

QUESTIONING THE U.S. CONSTITUTION:  
APPLYING EUROPE'S "RIGHT TO BE FORGOTTEN" TO THE UNITED STATES

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by

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## **ABSTRACT**

The innovative nature of the internet has created an immense free flow of information throughout the world. The idea of freedom of speech online entails that internet users have all discretion in posting, sharing and searching for content suitable to their likes and needs. The freedom of information and communication that the digital age allows for has been challenged by many governments with restrictive laws and regulations. This paper explains how the implementation of Europe's "right to be forgotten" in its entirety to the United States could infringe the Constitution's First Amendment's freedom of speech clause. The "right to be forgotten" is a data protection, regulation privacy right that allows internet users to ask for removal of content if the information is inadequate, irrelevant or excessive. I argue that the "right to be forgotten" in its pure form not only undermines the legal framework set by the United States, but it also poses moral issues in relation to harm and the free flow of information when determining what content is of importance to the society. The "right to be forgotten" imposes data protection laws that promote censorship through the internet in the hopes of securing the privacy of the individual. In the United States, the right to privacy and freedom of speech are two elements salient to the citizen yet the right to privacy can fall short of importance when facing freedom of speech issues. Censorship, filtration and control online are all factors that courts have struggled with in the application of the Constitution's principles and provisions. In addressing the implementation of the "right to



be forgotten," this paper also determines ways that modern and future developments of such right could focus on constitutional sound regulations.

## I. INTRODUCTION

The United States prides itself on providing and protecting freedom of speech set forth by the First Amendment of the Constitution. Freedom of speech is a valued right that has developed through the years and has recently been challenged by the digital age. The internet is a fairly new phenomenon that raises many legal and moral questions when determining regulations. Countries all over the world are struggling to control the abundance of information and have presented restrictive methods to filter out information without allowing citizens to make informed decisions of their own. The purpose of these regulations can have an array of reasons depending on bureaucratic policies. Regulations may be imposed to protect the government from being exposed by private citizens and can also protect the citizens from receiving information that may not be in conjunction with the ideas of the current government, and overall regulations on the internet may be imposed to secure the privacy and the security of those individuals that choose to participate in the flow of information that the internet allows for.

Like many other countries and regions, the European Union has followed in the same steps when it comes to forming regulations suitable to its citizens and the use of the internet, by trying to impose restrictions on the information made available. The European Union has taken the lead in trying to regulate the internet for the purpose of securing the privacy of its citizens and dividing the idea of freedom of speech online. Taking into consideration that the United States shares many core values of common law and morality with Europe, it is therefore important to consider them as a point of comparison as the “right to be forgotten” is presented. The restrictions that Europe presents are provided to secure the right of privacy to the citizen, a core value that the

United States also upholds. The case presented focuses on the implementation of Europe's "right to be forgotten," in its entirety to the United States and how it could potentially infringe the Constitution's First Amendment's freedom of speech clause. Since its passage many citizens, along with scholars, have either criticized the right or have upheld it to be a basis for a future American Right.

Various scholars, politicians and industry leaders have observed the “right to be forgotten” and have been both concerned with the privacy claims it entails and the freedom of speech that it chooses to suppress considering its application in the United States. Thus, the scholars that have permitted themselves to criticize the importance of freedom of speech and privacy have chosen a stance in the argument concerning the “right to be forgotten.” Author Jefferey Rosen stands on the side of the spectrum that upholds speech to be a powerful American right by stating his arguments based on three questions made applicable online.<sup>1</sup> Along with Rosen, Ravi Antani makes the case that the “right to be forgotten” would be a complete violation of the Constitution’s freedom of speech considering that the “European Right to be Forgotten” is poorly written and overbroad.<sup>2</sup> Kristine Byrum, Douglas W. Vick, Neil Richards and others share similar accounts concerning the application of the “right to be forgotten” to U.S. law considering the constitutional basis formed by American history.<sup>3</sup> These authors as well as others

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<sup>1</sup> Jeffrey Rosen, “The Right to Be Forgotten,” Response. *64 Stan. L. Rev. Online* 88, (2012), p. 90.

<sup>2</sup> Ravi Antani, "THE RESISTANCE OF MEMORY: COULD THE EUROPEAN UNION'S RIGHT TO BE FORGOTTEN EXIST IN THE UNITED STATES?." *Berkeley Technology Law Journal* 30, (2015), 1173-1210. *Computer Source*, EBSCOhost (accessed April 19, 2018).

