# Contract Law CP

## Legislation CP

### 1NC Core Shell

#### Text: The US Federal Government should establish a statutory right to voluntarily delete data through a default contract rule.

#### The aff is bound to defending an enforceable privilege – not a contract rule

Legal Information Institute no date [(small research, engineering, and editorial group housed at the Cornell Law School)“civil rights: an overview” Cornell University] AT

A civil right is an enforceable right or privilege, which if interfered with by another gives rise to an action for injury. Examples of civil rights are freedom of speech, press, and assembly; the right to vote; freedom from involuntary servitude; and the right to equality in public places. Discrimination occurs when the civil rights of an individual are denied or interfered with because of their membership in a particular group or class. Various jurisdictions have enacted statutes to prevent discrimination based on a person's race, sex, religion, age, previous condition of servitude, physical limitation, national origin, and in some instances sexual orientation.

#### Mutually exclusive—the right to be forgotten is no longer a civil right. Courts treat data deletion as an aspect of property contracts – the two approaches are incompatible

#### The right to be forgotten establishes a balancing test between privacy rights and the right to know.

Posner 14 [(eric, Kirkland and Ellis Distinguished Service Professor of Law at the University of Chicago Law School and a Fellow of the American Academy of Arts & Sciences) “We All Have the Right to Be Forgotten” Slate MAY 14] AT

The European “right to be forgotten” is the most important right you’ve never heard of. It’s not a right to be purged from the memory of people who know you, but rather to control how information about you appears online. On Tuesday, the European Court of Justice explained what this means. The court held that Google violated a Spanish lawyer’s right to be forgotten by refusing to eliminate links to embarrassing articles about him in its search results. The outcome was decried by press freedom advocates everywhere. In fact, it’s perfectly sensible. And it shows that, contrary to stereotype, America is rigidly ideological about free speech, while Europe is pragmatic and flexible. Back in 1998, the Spanish newspaper La Vanguardia published two notices about an auction of the property of a Spanish lawyer named Mario Costeja, held to pay off his debts. More than a decade later, anyone who Googled Costeja would see, in the search results, links to those notices on the newspaper’s website. Costeja asked the Spanish Data Protection Agency, which oversees the dissemination of personal data, to order La Vanguardia to take the notices down and to order Google to remove links to the pages from the search results for Costeja. The agency refused the first request because the newspaper had published the notices by court order. But it granted the second, telling Google to remove the links. This is the ruling that Europe’s highest court, the European Court of Justice, approved this week. Much of the case turns on technical issues, such as whether a search engine is a “processor” of personal data under the law (it is). The bottom line, however, is that Google must remove links to Web pages that contain personal information unless the public’s interest in access to the information in question outweighs the privacy interests of the person who is affected. This balancing test is vague, but it is hugely more protective of privacy interests than American law, which nearly always prevents people from winning anything from search engines and publishers who have spread personal information about them far and wide. The European ruling likely gives more protection to people who are not public figures, like Costeja, and from the publicizing of events that are long past. The right to be forgotten does not set up Google as “censor-in-chief for the European Union,” as Jeffrey Rosen argued a few years ago. The political content of the information plays no role.

#### The right to be forgotten is extremely vague – legislatures have empirically failed to accurately deploy the right, linking to the disads and tanking aff solvency

Bolton 14 [(Robert, Pierpont Community & Technical College) “The Right to Be Forgotten: Forced Amnesia in a Technological Age” John Marshall Journal of Computer & Information Law, Forthcoming Oct 15] AT

In addition to the issues of federalism and economic harm, and threats to speech that a right to be forgotten potentially poses, there is a final problem: its lack of clarity. As one scholar admitted, “[N]obody seems to have any very clear idea what [it] is.”62 While this might be expected in debating the boundaries of any right, the statement applies even to the terms for information handling. In the tech world, deletion and erasure carry two very different connotations; the former implies a limitation of access by anyone other than the data holder, while the latter means a complete removal of control even by the former data holder.63 Unsurprisingly, many legislatures unfamiliar with the terminology use the former term, and thus provide a reasonable defense to anyone charged with violating the statute. Additionally, while these laws are drafted to tackle specific problems like revenge porn, poorly worded statutes are often abused in ways never foreseen by legislators. As an alternative, it might be better to strictly enforce statutes already on the books, such as the cyberstalking provisions of the Violence Against Women Act,64 or revise the Copyright Code.65 Even California, which has the option of criminal sanctions at its disposal, has frequently elected to target large-scale traffickers instead for related criminal activities.66 Another approach has suggested Congress recognize a limited right “through adoption of a default contract rule where an implied covenant to delete user- submitted data upon request is read into website terms of service contracts.”67 If a legislature is determined to create a new statute, an approach like Finland’s restrictions on the accessing of data in certain circumstances would be a better method than making actions like erasure compulsory.

