brandeis, in his now famous dissent in *Olmstead v. United States*, noted that:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.[24]

And even more recently, Justice Kennedy waxed poetic about the significant, symbiotic connection between the right to engage in free expression and the fundamental human condition:

> The government "cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts." First Amendment

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[22] *Id.* at 879.

[23] Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593–94 (1982).

[24] 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), *overruled in part by* Katz v. United States, 389 U.S. 347 (1967), *and* Berger v. New York, 388 U.S. 41 (1967).

> freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought.[25]

Indeed, the Court's early free speech jurisprudence embodied this understanding that the right of free expression was at the core of personhood in the American republic.[26]

The self-realization rationale for protecting the free exchange of ideas protects, at its base, private, autonomous intellectual functioning. It treats each human brain as its own marketplace, capable of seeking and sorting inputs and prone to greater development and fulfillment by the process of producing thought.[27] Privacy—in a laissez-faire sense—therefore promotes the ability of each individual to create and manage her own self-development absent interference by outside governmental forces.

2. The Democratic Participation Rationale

Alexander Meiklejohn, the architect of the democratic participation theory for protecting free speech, summarized the critical role the free exchange of ideas plays in fostering self-governing democracy.[28] To achieve legitimate self-governance, according to Meiklejohn, individuals must have access to all information necessary to inform their voting decisions and choices.[29] As Redish and others have observed, Meiklejohn's democratic participation theory places the emphasis on the listener, as opposed to the speaker, and promotes the right to hear and receive ideas as the quintessential component of free speech protection.[30]

The outward thrust of Meiklejohn's theory is one of collective benefits. As the argument goes, the democratic state functions at its highest and best virtue when its participants are not only fully self-realized and self-actualized, in Emersonian terms, but are capable of making more rational,

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[25] Ashcroft v. Free Speech Coal., 535 U.S. 234, 253 (2002) (quoting Stanley v. Georgia, 394 U.S. 557, 566 (1969)).

[26] For a detailed discussion of the notion that speech is connected to being, see Alan K. Chen, *Instrumental Music and the First Amendment*, 66 HASTINGS L.J. 381, 403–10 (2015) (discussing the government participation, truth-seeking, and self-realization functions of the right of free expression).

[27] *Id.* at 435.

[28] *See* Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 263 (1961).

[29] ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 25–26 (1948).

[30] Redish & Mollen, *supra* note 16, at 1311; MEIKLEJOHN, *supra* note 29, at 25 (arguing that the "ultimate interest [of the First Amendment] is not the words of the speakers, but the minds of the hearers").

informed, and normatively superior decisions.[31] In this regard, Meiklejohn's notions of free speech are the logical extension of Emerson's individualized focus. Whereas Emerson emphasizes the importance of speech to individual intellectual and ethical development, Meiklejohn emphasizes the importance of intellectual and ethical people to the development of democratic society.[32]

Because he emphasized the collective over the individual, Meiklejohn spoke little of the personal right of privacy at stake when speech is aired publicly.[33] In fact, while Meiklejohn recognized that not every participant in a vibrant democracy would participate in public debate, he held up the public process for weighing ideas as the overriding virtue of the First Amendment.[34] But Meiklejohn's democratic participation theory implicitly supports the importance of privacy as a component of robust political debate.[35] He clearly supported an egalitarian view of public ideology in which no ideas—good or bad, dangerous or safe, right or wrong—are valued over others in terms of their entitlement to constitutional protection.[36] To be sure, "the reason for this equality of status in the field of ideas lies deep in the very foundations of the self-governing processes. When men govern themselves, it is they—and no one else—who must pass judgment upon unwisdom and unfairness and danger."[37] As such, while Meiklejohn dismissed self-motivated private speech as undeserving of constitutional status,[38] he inherently embraced the notion that ideas formed privately or communicated anonymously are still valid contributions to the protected public discourse.

Drawing on Meiklejohn's notions of political participation, ardent free speech defenders like Nadine Strossen have noted the speech-enhancing qualities that privacy protection provides.[39] Individuals are more likely to participate in the formation of public opinion when they do not feel personally at risk for their beliefs.[40] As cases like *NAACP v. Alabama ex rel.*

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[31] *See* ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 75 (1960).