<sup>3</sup> Kristie Byrum, "The European Right to Be Forgotten: A Challenge to the United States Constitution’s First Amendment and to Professional Public Relations Ethics." *Public Relations Review* 43, no. (2017) 1.102-11. doi:10.1016/j.pubrev.2016.10.010; Neil M. Richards, “The Puzzle of Brandeis, Privacy, and Speech.” *Vanderbilt Law Review* (2010), 1295-1352; Douglas W. Vick, "The Internet and the First Amendment." *The Modern Law Review* no. 3: (1998), 414. *JSTOR Journals*, EBSCOhost p. 414-421. (accessed April 27, 2018).

share the basis of ideas that outline the critical concern of the application of such ‘right’ in the United States.

On the opposite side of the spectrum, scholars that focus on the right of privacy—the purpose for the “right to be forgotten,” claim that such right would benefit the private citizen and provide not only a high extent of privacy but security and choice by limiting the amount of information that can be diminished through the internet. Geoffrey R. Stone creates a focus aimed at providing a historical background in which he addresses both freedom of speech and privacy as contributing actors. Although Stone claims that freedom of speech is an important aspect of American history he resorts to making various privacy claims geared at the laws that help protect it.<sup>4</sup> Like Stone, Amy Gajda focuses on not only the history that allows for a high extent of privacy, yet she also focuses on the contemporary laws that have been aimed at securing privacy for the citizen not only physically but in the online world.<sup>5</sup> Along with Stone and Gajda, scholars like Daisuke Wakabayashi and others take the approach at addressing the main claims of privacy and the need for its protection.<sup>6</sup> Freedom of speech and privacy are critical ideals that have been questioned when it comes to making an application of the “right to be forgotten” to U.S. Constitution and current law. The application of the right is especially

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<sup>4</sup> Geoffrey R. Stone, “Privacy, the First Amendment, and the Internet.” In *The Offensive Internet: Speech, Privacy, and Reputation.*, edited by Saul Levmore and Martha C. Nussbaum, (2010), 174-94. Cambridge, MA: Harvard University Press.

<sup>5</sup> Amy Gajda, Privacy, Press, and the Right to be Forgotten in the United States. *Washington Law Review*, (2018). [Vol. 93:201]

<sup>6</sup> Daisuke Wakabayashi, "California Passes Major Online Privacy Law." *New York Times*, 29 June 2018, p. B1(L). *Biography In Context*.

concerning when taking the contradicting needs and wants of the U.S. citizens into account.

## **THE RIGHT TO BE FORGOTTEN**

### *A. The European Right to be Forgotten*

To present the case, it is important to consider the background of the “right to be forgotten.” “On May 13, 2014 the European Court of Justice (ECJ), the EU’s highest court, established a “right to be forgotten” by declaring in *Google v. Costeja* that “data controllers” (including search engine operators) had to examine and honor EU citizen requests to delete results from internet searches of their names.”<sup>7</sup> This case emerged in Spain, where a citizen, Mario Costeja, sued *Google* as well as the newspaper *La Vanguardia*. Costeja contested that when his name was entered into *Google’s* search engine, the top links presented news articles from the past years detailing a real estate auction to resolve social security debts he owed at the time.<sup>8</sup> He argued that the information was harming his reputation and that it was irrelevant once resolved. The ruling provided a framework for such filtration attesting that, if the information or a link “in the list of results following a search made on the basis of [one’s] name” appears to be “inadequate, irrelevant... excessive in relation to the purposes of the processing at issue, or outdated,” the links must be erased from the list of results.<sup>9</sup> The court focused on “balancing the data subject’s privacy right with internet users interest in information.”<sup>10</sup> The key issue of the “right” relies on the unspecified language the court provided when presenting the idea. The

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<sup>7</sup> Ravi Antani, "THE RESISTANCE OF MEMORY: COULD THE EUROPEAN UNION'S RIGHT TO BE FORGOTTEN EXIST IN THE UNITED STATES?." *Berkeley Technology Law Journal* 30, (2015), 1173-1210. *Computer Source*, EBSCOhost (accessed April 19, 2018).

<sup>8</sup> *Ibid.*, 1173.

<sup>9</sup> *Ibid.*, 1173.

<sup>10</sup> *Ibid.*, 1175.

law is vague and overbroad with little guidance within the text that can provide search engine operators an idea on the types of content that contest to be eligible for removal. The main purpose in Europe providing for this right is to secure the right to privacy, which seems to trump freedom of speech.

### *B. Privacy Values in Europe*

The notion of such privacy has deep historical roots which “derive from the concepts of dignity, honor and personal respect, in contrast to the United States, privacy tenets rely on the notions of liberty and protection from state intervention.”<sup>11</sup> The European Union recognizes “human dignity as an absolute fundamental right.”<sup>12</sup> In the application of this notion of dignity “privacy or the right to a private life, to be autonomous, in control of information about yourself, to be let alone, plays a pivotal role.”<sup>13</sup> Citizens all over Europe believe that “privacy is not only an individual right but also a social value” that must be protected.<sup>14</sup> Europe also believes in the importance of freedom of speech but finds stronger ties to the concepts of privacy. Privacy is so important to them that they provided for the “right to be forgotten,” to assure that these common rights are upheld.