#### The CP solves privacy rights better—avoids violations of free speech, problems of legal vagueness, and standardizes privacy norms

Walker 12 [Robert Kirk Walker, J.D. Candidate at University of California, Hastings College of the Law. “The Right to Be Forgotten,” ] **AZ**

Establishing a statutory right to delete voluntarily submitted data would help fulfill user’s expectations of data privacy, align international privacy norms, and drive the market for improved data management technologies. Furthermore, such a right could be legislatively enacted as a default contract rule without running afoul of the U.S. Constitution.[[1]](#footnote-1) The main advantage of contracting for privacy is that the contract model does not endorse any right to stop others from speaking that would offend the First Amendment. Rather, it endorses a right to stop people from breaking their promises.[[2]](#footnote-2) In *Cohen v. Cowles Media*, the Supreme Court held that contracts not to speak—that is, promises made not to reveal information or say certain things—are enforceable and do not violate the First Amendment.[[3]](#footnote-3) Similarly, when persons have an expectation that their private data will be kept secret, then courts may infer an implied contract of confidentiality or apply the doctrine of promissory estoppel to enforce this expectation of privacy. “In many contexts, people reasonably expect—because of custom, course of dealing with the other party, or all the other factors that are relevant to finding an implied contract—that part of what their contracting partner is promising is confidentiality.”143 As such, the enforcement of privacy contracts does not offend free speech rights, as the government is not restricting speech, but rather enforcing obligations that the would-be speaker has voluntarily assumed.144 Privacy contracts also avoid the need for courts to determine whether disclosures are “highly offensive to a reasonable person,”145 as required by the Brandeis torts.146 Rather, privacy contracts rely on a more objective, purpose-limitation principle whereby “the recipient of personal information can only use that information for the purposes to which [the discloser] consented, and no[t] others.”147 Courts regularly look to usage in trade, course of dealings, standard business practices within an industry, et cetera to interpret implied-in-fact terms in commercial contracts. If Congress enacted legislation requiring implied privacy terms in website terms of service contracts, these same interpretative and evidentiary principles could be used to assess a person’s expectations of data privacy at the time of initial disclosure. Framing privacy rights in contractual terms also has the benefit of increasing data privacy protections across the Internet by standardizing website terms of service agreements and privacy policies. Currently, website privacy policies vary dramatically, even within a network of sites operated by a single company.148

#### More solvency mechanisms—changes corporate data practices to protect privacy without endangering free speech

Walker 12 [Robert Kirk Walker, JD Candidate Hastings, 2012, "The Right to Be Forgotten", Hastings Law Journal, 64 Hastings L. J. 257, p. 285]

Legislatively adopting such a right186 would serve several important public policy goals. First, it would better align corporate data protection practices with users’ privacy expectations.187 Second, it would provide clear guidance to website operators as to what data protocols are legally required, which would allow for more efficient business planning and technology investment. Third, prescribing statutory penalties for failing to comply with these standards would provide a powerful incentive to develop more secure data management technologies and to honor user deletion requests in a timely manner.188 Fourth, a statutory right of data deletion would potentially help to harmonize data protection policies in the United States and Europe and could possibly forestall the adoption of the more constitutionally troubling aspects of the Committee Proposal.189 Finally, explicit statutory rights of data privacy would engender greater trust in the marketplace for personal data,190 allowing individuals to disclose personal data without fear that it will be misused.

## Net Benefits

### Court Clog Net Benefit

#### The lack of clarity of the bill clogs the courts

Veldt 14 [(Digital Marketer, Writer & Online Business Builder) “THE EU’S CLEVER WORKAROUND FOR THAT PESKY “FREEDOM OF EXPRESSION” THING” MAY 15 2014] AT

Here’s what will happen: Google will spend a ton of money hiring more people to handle the inevitable flood of removal requests that will come their way from anyone and everyone who has an unflattering page appear in searches for their name. Those new hires will spend 99.99% of their day rejecting these requests because: A) People don’t understand what is and is not “eligible” for removal under this ruling, or don’t care and thought they’d try anyway B) Due to the hazy language, Google can argue almost anything is of public interest or relevant According to the ruling, every time Google rejects a request, the data subject can then bring it to the courts. In the end, Google will build a rejection team and the European legal system will be clogged with ridiculous efforts to deindex a webpage.

#### The clarity card means the CP avoids the disad.

#### Federal court clog causes collapses the federal judiciary – overburdens dockets, expansion can't keep pace

Oakley 96 ~John B. Oakley, Distinguished Professor of Law Emeritus US Davis School of Law, 1996 The Myth of Cost-Free Jurisdictional Reallocation~