[32] *Id.*

[33] *See* Redish & Mollen, *supra* note 16, at 1313 ("Put simply, because he considered 'excessive individualism' to be toxic to democracy, Meiklejohn concluded that speech pursuing an individual interest, rather than the common good, is beyond the scope of the First Amendment all together." (internal citations omitted)).

[34] MEIKLEJOHN, *supra* note 29, at 25–26.

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] For a discussion of Meiklejohn's views on private speech, which he defined as being in the speaker's self-interest as opposed to for the collective benefit, see Redish & Mollen, *supra* note 16, at 1313–15.

[39] Strossen, *supra* note 15, at 2106–11.

[40] *Id.*

Patterson[41] highlight, allowing the government unfettered access into ongoing, controversial, or progressive political debates stifles the type of democratic engagement the First Amendment exists to promote.[42] As a result, privacy is a critical component of free expression, even if the expression itself is limited to matters of overall public concern.

B. Cases Discussing Speech and Privacy

1. *Stanley v. Georgia*

While the Supreme Court has not explicitly addressed the interrelatedness of speech and privacy, its decisions lend some credence to the idea. For example, the Court in *Stanley v. Georgia*[43] noted that the First Amendment protects the private consumption of ideas and images that otherwise fall outside the realm of constitutional protection. At issue in *Stanley* was whether the state could prosecute an individual for possessing (and presumably viewing) obscene, sexually-explicit videos in his own home.[44] Stanley was suspected of unlawful bookmaking, and officers conducted a search of his home to locate evidence of that crime.[45] Finding none, they instead located a stash of pornographic material, including videos alleged to meet the legal test for obscenity.[46]

Stanley asserted a right to be free from state interference into his home library, which the Court characterized as being protected by the First and Fourteenth Amendments.[47] But in siding with Stanley, the Court noted that the protection against what amounted to state-sponsored mind control originated from "[o]ur whole constitutional heritage."[48] It noted that "the individual's right to read and or observe what he pleases . . . [is] so fundamental to our scheme of individual liberty" that no governmental justification could support criminalizing it.[49]

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41 357 U.S. 449 (1959) (holding that a state order to disclose NAACP member lists as public records violated the First Amendment free association clause).

42 *Id.* at 462–63 ("[O]n past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility. Under these circumstances, we think it apparent that compelled disclosure of petitioner's Alabama membership is likely to affect adversely the ability of petitioner and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate . . . .").

43 394 U.S. 557 (1969).

44 *Id.* at 559.

45 *Id.* at 558–59.

46 *Id.*

47 *Id.* at 565.

48 *Id.*

49 *Id.* at 568.

Scholars have long wrestled with the impact of *Stanley* on privacy, given its spatial and decisional dimensions.[50] Some argue that *Stanley* is a mere restatement of the "king of the castle" doctrine borrowed from Fourth Amendment search and seizure jurisprudence and is therefore limited to existing privacy rights already attendant to home ownership and residential dwellings.[51] Indeed, the Supreme Court itself has stated as much, characterizing *Stanley* as "hardly more than a reaffirmation that a man's home is his castle."[52] Still others argue that *Stanley* makes a broader contribution to the notion of individual autonomy and the protection afforded to a person's private thought process.[53] Regardless of how one interprets *Stanley*, it affirms that the First Amendment includes a privacy component and protects either private spaces or private thoughts, or both, from government interception.

2. The Untethered Right of Autonomous Thinking: Brandeis's Dissent in *Olmstead v. United States*

Justice Brandeis is widely considered to be the architect of privacy in the U.S. legal system.[54] His views on the right of privacy were initially aired in his influential 1890 law review article, *The Right of Privacy*, and later crystalized in his dissent in *Olmstead v. United States*.[55] Underlying his understanding of the privacy concerns at work in *Olmstead* was his belief that conversations between private citizens ought to remain shielded from governmental invasion.[56] More fundamentally, Justice Brandeis understood the privacy-related individual rights—those derived from the Fourth and Fifth Amendment—to protect not only people, spaces, and their effects, but the communication that occurs between individuals regardless of spatial

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[50] *See, e.g.*, Claudia Tuchman, *Does Privacy Have Four Walls? Salvaging* Stanley v. Georgia, 94 COLUM. L. REV. 2267 (1994).