### *C. The Flow of Information*

Although it is essential to present restrictions online for private information, this “right” has holes that need to be addressed, especially if it were to be presented in the

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<sup>11</sup> Kristie Byrum, "The European Right to Be Forgotten: A Challenge to the United States Constitution's First Amendment and to Professional Public Relations Ethics." *Public Relations Review* 43, no. (2017) 1.102-11. doi:10.1016/j.pubrev.2016.10.010

<sup>12</sup> John Smith, "Data Protection." European Data Protection Supervisor - European Commission. November 11, 2016. Accessed October 11, 2018. [https://edps.europa.eu/data-protection/data-protection\\_en](https://edps.europa.eu/data-protection/data-protection_en).

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

United States. The “right” presses the idea of removing content that is “inadequate, irrelevant... and excessive.”<sup>15</sup> However, how is this determined? “The implementation of the European Data Protection Directives” “right to be forgotten” challenges U.S. constitutional principles and conflicts with well-embraced communications theories to promote information exchange in a free society.”<sup>16</sup> In the United States, this “right” would be a violation of the free speech clause of the Constitution. The idea presented by “the right to be forgotten” as “an arbitrary creation of a ‘data controller’ that offends the First Amendment by the precluding free flow of information, which creates memory holes, and endangers the robust debate that characterizes the nation and serves as a foundation for the nations democracy.”<sup>17</sup> Kristie Byrum argues that, the “right to be forgotten” conflicts with the valued idea of the free flow of information and further states that the “right to be forgotten” conflicts with these principles by compromising the continuity of accurate information instead of respecting the free flow of information.”<sup>18</sup> She also adds that “the integrity of communication process is irreparably harmed when information is taken away from the search engine, leaving a gap in history.”<sup>19</sup> This would further contradict with the free market ideas that many prominent figures have chosen to protect. Included in those are popular court opinions held by Justice Brandeis and Holmes who have been attributed as protectors of freedom of speech. Furthermore, the user should not be restricted in accessing information and should be granted the

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<sup>15</sup> Ravi Antani, "THE RESISTANCE OF MEMORY: COULD THE EUROPEAN UNION'S RIGHT TO BE FORGOTTEN EXIST IN THE UNITED STATES?." *Berkeley Technology Law Journal* 30, (2015), 1173-1210. *Computer Source*, EBSCOhost (accessed April 19, 2018).

<sup>16</sup> Kristie Byrum, "The European Right to Be Forgotten: A Challenge to the United States Constitution's First Amendment and to Professional Public Relations Ethics." *Public Relations Review* 43, no. (2017) 1.102-11. doi:10.1016/j.pubrev.2016.10.010

<sup>17</sup> Ibid.

<sup>18</sup> Ibid., 9.

<sup>19</sup> Ibid., 9.

freedom of making informed decisions protected by precedent set forth by the Court and the Supreme Law of the Land.

## II. HISTORY AND PURPOSE OF THE FIRST AMENDMENT'S FREEDOM OF SPEECH

The contemporary idea of freedom of speech gradually emerged within the struggles of the middle ages and the 16<sup>th</sup> and 18<sup>th</sup> century and became a “vital part of individual liberty and democratic government.”<sup>20</sup> Considering these ideas “the *Declaration of the Rights of Man and of the Citizen*, was issued from the French Revolution in 1789 and it specifically affirmed freedom of speech as an inalienable right.”<sup>21</sup> Freedom of speech in the United States derives from roots grounded all the way back to British rule. The vital relationship between free expression and the fight for American liberty took a new meaning in Virginia 1776, where a new Bill of Rights was being drafted in hopes of getting the Constitution ratified by the colonies. Furthermore, the idea of freedom of speech stems to historical fights of human rights and should not be stifled by the modern European ‘right to be forgotten’ without addressing critical historical aspects that have revolutionized American ideals. The idea of freedom of speech in the First Amendment of the Constitution is influenced not only by American core values and beliefs but by its history and its need to protect the speech that enabled Americans to seek liberty.