￼Personal effects: The hidden costs of greater workloads. The hallmark of federal justice traditionally has been the searching analysis and thoughtful opinion of a highly competent judge, endowed with the time as well as the intelligence to grasp and resolve the most nuanced issues of fact and law. Swollen dockets create assembly-line conditions, which threaten the ability of the modern federal judge to meet this high standard of quality in federal adjudication. No one expects a federal judge to function without an adequate level of available tangible resources: sufficient courtroom and chambers space, competent administrative and research staff, a good library, and a comfortable salary that relieves the judge from personal financial pressure. Although salary levels have lagged—encouraging judges to engage in the limited teaching and publication activities that are their sole means of meeting such newly pressing financial obligations as the historically high mortgage expenses and college tuitions of the present decade—in the main, federal judges have received a generous allocation of tangible resources. It is unlikely that there is any further significant gain to be realized in the productivity of individual federal judges through increased levels of tangible resources,13 other than by redressing the pressure to earn supplemental income.14 ￼On a personal level, the most important resource available to the federal judge is time.15 Caseload pressures secondary to the indiscriminate federalization of state law are stealing time from federal judges, shrinking the increments available for each case. Federal judges have been forced to compensate by operating more like executives and less like judges. They cannot read their briefs as carefully as they would like, and they are driven to rely unduly on law clerks for research and writing that they would prefer to do themselves.16 If federal judges need more time to hear and decide each case, an obvious and easy solution is to spread the work by the appointment of more and more federal judges. Congress has been generous in the recent creation of new judgeships,17 and enlargement ￼of the federal judiciary is likely to continue to be the default response, albeit a more grudging one, to judicial concern over the caseload consequences of jurisdictional reallocation. Systemic effects: The hidden costs of adding more judges. Increasing the size of the federal judiciary creates institutional strains that reduce and must ultimately rule out its continued acceptability as a countermeasure to caseload growth. While the dilution of workload through the addition of judges is always incrementally attractive, in the long run it will cause the present system to collapse. I am not persuaded by arguments that the problem lies in the declining quality of the pool of lawyers willing to assume the federal bench18 or in the greater risk that, as the ranks of federal judges expand, there will be more frequent lapses of judgment by the president and the Senate in seating the mediocre on the federal bench.19 In my view, the diminished desirability of federal judicial office is more than offset by the rampant dissatisfaction of modern lawyers with the excessive commercialization of the practice of law. There is no shortage of sound judicial prospects will￼ing and able to serve, and no sign that the selection process—never the perfect meritocracy—is becoming less effective in screening out the unfit or undistinguished. Far more serious are other institutional effects of continuously compounding the number of federal judges. Collegiality among judges, consistency of decision, and coherence of doctrine across courts are all imperiled by the growth of federal courts to cattle-car proportions. Yet the ability of the system to tolerate proliferation of courts proportional to the proliferation of judges is limited, and while collapse is not imminent, it cannot be postponed indefinitely. Congress could restructure the federal trial and appellate courts without imperiling the core functions, but the limiting factor is the capacity of the Supreme Court to maintain overall uniformity in the administration and application of federal law. That Court is not only the crown but the crowning jewel of a 200-year-old system of the rule of law within a constitutional democracy, and any tinkering with its size or jurisdiction would raise the most serious questions of the future course of the nation.

#### **Separation of power solves unaccountable decisions to go to war – causes extinction**

Adler 96 - (David, professor of political science at Idaho State, The Constitution and Conduct of American Foreign Policy, p. 23-25)

The structure of shared powers in foreign relations serves to deter the abuse of power, misguided policies, irrational action, and unaccountable behavior. As a fundamental structural matter, the emphasis on joint policymaking permits the airing of sundry political, social, and economic values and concerns. In any event, the structure wisely ensures that the ultimate policies will not reflect merely the private preferences or the short-term political interests of the president. Of course this arrangement has come under fire in the postwar period on a number of policy grounds. Some critics have argued, for example, that fundamental political and technological changes in the character of international relations and the position of the United States in the world have rendered obsolete an eighteenth-century document designed for a peripheral, small state in the European system of diplomatic relations. Moreover, it has been asserted that quick action and a single, authoritative voice are necessary to deal with an increasingly complex, interdependent, and technologically linked world capable of massive destruction in a very short period of time. Extollers of presidential dominance have also contended that only the president has the qualitative information, the expertise, and the capacity to act with the necessary dispatch to conduct U.S. foreign policy. These policy arguments have been reviewed, and discredited, elsewhere; space limitations here permit only a brief commentary. Above all else, the implications of U.S. power and action in the twentieth century have brought about an even greater need for institutional accountability and collective judgment that existed 200 years ago. The devastating, incomprehensible destruction of nuclear war and the possible extermination of the human race demonstrate the need for joint participation, as opposed to the opinion of one person, in the decision to initiate war. Moreover, most of the disputes at stake between the executive and legislative branches in foreign affairs, including the issues discussed in this chapter, have virtually nothing to do with the need for rapid response to crisis. Rather, they are concerned only with routine policy formulation and execution, a classic example of the authority exercised under the separation of powers doctrine. But these functions have been fused by the executive branch and have become increasingly unilateral, secretive, insulated from public debate, and hence unaccountable. In the wake of Vietnam, Watergate, and the Iran-Contra scandal, unilateral executive behavior has become even more difficult to defend. Scholarly appraisals have exploded arguments about intrinsic executive expertise and wisdom on foreign affairs and the alleged superiority of information available to the president. Moreover, the inattentiveness of presidents to important details and the effects of “group-think” that have dramatized and exacerbated the relative inexperience of various presidents in international relations have also devalued the extollers arguments. Finally, foreign policies, like domestic policies, are a reflection of values. Against the strength of democratic principles, recent occupants of the White House have failed to demonstrate the superiority of their values in comparison to those of the American people and their representatives in Congress

### Free Speech Net Benefit

SEE THE RULE UTIL CONSTITUTION DA FILE

#### The plan conflicts with free speech doctrine

Fisher 14 [(Daniel, Forbes Staff, I cover finance, the law, and how the two interact) “Europe's `Right To Be Forgotten' Clashes With U.S. Right To Know” Forbes 5/16] AT