[51] *See, e.g.*, Marc Jonathan Blitz, Stanley *in Cyberspace: Why the Protections of the First Amendment Should be More Like the Fourth Amendment*, 62 HASTINGS L.J. 357, 361 (2010).

[52] Paris Adult Theatre I v. Slaton, 413 U.S. 49, 66 (1973). Since its decision in *Stanley*, the Court has considered the question of whether the First Amendment protects private possession of obscenity in the mail (United States v. Riedel, 402 U.S. 351 (1971)); in a suitcase (United States v. Thirty-Seven (37) Photographs, 402 U.S. 363 (1971)); at a border crossing (United States v. 12 200-Foot Reels, 413 U.S. 123 (1973)); and displayed to consenting adults in a private theater (*Paris Adult Theatre I*, 413 U.S. 49). Deciding each instance in the negative, the Court took a narrow view of *Stanley* and limited its protection, at least spatially, to the home.

[53] For a summary of these arguments, see Blitz, *supra* note 51, at 382–86.

[54] *See* Samuel D. Warren & Louis D. Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 3 (1890). In contrast, the European legal tradition more specifically embraces a right of privacy, both constitutionally and statutorily. *See* Ronald J. Krotoszynski, Jr., *Reconciling Privacy and Speech in the Age of Big Data: A Comparative Legal Analysis*, 56 WM. & MARY L. REV. 1279, 1291–1314 (2015).

[55] 277 U.S. 438 (1928).

[56] *See id.* at 475–76 (Brandeis, J., dissenting).

dimension.[57] Although his principle concern was with the scope of the police search, his dissent can also be read as embodying an implicit First Amendment, speech-protective component:

> The evil incident to invasion of the privacy of the telephone is far greater than that involved in tampering with the mails. Whenever a telephone line is tapped, the privacy of the persons at both ends of the line is invaded, and all conversations between them upon any subject, and although proper, confidential, and privileged, may be overheard. Moreover, the tapping of one man's telephone line involves the tapping of the telephone of every other person whom he may call, or who may call him. As a means of espionage, writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wire tapping.[58]

Although not tethered to any particular constitutional right, Justice Brandeis's understanding of privacy evokes speech-related and relational components vis-à-vis government interception. His concern was not that compromising the privacy of free expression would stunt self-realization or informed participation in a democracy, but rather that permitting the government to invade speech intended for private parties would transform the state into a surveillance superpower.[59] Justice Brandeis therefore viewed both privacy and free expression as checks on government action, rather than as integral to personhood, further demonstrating the mutually-reinforcing objectives served by the protection of both speech and privacy.[60]

3. *Riley v. California*

In this ground-breaking case, the Supreme Court explicitly recognized that all individuals, including even those accused of heinous crimes, have a constitutionally-protected privacy right in the information contained in their cell phones.[61] As Justice Roberts so eloquently described in his majority opinion, cell phones contain a wide range of information integral to a person's life: banking records, political news apps, medical data, locations

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[57] *Id.* at 473 ("Subtler and more far-reaching means of invading privacy have become available to the government. Discovery and invention have made it possible for the government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet.").

[58] *Id.* at 475–76.

[59] *Id.*

[60] *See* Richards, *supra* note 6, at 1324–25 (discussing both Justice Brandeis' view that government regulation of expression should be used sparingly and his concerns that governmental overreach would compromise the democratic process).

[61] Riley v. California, 573 U.S. 373 (2014). (holding that individuals have a privacy expectation in their cell phones and that police must obtain a warrant before searching a cell phone seized incident to a lawful arrest).

frequented by the owner, contacts for friends and relatives, Web MD search history, and so on.[62] Indeed, "[m]odern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans the privacies of life."[63]

The overlap between speech and privacy in *Riley* is intuitive and obvious. Individuals use cell phones to spur communication with friends and associates, with news agencies, with banks, doctors, and lawyers, and with complete strangers halfway around the globe.[64] Indeed, cell phones and smart phones are the primary method of communication for most Americans.[65] Over ninety-six percent of Americans own a cell phone, and more than twenty percent use their smart phones as their exclusive means of internet access.[66] Protecting the sanctity of a person's cell phone from unwarranted and unjustified governmental surveillance therefore protects not only existing speech already created and exchanged, but also the most significant channel for the communication of free expression.