### A. *The Bill of Rights and the Language of Freedom of Speech*

The Bill of Rights of the Constitution secures the importance of freedom of speech in history and society. The First Amendment of the Bill of Rights states that

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<sup>20</sup> “Speech, Freedom Of,” *Funk & Wagnall New World Encyclopedia*, 2017. 1

<sup>21</sup> *Ibid.*



“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”<sup>22</sup> This statement constitutes the First Amendment of the Constitution guaranteeing its importance to the democratic state that was soon to develop. The language of the amendment draws a fine line between overbroad and specific, thus giving high discretion not only to the Supreme Court but to its citizens when deciding to interpret the true meaning and boundaries that the amendment allows for.<sup>23</sup> In the United States, freedom of speech is seen as an unalienable right that enables the citizen to speak freely with little restrictions that the Supreme Court has formatted considering the needs of U.S. citizens. The Supreme Court has gone as far as to define the restrictions imposed on freedom of speech, stating that ‘it is well understood that the right of free speech is not absolute at all times and under all circumstances.’<sup>24</sup> They state that, “there is well defined and narrowly limited classes of speech, which include lewd and obscene, the profane, the libelous, and the insulting or fighting words—those which by their very utterance inflict injury or tend to incite an immediate breach of peace.”<sup>25</sup> Furthermore, the Court has also stated that, “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.”<sup>26</sup> With the consideration of these ideas, the internet

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<sup>22</sup> LII Staff. "First Amendment." Legal Information Institute. October 10, 2017. Accessed October 10, 2018. [https://www.law.cornell.edu/constitution/first\\_amendment](https://www.law.cornell.edu/constitution/first_amendment).

<sup>23</sup> Ibid.

<sup>24</sup> *Chaplinsky v. New Hampshire*, 315 U.S. 568, (1942)

<sup>25</sup> Ibid.

<sup>26</sup> *Texas V. Johnson*, 491 U.S. 397, (1989)

has created new doors in the free speech process, allowing the user to extend such freedom to the ends of the world with little restrictions.

### *B. Supreme Court Rulings*

Precedent is one of the leading factors that influences future law provides the boundaries and provisions of how a law should be enforced and applied. The U.S. Supreme Court has taken many cases concerning freedom of speech and has made huge strides in examining the true meaning of the First Amendment's freedom of speech clause. Not only have they made very opiated decisions on controversial cases, but they have also provided tests and given dissenting accounts that have further influenced their own decisions. The United States courts have been conflicted when determining what constitutes as violations of the free speech clause of the Constitution, especially with the rise of the digital age. Supreme court cases like *New York Times Co. v. Sullivan (1964)* and *Reno v. American Civil Liberties Union (1997)* along with others have been landmark cases that can be applied to online politics concerning freedom of speech and privacy.

#### *1. New York Times Co. v. Sullivan (1964)*

One of the most prominent cases concerning freedom of speech has been that of *New York Times Co. v. Sullivan (1964)*, a landmark case that relied on the privacy of a public figure concerning criticism. "The Supreme Court made clear in *New York Times v. Sullivan*, the First Amendment embodies "a profound national commitment" to the principle that public discourse "should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp" speech."<sup>27</sup>

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<sup>27</sup> Geoffrey R. Stone, "Privacy, the First Amendment, and the Internet." In *The Offensive Internet: Speech, Privacy, and Reputation.*, edited by Saul Levmore and Martha C. Nussbaum, (2010), 174-94. Cambridge, MA: Harvard University Press.

*Sullivan* addresses the issue of criticizing a public individual. This speech was not made online but can be projected on the internet, which by form, makes all those who participate more likely to be public individuals since it has become the biggest information sharing technique. The Supreme Court ruled that the Constitution accords citizens and press an unconditional freedom to criticize official conduct. This allows the user to speak freely in issues of public concern which should not be restricted by the privacy the public official holds.

## 2. *Reno v. American Civil Liberties Union (1997)*

Another case that derives from freedom of speech is *Reno v. ACLU (1997)*, which is concerned with speech made online. The court ruled that putting restrictions on certain information online to protect other users was a form of censorship. The Court stated that “the dramatic expansion of the new marketplace of ideas contradicts the factual basis of the contention and that the record demonstrates the phenomenal growth of the Internet.”<sup>28</sup> They also contended that “governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it.”<sup>29</sup> Therefore, the “interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.”<sup>30</sup> This opinion also held that the law which they were criticizing was vague and overbroad. The “right to be forgotten” is also written in such manner, for it is not carefully refined. “Vague legislation is frequently struck down on First Amendment grounds, particularly if the legislation regulates the

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<sup>28</sup> *Reno v. American Civil Liberties Union*, 521 U.S. 844, (1997).

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*

content of speech.”<sup>31</sup> In part, “vagueness is condemned because it permits discriminatory enforcement, which in turn encourages potential speakers (particularly unpopular ones) to engage in self-censorship.”<sup>32</sup> Previous cases presented by the courts deal with free speech issues that have a definite time and geographical place, yet the internet breaks all rules of time and boundaries; they seem non-existent.