The decision treats search engines like publishers, with the power to pick and choose what other people can see when they type in an individual’s name. That conflicts directly with U.S. law, which protects the free flow of information through the First Amendment and relies upon tort law, primarily libel and invasion of privacy, to protect individuals. Search engines and Internet providers in the U.S. are generally protected from liability for passing on data unless they have direct knowledge it is false or violates copyright law. (Though Google, like most search operators, has mechanisms for requesting takedowns of copyrighted or private material.) It’s ironic that the flashpoint is the “right to be forgotten,” since the U.S. for most of its existence has been a place where people come to put the past behind them. The country’s strong protections against political persecution and liberal bankruptcy laws to allow them to escape crushing debts both served as powerful magnets for immigrants seeking escape. How, then, could the U.S. get so far out of whack with Europe on personal privacy? Europe has long had a much different conception of privacy and how to protect it. The EU court technically was enforcing a 1995 EU directive on privacy that treats search engines as data “collectors” subject to regulation. But the decision has its roots in the older French concept of droit à l’oubli, or the right to oblivion. As this useful article by Internet-privacy experts Meg Leta Amrose and Jeff Ausloos explains, EU regulators have long been more concerned than their U.S. counterparts about personal privacy and the role of government in enforcing it. The European Convention on Human Rights, adopted in 1953, explicitly introduced the right to “respect for private and family life.” A 1981 provision specifically targets the automatic processing of data and the European Commission declared the right to be forgotten a a pillar of the Data Protection Regulation in 2010. So the EU court’s decision shouldn’t have come as such a surprise to Google, given the explicit language that preceded it. That decision requires Google to take down data that are “inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes for which they were processed and in the light of the time that has elapsed.” This mirrors existing EU regulations prohibiting companies from holding personal data for an unreasonable time. In this case it was articles about the the 1998 repossession of a Spanish man’s home. But the decision could result in large swaths of currently public information being removed from the view of European Internet users, although how Google, Yahoo and other search engines will accomplish this — or how consistently the 28 member countries will enforce the decision – is still unknown. Will it create yet another World Wide Web, censored, like in China, to protect users from knowing too much? Or will it prove unworkable, as did Europe’s generally toothless regulations on the long-term storage of personal data? Privacy isn’t the only area where European and U.S. views toward individual rights diverge. European law is more protective of individual creative rights, in a way that might strike Americans as paternalistic or interfering with other fundamental rights like property and the right of contract. In Europe, artists possess inalienable “moral rights” — based again on the French “droit moral” — over their creations that supersede copyright and allows them to prevent alterations that they think would show them in a bad light. In the U.S., artists can sell their works to the highest bidder with no strings attached, as many novelists have learned to their horror after watching their works translated into Hollywood films. The right to be forgotten reflects a similar concern with how individuals are viewed by the rest of the world. It is to a large extent based on the right to have only correct information about oneself available to the public. Most Americans would understand that, in the context of requiring credit reporting agencies to delete incorrect records of unpaid debts, for example.

#### Free speech is a net benefit – it enforces contracts rather than ruling that privacy overrides free speech

Walker 12 [Robert Kirk Walker, J.D. Candidate at University of California, Hastings College of the Law. “The Right to Be Forgotten,” ] **AZ**

Establishing a statutory right to delete voluntarily submitted data would help fulfill user’s expectations of data privacy, align international privacy norms, and drive the market for improved data management technologies. Furthermore, such a right could be legislatively enacted as a default contract rule without running afoul of the U.S. Constitution.[[4]](#footnote-4) The main advantage of contracting for privacy is that the contract model does not endorse any right to stop others from speaking that would offend the First Amendment. Rather, it endorses a right to stop people from breaking their promises.[[5]](#footnote-5) In *Cohen v. Cowles Media*, the Supreme Court held that contracts not to speak—that is, promises made not to reveal information or say certain things—are enforceable and do not violate the First Amendment.[[6]](#footnote-6) Similarly, when persons have an expectation that their private data will be kept secret, then courts may infer an implied contract of confidentiality or apply the doctrine of promissory estoppel to enforce this expectation of privacy.[[7]](#footnote-7) “In many contexts, people reasonably expect—because of custom, course of dealing with the other party, or all the other factors that are relevant to finding an implied contract—that part of what their contracting partner is promising is confidentiality.”143 As such, the enforcement of privacy contracts does not offend free speech rights, as the government is not restricting speech, but rather enforcing obligations that the would-be speaker has voluntarily assumed.144

#### The thesis of the free speech violation is not that removing information itself removes free speech. Instead, it’s that ruling in favor of privacy and limiting free speech allow free speech violations.

#### Multiple precedents rule in favor of free speech. Either the aff overrules centuries of precedent which links to the disad, or the plan action gets overturned by the courts and the CP is the best option

Walker 12 [Robert Kirk Walker, J.D. Candidate at University of California, Hastings College of the Law. “The Right to Be Forgotten,” ] **AZ**