4. Anonymous Speech Cases

Among the rights protected by the First Amendment from overbroad governmental regulation is the right of association for the purpose of engaging in political activity.[67] Undergirding this right is the concept that collective action resonates more effectively than individual speech.[68] Indeed, "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association."[69] In this regard, the right of free expression and the right to free association are inextricably linked; the individual right to speak out on public and political topics is even stronger when a group of individuals chooses to speak collectively for a common purpose.[70]

When the speech itself is political in nature, these rights are further intensified. Embedded in the First Amendment's guarantee of free expression is the notion that core political speech is deserving of the utmost protection,

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[62] *Id.* at 395–96.

[63] *Id.* at 403 (citations omitted).

[64] *See id.*

[65] Frank Newport, *The New Era of Communication Among Americans*, GALLUP NEWS (Nov. 10, 2014), https://news.gallup.com/poll/179288/new-era-communication-americans.aspx.

[66] *See Mobile Fact Sheet*, PEW RES. CTR. (June 12, 2019), https://www.pewinternet.org/fact-sheet/mobile/.

[67] *See, e.g.*, Citizens Against Rent Control/Coal. for Fair Hous. v. Berkeley, 454 U.S. 290, 294 (1981) ("[T]he practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process.").

[68] *Id.*

[69] NAACP v. Ala. ex rel. Patterson, 357 U.S. 449, 460 (1958).

[70] *See, e.g.*, NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982).

particularly when the content of the speech is controversial or unpopular.[71] In fact, "a principal 'function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.'"[72] This core function of the First Amendment produces an ironic yet important result: it is the potentially offensive and unpopular expression that is most deserving of constitutional protection.[73]

Where collective speech focuses on content protected by the First Amendment, the federal courts have also protected collective political activity from government overreaching and harassment. For example, in *NAACP v. Claiborne Hardware Co.*, the Supreme Court acknowledged the First Amendment protection that adheres to forceful political action in support of a boycott: "[s]peech does not lose its protected character . . . simply because it may embarrass others or coerce them into action."[74] Similarly, in *State of Missouri v. National Organization for Women, Inc.*,[75] the Eighth Circuit extended First Amendment protection to an organized state-wide boycott designed to pressure Missouri into ratifying the Equal Rights Amendment. So too have courts protected privileged associational information from disclosure in response to government discovery requests.[76] This is so because the compelled disclosure of political associations can impose a strong chilling effect on participation in political campaigns.[77] Disclosures of political affiliations and activities that have a

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[71] *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

[72] *Id.* at 408–09 (citing Terminiello v. Chicago, 337 U.S. 1, 4 (1949)).

[73] Consistent with this principle, the Supreme Court has recognized only three limited categories of expressive material not deserving of First Amendment protection: (1) "fighting words," or words which are likely to provoke an immediate, violent response, Brandenburg v. Ohio, 395 U.S. 444 (1969); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); (2) child pornography, New York v. Ferber, 458 U.S. 747 (1982); and (3) obscenity, Miller v. California, 413 U.S. 15 (1973). The Supreme Court has also extended only limited First Amendment protection to libel and slanderous statements that are false or were published with reckless disregard for their truth. *See* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988); Time, Inc. v. Hill, 385 U.S. 374 (1967); New York Times Co. v. Sullivan, 376 U.S. 254 (1964). Absent the application of these exceptions, the First Amendment prohibits governments from enacting a prior restraint on the right to engage in protected expression and expressive conduct by criminally prosecuting individuals who choose to exercise that right. *See* Dombrowski v. Pfister, 380 U.S. 479, 487 (1965) ("The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure."); *see also* Wisconsin v. Mitchell, 508 U.S. 476 (1993) (recognizing that hate crime sentencing enhancement may enact a chilling effect on the expression of unpopular beliefs).

[74] *Claiborne*, 458 U.S. at 910.

[75] 620 F.2d 1301 (8th Cir. 1980).

[76] *See, e.g.*, Perry v. Schwarzenegger, 591 F.3d 1147 (9th Cir. 2009).