### *C. Prominent Justice Opinions*

Given the status of the Supreme Court as the highest court of the land, and of the importance of the role of judicial review, at this time it is essential to examine significant opinions penned by Supreme Court justices on the issue of freedom of speech and privacy. Many of those opinions and dissents have been formulated by some of the most popular judges and have been used for many years after their creation in following cases. Justice Oliver Wendell Holmes and Justice Louis Dembitz Brandeis have been two of the most prominent commentators on issues that concern freedom of speech. In the beginning of the twentieth century, “Holmes and Brandeis laid the foundations for free speech theories in the United States.”<sup>33</sup> As Lahav points out, “although their work is usually lumped together as the ‘Holmes-Brandeis dissents,’ their opinions are not of one cloth. Their sources of inspiration, their conceptions of the policy, and as could be anticipated, their temperaments were different.”<sup>34</sup> Their difference in philosophy accounts for their strong opinions concerning freedom of speech and privacy, therefore

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<sup>31</sup> Douglas W. Vick, “The Internet and the First Amendment.” *The Modern Law Review* no. 3: (1998), 414. *JSTOR Journals*, EBSCOhost p. 414-421. (accessed April 27, 2018).

<sup>32</sup> *Ibid.*

<sup>33</sup> Pnina Lahav, “*Holmes and Brandeis: Libertarian and Republican Justifications for Free Speech*”, (1988). 4 *J.L. & Pol.* 451, 452–54

<sup>34</sup> *Ibid.*

creating an imbalance in the Court when dealing with freedom of speech and the idea of privacy.

### 1. Justice Holmes

Justice Holmes was a protector of freedom of speech and held very strong opinions about what constituted protected speech. Holmes's justification for freedom of speech, were “based on the free trade of ideas, that are traced to modern English works on free speech, particularly John Stuart Mill's *On Liberty*.<sup>35</sup> The free trade of ideas—Holmes' choice of justification—reflected Holmes' libertarian political persuasion.<sup>36</sup> “But Holmes was not merely echoing Mill. His defense of freedom of expression clearly reflected the Enlightenment belief that the state has no monopoly over truth and that free speech is crucial for the process of discovering truth.”<sup>37</sup> His ideas created a basis for future opinions set forth by the Court, and provided a new way of viewing freedom of speech. His most popular work concerning freedom of speech stemmed off of the court case *Schenck v. United States (1919)* in which the constitutionality of the speech was being questioned in a time of war. Delivering the opinion of the Court Chief Justice Holmes stated that,

“the most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic ... The question in every case is whether the words are used in such circumstances and are of such a nature as to

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<sup>35</sup> Pnina Lahav, “*Holmes and Brandeis: Libertarian and Republican Justifications for Free Speech*”, (1988). 4 J.L. & Pol. 451, 452–54

<sup>36</sup> *Ibid.*, 53

<sup>37</sup> *Ibid.*

create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.”<sup>38</sup>

That test was used for about 50 years in the court and was later modified into a test that stated, “that the state could only limit speech that incites *imminent* unlawful action. This standard is still applied by the Court today onto free speech cases involving the advocacy of violence.”<sup>39</sup> Furthermore, Holmes’ ideas on freedom of speech provided for a basis on what constitutes to be protected under the First Amendment and the powers that congress has in defining law concerning freedom of speech. Holmes relies on the philosophy that congress can only block speech under very strict circumstances and that any other oppression of speech would be unconstitutional.

## 2. Justice Brandeis

Along with Justice Holmes, Justice Brandeis held very strong opinions about freedom of speech. Holmes and Brandeis both tended to share the same ideals and heavily sided with each other when making decisions on cases that were being questioned under constitutional basis. Brandeis' justification for free speech, “interpreted by some as the justification from self-rule,<sup>6</sup> and by others as the justification from self-fulfillment, but which can be link to civic virtue, traced to fifth century Athens, particularly to Pericles' Funeral Oration.”<sup>40</sup> Furthermore, “civic virtue—Brandeis' choice of justification—reflected Brandeis' republican leanings.”<sup>41</sup> This created a way in which Brandeis justified free speech on the “grounds that it was indispensable to the ways in

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<sup>38</sup> Schenck v. United States, 249 U.S. 47. (1919)

<sup>39</sup> Joshua Waimberg, Schenck v. United States: Defining the Limits of Free Speech. National Constitution Center, (2015).