At first blush, the tort of public disclosure of a private fact seems viable as a remedy to unwanted dissemination of personal information, but American courts have consistently found that rights of freedom of speech, particularly those of the press, often trump privacy rights and preclude recovery.[[8]](#footnote-8) When tort injury conflicts with free speech, the latter must win because, “in public debate [we] must tolerate insulting, and even outrageous, speech in order to provide adequate ‘breathing space’ to the freedoms protected by the First Amendment.”[[9]](#footnote-9) The desiccation of the tort of public disclosure came under the heat of three Supreme Court cases: Cox Broadcasting v. Cohn,[[10]](#footnote-10) Smith v. Daily Mail Publishing,[[11]](#footnote-11) and Florida Star v. B.J.F.[[12]](#footnote-12) In Cox Broadcasting, the Court considered whether the father of a deceased rape victim was entitled to damages from a broadcast television station that had identified the victim by name during coverage of her alleged rapist’s trial.[[13]](#footnote-13) The Court found for the station.[[14]](#footnote-14) After reviewing the arguments put forward in The Right to Privacy, as well as the privacy torts contained in the Restatement,[[15]](#footnote-15) the Court concluded that, “even the prevailing law of invasion of privacy generally recognizes that the interests in privacy fade when the information involved already appears on the public record.”[[16]](#footnote-16) The Court, however, avoided the issue of whether a state could define certain private activities and information as off-limits from the press, and instead narrowed its holding to exempt from liability only the truthful publication of names obtained from public court records.[[17]](#footnote-17) Two years later, in Oklahoma Publishing Co. v. District Court ex rel. Oklahoma County, the Court affirmed Cox Broadcasting and held that a newspaper company could not be held liable for publishing the events of a closed-door juvenile proceeding because the sitting judge allowed media into the courtroom.[[18]](#footnote-18) Then in Daily Mail, the Court suggested in dicta that all truthful publications made by the press are protected under the First Amendment, so long as the information was obtained from a lawful source.[[19]](#footnote-19) After reviewing its holdings in Cox Broadcasting, the Court said that “if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order.”[[20]](#footnote-20) Finally, in Florida Star, the Court held that “where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order.”[[21]](#footnote-21) In dissent, Justice White argued that allowing a state to penalize the publication of truthful information only when “a state interest of the highest order” was involved effectively “obliterate[s] one of the most noteworthy legal inventions of the 20th century: the tort of the publication of private facts.”[[22]](#footnote-22) Therefore, in light of the Court’s view that the First Amendment guarantees the media a nearly unlimited right to publish truthful information, many scholars have questioned whether the tort of public disclosure is still valid:[[23]](#footnote-23) [T]he tort’s use is limited to cases in which the press publishes information that was unlawfully obtained and wholly unrelated to a matter of public significance. . . . Given the narrow class of information that fulfills the Florida Star requirements, the tort can no longer be an effective tool for protecting individual privacy.[[24]](#footnote-24) Thus, because of the public disclosure tort’s tenuous constitutional status and the broad range of activities that qualify as protected speech,[[25]](#footnote-25) there seems little merit to using the tort as a basis for enforcing online privacy rights.

#### Strong free speech precedent is key to check aggression – suppression makes xenophobic violence inevitable

Blasi 85 - Vincent Blasi, Professor of Civil Liberties, Columbia University. Columbia Law Review, APRIL, 1985. 85 Colum. L. Rev. 449. “THE PATHOLOGICAL PERSPECTIVE AND THE FIRST AMENDMENT.”

There is reason to believe that susceptibility to pathological challenge is especially characteristic of the central constitutional norms regarding free expression and inquiry. Most constitutional commitments are fragile in the sense that they embody ideals that are easily abandoned or tempered in times of stress. Certain distinctive features of the commitment to free speech enhance that fragility. The aggressive impulse to be intolerant of others resides within all of us. It is a powerful instinct. Only the most sustained socialization -one might even say indoctrination in the value of free speech -keeps the urge to suppress dissent under control. 9 When the constraints imposed by that socialization lose their effectiveness, as most social constraints intermittently do, the power of the instinct toward intolerance usually generates a highly charged collective mentality. Because the instinct to suppress dissent is basic, primitive, and aggressive, it tends to have great momentum when it breaks loose from the shackles of social constraint. Aggression is contagious, and hatred of strangers for what they believe is one of the safest and most convenient forms of aggression. The problem is compounded by the fact that the suppression of dissent ordinarily is undertaken in the guise of political affirmation, of insisting that everyone stand up and be counted in favor of the supposed true values of the political community. As such, this particular type of challenge to constitutional liberties can take on the character of a mass movement; it can engage the imagination of the man on the street. It would be a great mistake, moreover, to assume that pathologies regarding the liberties of expression and inquiry constitute mere passing tempests, rough and unsettling at the time but of only limited significance in the long run. Some historians believe that the Red Scare was a factor in the precipitous collapse during the 1920s of the once potent Socialist movement in the United States. 10 The State Department's corps of experienced specialists on the Far East was decimated as a result of firings and forced resignations during the McCarthy Era; [\*458] miscalculations in American policy toward Vietnam have been attributed to that loss of expertise. 11 The Hollywood Blacklist struggle of 1947-1953 left a residue of broken careers, expatriate talents, and extreme reluctance on the part of film studios to address controversial subjects or portray social conditions of potential political significance. 12 The character of the trade union movement was permanently altered by the expulsion during the anti-Communist purges of the 1950s of some of its most skillful, uncompromising, and incorruptible leaders. 13 Pathological periods tend to be short-lived, but their consequences linger on. So far I have argued that the central norms of the constitutional tradition, which are normally immune from serious challenge both in political debate and adjudication, tend to be placed in jeopardy during pathological periods. That claim still does not establish that adjudication in ordinary times should be heavily influenced by the goal of strengthening the central norms of the first amendment tradition against the possibility of pathological challenges. Even if the most serious challenges to those norms tend to be concentrated in pathological periods, it may be that the best way to fortify a constitutional regime against pathological challenge is to develop a strong tradition of adjudication geared to normal times.