[77] *See, e.g.*, Buckley v. Valeo, 421 U.S. 1, 64 (1976) ("[W]e have repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment."); AFL–CIO v. FEC, 333 F.3d 168, 175 (D.C. Cir. 2003) ("The Supreme Court has long

"deterrent effect on the exercise of First Amendment rights" are therefore subject to exacting scrutiny.[78] In determining whether to apply associational privilege, courts generally conduct a balancing test, weighing the harm of disclosure against the necessity for the information.[79]

As these cases make clear, the ability to privately associate without fear of spying and retribution promotes robust and open dialogue about matters of societal and political importance. Their outcomes resound the rationales of self-realization and democratic participation Emerson and Meiklejohn so forcefully advanced in the middle decades of the Twentieth Century.[80] Moreover, they remind us that some ideas, thoughts, and beliefs are too risky to be aired out publicly, making the right of free expression in those instances dependent on an implicit right of privacy.

B. What is Privacy?

What do we mean when we discuss privacy? It is a tricky concept, indeed, and one the courts have not carefully articulated. In the common law context, privacy can be addressed by civil tort liability for interference into private communications or relationships by third parties not acting on the government's behalf.[81] But in the constitutional sense, privacy is more equated with relational and personal autonomy insulated from government invasion. For example, in *Stanley*, privacy meant not only the right to control one's own thoughts, attitudes, and beliefs, but also the right to autonomously direct the inputs necessary to control one's thinking.[82] If a man needs to view obscenity in his living room to understand the mysteries of life, so be it, says the Supreme Court.[83] In a more defined sense, the substantive due process brand of privacy extends to various personal and intimate matters, including the right to marry a person of one's own choosing;[84] the right to procreate,[85] or not to procreate;[86] the right of parents to educate their children;[87] the right

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recognized that compelled disclosure of political affiliations and activities can impose just as substantial a burden on First Amendment rights as can direct regulation.").

[78] *Buckley*, 424 U.S. at 64–65.

[79] NAACP v. Ala. ex rel. Patterson, 357 U.S. 459, 463–64 (1958).

[80] *See* Emerson, *supra* note 21, at 879–81; Meiklejohn, *supra* note 28, at 253–54.

[81] Both state common and statutory law contain tort causes of action for the publication of private facts, for example. *See, e.g.*, Templeton v. Fred W. Albrecht Grocery Co., 72 N.E.3d 699 (Ohio Ct. App. 2017) (identifying elements of the publication of private facts tort in Ohio).

[82] Stanley v. Georgia, 394 U.S. 557, 565–66 (1969).

[83] *See id.*

[84] *See* Loving v. Virginia, 388 U.S. 1 (1967).

[85] *See* Skinner v. Oklahoma, 316 U.S. 535 (1942).

[86] *See* Griswold v. Connecticut, 381 U.S. 479 (1965) (protecting the right to purchase contraception).

[87] *See* Meyer v. Nebraska, 262 U.S. 39 (1923).

to make decisions about one's own body and health;[88] and the right to enter into private, intimate relationships, even those branded as morally specious by some people.[89]

Both the right to access information and the right of privacy are fundamental. In concluding that the private possession of obscenity could not be criminalized in *Stanley*, the Supreme Court expressly labeled the right to view even worthless material as "fundamental to our free society."[90] Equally fundamental is the right of privacy inherent in the notion of substantive due process.[91] In fact, in order to qualify for protection under the substantive due process concept of privacy, a right must be "fundamental" and "implicit in the concept of ordered liberty."[92] Thus, if a right is governed by constitutional privacy protection under either the First Amendment or through substantive due process, it is for all intents and purposes a fundamental right.

In fact, *Stanley* itself stands for the proposition that what may be explicitly excluded from one component of the First Amendment, e.g., obscenity, may nevertheless be protected by another, e.g., the right to think and view material on any subject.[93] The very reason obscenity is excluded from the First Amendment is because it is presumed to have no redeeming social value.[94] This says nothing of what private value it may have to the individual or even whether society must agree with that value to find its private possession and acquisition worthy of constitutional protection. Although the First Amendment may not shield the material itself as protected speech, it nevertheless protects the fundamental right to access, possess, and view the material as an aspect of privacy. It is this form of privacy with which this Article is concerned.

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[88] *See* Rochin v. California, 342 U.S. 165 (1952) (protecting the right to bodily integrity); Roe v. Wade, 410 U.S. 113 (1973) (affirming the right to an abortion); Cruzan v. Dir. of Mo. Dept. of Health, 497 U.S. 261 (1990) (identifying the right to refuse unwanted medical treatment).