<sup>40</sup> Pnina Lahav, “Holmes and Brandeis: Libertarian and Republican Justifications for Free Speech”, (1988). 4 J.L. & Pol. 451, 452–54

<sup>41</sup> Ibid., 53.

which a self-governing citizenry made intelligent, informed decisions.”<sup>42</sup> Privacy law professor Richards Neil states that for “Brandeis, free speech was worth protecting not merely because it was an individual right, but because it safeguarded the social processes of self-governance.”<sup>43</sup> Along with that, Brandeis also held very strong opinions about privacy and made a attribution to it in his dissent in *Olmstead v. United States (1928)*. Along with Justice Samuel Warren, Brandeis argued that the “intrusion into and public disclosure of private affairs by the press was deeply hurtful, and that the common law should be read to recognize a tort remedy for such violations.”<sup>44</sup> This dissent set a foundation for the idea of privacy that is not explicitly stated in the U.S. Constitution like freedom of speech is. The critical and contradictory ideas held by Justice Brandeis on freedom of speech and privacy further address privacy and speech as a irreconcilable conflict.

### **III. ONLINE CONTENT REMOVAL AS A VIOLATION OF FREEDOM OF SPEECH**

Considering the accounts of freedom of speech that the First Amendment and First Amendment jurisprudence has provided for, it can be easy to state that the same conditions should be applied online, yet it has been made difficult for many lawmakers to take this into consideration. The internet has an unlimited amount of doors that provide access to a free market of ideas that should not be stifled with. As Justice Hugo Black

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<sup>42</sup> Neil M. Richards, “The Puzzle of Brandeis, Privacy, and Speech.” *Vanderbilt Law Review* (2010), 1295-1352.

<sup>43</sup> *Ibid.*

<sup>44</sup> Geoffrey R. Stone, “Privacy, the First Amendment, and the Internet.” In *The Offensive Internet: Speech, Privacy, and Reputation.*, edited by Saul Levmore and Martha C. Nussbaum, (2010), 174-94. Cambridge, MA: Harvard University Press.

would state “The First Amendment says what it means and means what it says. The First Amendment is an absolute. The government "shall make no law abridging the freedom of speech, or of the press. End of discussion.”<sup>45</sup> Although, that is a very broad claim that has since then been refined it serves the purpose to define the meaning of the First Amendment. Considering the claims stated by the precedent that the Supreme Court has allowed for, one can conclude that online content removal would constitute a violation of freedom of speech—a right that the United States rightfully upholds. The application of any law that chooses to oppress freedom of speech would then choose to eliminate the values and ideas that the United States stands for.

*A. Censorship, Control and Filtration.*

The internet is an explosion of information that the human brain cannot process, but has freedom in doing so. Restricting the internet provides for a sort of censorship and filtration online, which are in fact, a violation of the U.S. Constitution. American law professor and noted First Amendment scholar Geoffrey Stone, makes the claim that the Internet “provides universal distribution of what had earlier reached a limited number of eyes and ears.”<sup>46</sup> In stating that, Stone portrays the internet to be an opening to an unlimited amount of positive and negative opportunities. In considering that claim, many other scholars have made that attributions at trying to tackle the application of law to the internet, especially based on first amendment claims and its underlying negative factors of censorship, filtration and control. Jeffrey Rosen presents three questions that are revealed in the application of the “right to be forgotten” to the United States. He states

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<sup>45</sup> Geoffrey R. Stone, “Privacy, the First Amendment, and the Internet.” In *The Offensive Internet: Speech, Privacy, and Reputation.*, edited by Saul Levmore and Martha C. Nussbaum, (2010), 174-94. Cambridge, MA: Harvard University Press.

<sup>46</sup> *Ibid.*



that, “if I post something online, do I have the right to delete it?”<sup>47</sup> The second question presented states, “if I post something and someone else copies it and re-posts it on their own site, do I have the right to delete it.?”<sup>48</sup> The last question presents the most contentious of free speech questions when addressing freedom of speech stating that, “if someone else posts something about me, do I have the right to delete it.?”<sup>49</sup> These three questions are all presented when determining the constitutionality of the “right to be forgotten” in the United States. The first entails a very simple act that does not conflict with the behaviors of others, yet the last two present an influence on other’s mental thought. Once others are influenced by the information one chooses to share, the content is of importance to society and the free flow of information. Furthermore, “the Court has declared that the freedom of speech may “best serve its high purpose when it induces a condition of unrest . . . or even stirs people to anger. The Court has therefore long and consistently held that the First Amendment generally forbids restrictions of speech in public discourse on the ground that it is offensive, unsettling, insulting, demeaning, annoying, snarling, bilious, rude, abusive, or nasty.”<sup>50</sup> With this being stated, no law should be applied on or offline concerning freedom of speech without considering the only restrictions that have been provided for it.

#### **IV. THE RIGHT OF PRIVACY**

The right to privacy refers to the notion that one's personal information is protected from public scrutiny and as Justice Louis Brandeis called it “the right to be left

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<sup>47</sup> Rosen, Jeffrey. (2012). “The Right to Be Forgotten.” Response. *64 Stan. L. Rev.* Online 88. p. 90.