#### Free speech checks war and terrorism

D’Souza 96 - Frances D'Souza, Executive Director of Article 19, the International Centre Against Censorship. Public Hearing Committee on Foreign Affairs, Security and Defence Policy Subcommittee on Human Rights Brussels, 25 April 1996. “Freedom of Expression: The First Freedom?” Article 19, International Centre Against Censorship. http://www.europarl.europa.eu/hearings/19960425/droi/freedom\_en.htm

There are undoubted connections between access to information, or rather the lack of it, and war, as indeed there are between poverty, the right to freedom of expression and development. One can argue that democracy aims to increase participation in political and other decision-making at all levels. In this sense democracy empowers people. The poor are denied access to information on decisions which deeply affect their lives, are thus powerless and have no voice; the poor are not able to have influence over their own lives, let alone other aspect of society. Because of this essential powerlessness, the poor are unable to influence the ruling elite in whose interests it may be to initiate conflict and wars in order to consolidate their own power and position. Of the 126 developing countries listed in the 1993 Human Development Report, war was ongoing in 30 countries and severe civil conflict in a further 33 countries. Of the total 63 countries in conflict, 55 are towards the bottom scale of the human development index which is an indicator of poverty. There seems to be no doubt that there is a clear association between poverty and war. It is reasonably safe to assume that the vast majority of people do not ever welcome war. They are normally coerced, more often than not by propaganda, into fear, extreme nationalist sentiments and war by their governments. If the majority of people had a democratic voice they would undoubtedly object to war. But voices are silenced. Thus, the freedom to express one's views and to challenge government decisions and to insist upon political rather than violent solutions, are necessary aspects of democracy which can, and do, avert war. Government sponsored propaganda in Rwanda, as in former Yugoslavia, succeeded because there weren't the means to challenge it. One has therefore to conclude that it is impossible for a particular government to wage war in the absence of a compliant media willing to indulge in government propaganda. This is because the government needs civilians to fight wars for them and also because the media is needed to re-inforce government policies and intentions at every turn. In a totalitarian state where the expression of political views, let alone the possibility of political organis-ation, is strenuously suppressed, one has to ask what other options are open to a genuine political movement intent on introducing justice. All too often the only perceived option is terrorist attack and violence because it is, quite literally, the only method available to communicate the need for change.

### Constitution Net Benefit

#### Courts will strike down the right to be forgotten when it conflicts with free speech. Multiple violations of the First Amendment and legal precedent means courts won’t enforce privacy rights, tanks aff solvency

Walker 12 [Robert Kirk Walker, J.D. Candidate at University of California, Hastings College of the Law. “The Right to Be Forgotten,” brackets in original] **AZ**

“The American resistance to [privacy rights] has always been a resistance founded on two values in particular: the value of the free press, and the value of the free market.”116 This has been particularly true when privacy rights interfere with newsgathering. In the United States, the media is expected to “uncover the truth and report it—not merely the truth about government and public affairs, but the truth about people.”117 The law protects these expectations, and “when they collide with expectations of privacy, privacy almost always loses.”118 Thus, some scholars have predicted that if the right to be forgotten were adopted in the United States, it would fare no better under constitutional scrutiny than the Brandeis torts have.119 This may not be the case. Consider the three primary groups of actors who are implicated by the right to be forgotten: data subjects, content creators, and third-party websites like search engines and aggregators.[[26]](#footnote-26) The first group covers people who are the subjects of data posted, stored, or collected online. The second group contains persons who post data online that qualifies as protected speech, such as blog posts, pictures on Facebook, videos on YouTube, product comments in online stores, et cetera. The third category comprises websites that display or link to material created by others (for example, news feeds, search engines, audiovisual databases).[[27]](#footnote-27) In the interaction between these three groups, the salient question is whether granting data subjects the right to compel the removal of personal information from the Internet would infringe upon the First Amendment rights of either content creators or third-party websites.[[28]](#footnote-28) Or, in terms of the hypothetical: (1) Would granting Allison, a data subject, the right to require that Nell, a creator, remove the offending pictures from her website violate Nell’s free speech rights; and (2) would granting this right allow Allison to compel that the pictures be removed from third-party websites, such as myexgirlfriend.com? Turning to the first question, photography is a form of expressive conduct that is protected by the First Amendment.[[29]](#footnote-29) Accordingly, Nell has a constitutional right to make photographs and to display her work in public fora such as her website. However, sexually explicit pictures also convey information related to the people photographed, and so the pictures fall within the scope of data that are subject to the Commission Proposal’s right to be forgotten: “any information relating to a data subject.”124 So, Nell’s free speech rights stand in direct opposition to Allison’s putative right to be forgotten. However, as discussed in Subpart II.B, the Commission Proposal also provides that data may not be deleted when it is necessary for exercising “the right of freedom of expression,” as defined by national laws.125 Under *Daily Mail* and *Florida Star*, truthful publications of lawfully obtained information 126 may be constrained only when the restriction is “narrowly tailored to a state interest of the highest order.”127 While truthful publications are not automatically afforded First Amendment protection,128 there have been no cases where the Court has found an individual’s privacy rights are themselves a “state interest of highest order.” Furthermore, given that the *Florida Star* Court held that a newspaper could not be constrained from publishing the full name of a sexual assault victim,129 it is all but inconceivable that a court would find that the privacy rights of a willful sexual actor who subsequently regretted her decisions are of sufficient state interest to justify a restraint on speech: “[A]bsent exceptional circumstances, reputational interests alone cannot justify the proscription of truthful speech.”130 Therefore, Allison would not have grounds to compel the removal of the photographs from Nell’s website based on the right to be forgotten, as doing so would violate Nell’s First Amendment rights.131 Thus, by extension, it seems that the right to be forgotten could only be applied by a data subject against a content creator under “exceptional circumstances” of the “highest order” of state interest. Personal privacy and reputational harm are not such interests. Similarly, the First Amendment would preclude Allison from compelling the removal of the photographs from third party websites, including myexgirlfriend.com. Even though Marco acquired the photographs through illicit means (that is, by copying Nell’s copyrighted images without authorization), Nell lawfully created the original photographs. Unlike Nell, Allison does not have any proprietary interests in the photographs,[[30]](#footnote-30) and she cannot compel Nell to enforce her copyrights against third-party infringers. Likewise, if there is no basis for a data subject to assert the right to be forgotten against a content creator,[[31]](#footnote-31) then there is also no basis for a claim against third parties who copy, link to, or otherwise republish the offending data. Given the breadth of First Amendment protections following Florida Star, the speech rights of creators and third-party websites trump the privacy rights of data subjects. Thus, without Nell’s assistance, Allison has no constitutionally valid means to compel websites displaying the photographs to remove them.