[89] *See* Lawrence v. Texas, 539 U.S. 558 (2003) (upholding the right to sexual privacy).

[90] *See* Stanley v. Georgia, 394 U.S. 557, 564, 568 (1969) (defining right to read and observe as "*fundamental* to our scheme of individual liberty") (emphasis added).

[91] *See id.* at 564 ("[A]lso *fundamental* is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy." (emphasis added)); *see also* Lawrence, 539 U.S. at 565 ("[T]he protection of liberty under the Due Process Clause has a substantive dimension of *fundamental* significance in defining the rights of the person." (emphasis added)).

[92] *See Roe*, 410 U.S. at 152.

[93] *See Stanley*, 394 U.S. at 560, 567 (recognizing that while obscenity itself is not protected by the First Amendment, the private possession of obscenity falls within constitutional coverage); *see also* Boos v. Berry, 485 U.S. 312 (1988) (finding that a statute which did not violate equal protection still violated the First Amendment).

[94] *See, e.g.*, Memoirs v. Massachusetts, 383 U.S. 413, 419 (1966).

III. PRIVACY AND FREE EXPRESSION

By now, it should be apparent that, in certain contexts, speech and privacy are mutually-reinforcing and promote the synergetic normative values of autonomy, individuality, and government restraint. This observation is not entirely new. Other scholars—Professors Nadine Strossen[95] and Russell Weaver,[96] for example—have attempted to bridge the theoretical divide between the private and the public components of the First Amendment right to free expression.

But, as Professor Neil Richards points out in his insightful article on Justice Brandeis, it can be difficult to reconcile the potentially competing values embodied by the rights of privacy and free speech without redefining traditional notions of privacy.[97] Carefully analyzing the work of Justice Brandies, he argues that the right of privacy is better understood to encompass only a right to "intellectual privacy."[98] He uses this term to mean "the ability to develop ideas and beliefs away from the unwanted gaze or interference of others."[99] Absent the ability of an individual to maintain secrecy around ideas, thoughts, and beliefs that are not fully formed, Professor Richards worries that vigorous public debate will be stifled, because people will generally have nothing new to say.[100] He focuses far more seriously on the process by which ideas are developed than the ideas themselves.[101] Given the need for a private, deliberative, sanctified intellectual process, he concludes: "[f]ree speech thus requires some measure of intellectual privacy to be effective."[102]

Professor Richards' theory, derived from the writings of Justice Brandeis, sounds awfully similar to Emerson's self-realization justification for the First Amendment. Both Richards and Emerson seek to protect the private, individualized thought process and the freedom of the individual to come to his own conclusions based upon a self-curated set of inputs and outputs.[103] Richards, drawing on Brandeis, calls this privacy; Emerson calls it speech. But both lines of thinking are united in their belief that the First Amendment includes a privacy component that protects private thoughts from external surveillance.

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[95] *See* Strossen, *supra* note 15.

[96] *See generally* RUSSELL L. WEAVER, FROM GUTENBERG TO THE INTERNET: FREE SPEECH, ADVANCING TECHNOLOGY AND THE IMPLICATIONS FOR DEMOCRACY (2013).

[97] Richards, *supra* note 6, at 1298–99.

[98] *Id.*

[99] *Id.* at 1347.

[100] *Id.* at 1348.

[101] *Id.*

[102] *Id.* at 1299.

[103] *Id.* at 1347.

IV. CONCLUSION

Free speech and privacy are not mutually exclusive concepts that are always in tension with one another, but instead can work symbiotically to promote individual liberty. People are more likely to exercise their right to free speech when protected by the belief that their expression will remain private, or, at the very least, that the decision as to whether to share their expression rests solely with them. In this way, in certain circumstances, privacy is a necessary precondition to the creation of expression. The evidentiary privileges that attach to certain relationships—attorneys and clients, for example, or husbands and wives—are strong proof of this phenomenon.[104] Privacy is therefore overwhelmingly speech-positive and speech-enhancing.

So too is the First Amendment right of free expression protective of individual and relational privacy. As pointed out by Emerson, Meiklejohn, and others, the First Amendment at its core protects human identity, both autonomously and in relation to others who function in democratic systems and spaces. In this way, speech and privacy are fundamentally interconnected and are not really competing at all.

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[104] *See supra* notes 11–13.