<sup>48</sup> *Ibid.*, 90.

<sup>49</sup> *Ibid.*, 91.

<sup>50</sup> Geoffrey R. Stone, “Privacy, the First Amendment, and the Internet.” In *The Offensive Internet: Speech, Privacy, and Reputation.*, edited by Saul Levmore and Martha C. Nussbaum, (2010), 174-94. Cambridge, MA: Harvard University Press.

alone.”<sup>51</sup> The right to privacy is not explicitly stated in the U.S. Constitution, yet some amendments provide several protections while the rest is left upon statutory law. The laws that provide for the right to privacy have been carefully defined, yet have not met the standard when creating a distinction of the power freedom of speech holds over it in a Constitutional basis. The laws have been applied but cannot further protect individuals on a platform such as the Internet. In providing the “right to be forgotten,” in hopes to achieve privacy, violations of freedom of speech would emerge. It is stated that, “the most realistic way to protect privacy today is at its source.”<sup>52</sup> That “by prohibiting highly intrusive methods of gaining information that people want to keep confidential it is still possible to enable individuals who truly care about their privacy to preserve it, if they act carefully and with discretion.”<sup>53</sup> Therefore, is the duty of the private individual to look into their own protection when it comes to privacy. If individuals were careful enough in protecting what they find of value within their private lives it would be difficult for others to receive information that does not pertain to them. So forth, the information must be protected at its root, because once it is out, it is out.

#### A. *The Harm Principle*

To consider the damage and benefits of freedom of speech and privacy it is important to consider the harm that it entails. The harm principle was coined by English philosopher John Stuart Mill, which can be rightfully applied to the ideas of freedom of speech and privacy. Mill states in his book *On Liberty*, that the “only purpose for which

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<sup>51</sup> Pnina Lahav, “*Holmes and Brandeis: Libertarian and Republican Justifications for Free Speech*”, (1988). 4 J.L. & Pol. 451, 452–54

<sup>52</sup> Geoffrey R. Stone, “Privacy, the First Amendment, and the Internet.” In *The Offensive Internet: Speech, Privacy, and Reputation.*, edited by Saul Levmore and Martha C. Nussbaum, (2010), 174-94. Cambridge, MA: Harvard University Press.

<sup>53</sup> *Ibid.*, 178.

power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.”<sup>54</sup> For example, these accounts are applied to the rights set forth by the Constitution especially concerning freedom of speech and privacy. When considering privacy and the harm principle one can state that if something rightfully harms a person due to privacy claims would entitle that person to seek protection under the law even if it were to constitute of a freedom of speech violation. With that being said, Mill also shares the idea that “if all mankind minus one, were of one opinion, and only one person were of the contrary opinion, mankind would be more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind.”<sup>55</sup> In applying this into a more contemporary concept, one can conclude that “it is sometimes said that the harm from speech on the Internet is potentially greater than the harm from speech in other media, because the potential audience is much larger, the speech remains indefinitely discoverable, and information can be easily located through search engines like Google.”<sup>56</sup> Therefore, “as a matter of first approximation, the fact that speech on the internet can cause more harm than speech in a local newspaper is not a reason to accord it any less protection under the First Amendment. The balance between value and harm remains more or less constant.”<sup>57</sup> These ideas have created a basis for opinions that have been made when considering both privacy and freedom of speech laws.

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<sup>54</sup> John Stuart Mill, and Stefan Collini, *On Liberty*. Cambridge: Cambridge Univ. Press, (2015) 8.

<sup>55</sup> *Ibid.*, 14.

<sup>56</sup> Geoffrey R. Stone, “Privacy, the First Amendment, and the Internet.” In *The Offensive Internet: Speech, Privacy, and Reputation.*, edited by Saul Levmore and Martha C. Nussbaum, (2010), 174-94. Cambridge, MA: Harvard University Press.

<sup>57</sup> Geoffrey R. Stone, “Privacy, the First Amendment, and the Internet.” In *The Offensive Internet: Speech, Privacy, and Reputation.*, edited by Saul Levmore and Martha C. Nussbaum, (2010), 174-94. Cambridge, MA: Harvard University Press.