#### Constitution is a net benefit – courts have ruled that implied contracts not to speak are enforceable and consistent with the constitution

Walker 12 [Robert Kirk Walker, J.D. Candidate at University of California, Hastings College of the Law. “The Right to Be Forgotten,” ] **AZ**

Establishing a statutory right to delete voluntarily submitted data would help fulfill user’s expectations of data privacy, align international privacy norms, and drive the market for improved data management technologies. Furthermore, such a right could be legislatively enacted as a default contract rule without running afoul of the U.S. Constitution.[[32]](#footnote-32) The main advantage of contracting for privacy is that the contract model does not endorse any right to stop others from speaking that would offend the First Amendment. Rather, it endorses a right to stop people from breaking their promises.[[33]](#footnote-33) In *Cohen v. Cowles Media*, the Supreme Court held that contracts not to speak—that is, promises made not to reveal information or say certain things—are enforceable and do not violate the First Amendment.[[34]](#footnote-34) Similarly, when persons have an expectation that their private data will be kept secret, then courts may infer an implied contract of confidentiality or apply the doctrine of promissory estoppel to enforce this expectation of privacy.[[35]](#footnote-35) “In many contexts, people reasonably expect—because of custom, course of dealing with the other party, or all the other factors that are relevant to finding an implied contract—that part of what their contracting partner is promising is confidentiality.”143 As such, the enforcement of privacy contracts does not offend free speech rights, as the government is not restricting speech, but rather enforcing obligations that the would-be speaker has voluntarily assumed.144

#### Constitutionality is key to credibility – violating the constitution proves that we’re not trustworthy.

Tom Ginsburg 6 (Professor of Law and Political Science, University of Illinois, Urbana-Champaign). “LOCKING IN DEMOCRACY: CONSTITUTIONS, COMMITMENT, AND INTERNATIONAL LAW.” 2006. http://works.bepress.com/tom\_ginsburg/12/

Why might these issues of constitutional design vary across countries? I draw on the literature that treats constitutions as mechanisms for making political precommitments.56 A precommitment means “becoming committed, bound or obligated to some course of action or inaction or to some constraint on future action . . . to influence someone else’s choices.”57 Imagine a constitution written by a single political leader, seeking to establish legitimate authority. The politician can promise to behave in particular ways, for example, not to interfere with the rights of his or her citizens. But there is no reason for citizens to believe mere promises from their leader. A promise at Time 1 only has value if the promisee believes that it will be obeyed at Time 2. The politician thus faces the problem of making the promise credible. This problem is particularly acute when the politician cannot predict the incentives he or she will face in the future.58 If costs and benefits vary in unpredictable ways, the politician’s promise to behave in the specified way may be less believable. To paraphrase Stephen Holmes, why should people believe their leader when sober, knowing that sometimes leaders can become drunk and behave quite differently?59 Facing this problem, a rational constitutional designer might realize that it makes sense to limit her own power, in order to obtain the consent of those she governs. Democratic constitutions can help to serve this role. As Sunstein has written: “Democratic constitutions operate as ‘precommitment strategies’ in which nations, aware of problems that are likely to arise, take steps to ensure that those problems will not arise or that they will produce minimal damage if they do.”60 Constitutions help make the promises credible by imposing costs on those who violate promises.61 By tying their own hands, politicians actually can enhance their own authority.