## *B. History of Privacy in Law*

The right to privacy in the United States was coined in a dissenting opinion by Justice Brandeis and Justice Warren as stated above. The right to privacy was formulated to protect individuals not only by government intrusion but by individual citizens. Justice Brandeis and Warren state that,

“It is not however necessary, in order to sustain the view that the common law recognizes and upholds a principle applicable to cases of invasion of privacy, to invoke the analogy, which is but superficial, to injuries sustained, either by an attack upon reputation or by what the civilians called a violation of honor; for the legal doctrines relating to infractions of what is ordinarily termed the common-law right to intellectual and artistic property are, it is believed, but instances and applications of a general right to privacy, which properly understood afford a remedy for the evils under consideration.”<sup>58</sup>

Privacy is not a right that has been explicitly stated in the U.S. Constitution but has been implied in the Bill of Rights. The right to privacy created by Brandeis and Warren further suggest that the government should have a say in protecting individuals from being exposed. The laws not only protects freedom of Speech ideals but it also guards individual “privacy by recognizing and enforcing a broad range of confidential relationships,” for it, “enables individuals to be reasonably confident that certain places, activities, communications, and relationships, such as one's home, one's phone calls, one's bank records, and one's private communications with doctors and lawyers, will generally

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<sup>58</sup> Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. (1890). 193, 206

be protected against public exposure.”<sup>59</sup> The history that has been formulated in the courts to try to provide a definition for the protection of privacy has been set by boundaries that yet seem to favor freedom of speech.

### *C. Current Legislation Concerning Privacy*

In addition to the foundation that Brandeis and Warren have provided when trying to seek laws that protect the privacy of the individual, many current laws have tried to find the balance between protecting privacy and upholding freedom of speech rights. One of the current laws that seems to have found a balance between the two is the California Consumer Privacy Act, A.B. 375. This law is focused in protecting privacy rights while still considering freedom of speech restrictions, yet it has not been examined by judicial review considering it is a very new law that has yet to be placed in effect. California passed the law in early June 2018 “granting consumers more control over and insight into the spread of their personal information online, creating one of the most significant regulations overseeing the data-collection practices of technology companies in the United States.”<sup>60</sup> This law goes into effect “in January 2020, making it easier for consumers to sue companies after a data breach.”<sup>61</sup> This is the first law of its kind and it pokes at the idea of “the right to be forgotten” in Europe. Although very different from the “right to be forgotten” it pushes at the same ideas that choose to protect privacy, yet with the basis of continuing to uphold Constitutional rights.

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<sup>59</sup>Geoffrey R. Stone, “Privacy, the First Amendment, and the Internet.” In *The Offensive Internet: Speech, Privacy, and Reputation.*, edited by Saul Levmore and Martha C. Nussbaum, (2010), 174-94. Cambridge, MA: Harvard University Press.

<sup>60</sup> Daisuke Wakabayashi, "California Passes Major Online Privacy Law." *New York Times*, 29 June 2018, p. B1(L). *Biography In Context*.

<sup>61</sup> *Ibid*.

## V. APPLICATION WITH MODIFICATIONS

If a right like the “right to be forgotten” were to be applied to the United States and array of modifications would be needed in order for the right to meet First Amendment requirements. If the “right” were to be applied in its current state it would be without a doubt unconstitutional. For a right to be rightfully applied it would need to consider precedent and the restrictions that the First Amendment holds. The right would need to fall within those restrictions of limited classes of speech concerning “fighting words, obscenity, child pornography, libel and slander, crimes involving speech, threats, violation of copyright rules, conduct regulations and some commercial speech.”<sup>62</sup> These classes of limited speech are the only ones that are allowed when choosing to suppress any speech, if for some reason a type of speech does not fall within those categories and is silenced than a unconstitutional act has been committed. Furthermore, in seeking to conduct a right that would allow for privacy of the individual legislators as well as commentators should highly consider the restrictions put in place. The internet may be a bigger platform that gives a higher amount of access when sharing information, and for that purpose it should be afforded the same application of law even if some find it to be a risky. It is without doubt the liberty, right and duty of the individual to hold their own privacy and to seek to protect it, by limiting the information they choose to share. If information is not meant to be made public than it should stay within the hands of the source.

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<sup>62</sup> Geoffrey R. Stone, “Privacy, the First Amendment, and the Internet.” In *The Offensive Internet: Speech, Privacy, and Reputation.*, edited by Saul Levmore and Martha C. Nussbaum, (2010), 174-94. Cambridge, MA: Harvard University Press.

## VI. CONCLUSION

The internet has provided for an infinite amount of information that threatens government corruption and enforces social freedom around the world. The free flow of information is essential in making present and future decisions. The “right to be forgotten” constricts the flow of information and the market of ideas by placing barriers on speech. The right derived with the purpose of protecting the privacy of the individual in Europe. The case focuses on the implementation of Europe's "right to be forgotten," in its pure form to the United States and how it could potentially infringe in the Constitution's First Amendment's freedom of speech clause. Although Europe and the United States share core values, it is difficult to promote such a “right” in its entirety to exist in the United States without making adjustments to suit Constitutional needs. The digital age has opened the doors to an infinite freedom of speech, and restrictions to such phenomenon would only halt the free flow of information and thought.

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