#### International credibility solves multiple scenarios for extinction.

Nye and Armitage 07 [Joseph Nye (University Distinguished Service Professor at Harvard University, and previous dean of Harvard University's John F. Kennedy School of Government) and Richard Armitage (13th United States Deputy Secretary of State, the second-in-command at the State Department, serving from 2001 to 2005), “CSIS Reports – A Smarter, More Secure America”, 11/6, 2007 http://www.csis.org/component/option,com\_csis\_pubs/task,view/id,4156/type,1/]

Soft power is the ability to attract people to our side without coercion. Legitimacy is central to soft power. If a people or nation believes American objectives to be legitimate, we are more likely to persuade them to follow our lead without using threats and bribes. Legitimacy can also reduce opposition to—and the costs of—using hard power when the situation demands. Appealing to others’ values, interests, and preferences can, in certain circumstances, replace the dependence on carrots and sticks. Cooperation is always a matter of degree, and it is profoundly influenced by attraction…The information age has heightened political consciousness, but also made political groupings less cohesive. Small, adaptable, transnational networks have access to tools of destruction that are increasingly cheap, easy to conceal, and more readily available. Although the integration of the global economy has brought tremendous benefits, threats such as pandemic disease and the collapse of financial markets are more distributed and more likely to arise without warning. The threat of widespread physical harm to the planet posed by nuclear catastrophe has existed for half a century, though the realization of the threat will become more likely as the number of nuclear weapons states increases. The potential security challenges posed by climate change raise the possibility of an entirely new set of threats for the United States to consider… States and non-state actors who improve their ability to draw in allies will gain competitive advantages in today’s environment. Those who alienate potential friends will stand at greater risk. China has invested in its soft power to ensure access to resources and to ensure against efforts to undermine its military modernization. Terrorists depend on their ability to attract support from the crowd at least as much as their ability to destroy the enemy’s will to fight.

### Data Protection Net Benefit

#### The CP is key to solving disparities in data protection across the Internet—the creation of a norm is a net benefit

Walker 12 [Robert Kirk Walker, J.D. Candidate at University of California, Hastings College of the Law. “The Right to Be Forgotten,” ] **AZ**

Policies are also subject to change— often [[36]](#footnote-36)suddenly—at the sole discretion of website operators.[[37]](#footnote-37) Further, the software architecture of many websites incorporates data-gathering technologies provided by third parties, such as advertising networks,[[38]](#footnote-38) that collect information about users either on behalf of the host website or for their own business purposes. For example, according to a *Wall Street Journal* investigative report, “the nation’s 50 top websites on average installed 64 pieces of tracking technology onto the computers of visitors, usually with no warning.”[[39]](#footnote-39) Certain types of data collection are subject to statutory restriction, such as financial data,[[40]](#footnote-40) healthcare information,[[41]](#footnote-41) and information collected about children.[[42]](#footnote-42) But most personal data collected and stored by website operators (for example, a user’s geographic location, web search and browsing history, personal messages and information shared on social media sites, and files stored “in the cloud”) are not currently subject to regulation.[[43]](#footnote-43) Additionally, personal data collection and retention practices are also largely out of sync with public perception of what data privacy rights should exist.[[44]](#footnote-44) For example, a 2009 survey by the Universities of Pennsylvania and California found that more than 80% of Americans believe websites should not track their behavior for advertising, and that more than 90% believe advertisers should be required by law to stop tracking on request.[[45]](#footnote-45) A follow-up study in 2010 found that 88% of young adults surveyed[[46]](#footnote-46) said that the law should require websites to delete all stored information about users,[[47]](#footnote-47) and 62% said there should be a law giving people the right to know all the information that a website has collected about them.[[48]](#footnote-48) The authors of these surveys found that, “large percentages of young adults are in harmony with older Americans when it comes to sensitivity about online privacy.”[[49]](#footnote-49) These empirical results indicate a broad cultural preference for having the ability to optout of data collection and to have personal data removed on demand. The existence of cultural preferences concerning online privacy does not necessarily imply that a user would expect these preferences to be reflected in a website terms of service agreement: Users may wish one thing, but expect or even accept its opposite. However, just because users might not currently expect contractual data privacy, this does not present a barrier against a legislature requiring that an implied data deletion term be included in all website terms of service contracts. Indeed, such legislative action is likely necessary for data retention practices to ever come into line with popular preferences, as website operators have relatively weak incentives to do so on their own. For example, data storage is increasingly inexpensive,[[50]](#footnote-50) and website operators benefit financially from retaining data for future use—such as selling their databases to other companies or “mining” them for the purposes of targeted advertising or marketing.[[51]](#footnote-51) Moreover, website operators are often slow to enforce their own privacy procedures.[[52]](#footnote-52) While websites that publicly violate user privacy norms risk reputational damage and loss of goodwill to their corporate brands, so long as all operators maintain similarly weak data privacy and protection standards, the headline sensitivity for any individual company is minimized.[[53]](#footnote-53) Thus establishing an explicit legal basis for users to demand the deletion of data, accompanied by strong penalties for non-compliance, would act as a market lever to pressure website operators into adopting deletion protocols that better align with users’ professed preferences.[[54]](#footnote-54)

## 2NR

### 2NR Top Level Explanation

#### The counterplan establishes an implicit contract when data is gathered about someone, where the subject of the data has implicitly consented only to one specific use of the data. When information is posted online against a person’s will, they have violated that implicit contract, and that violation warrants removal of the information.

#### The aff establishes a civil right to be forgotten, where individuals can request search engines to remove data or bring those search engines to court if they refuse. There is a difference in approach – the right to forgotten is enforced by comparing privacy rights vs speech rights, and if there is a sufficient violation of privacy, the information is removed. The counterplan treats data as a contract, where if the information is used against a person’s will, the contract is violated and the data is removed.

#### This approach solves better – it’s an objective approach as opposed to the legal confusion associated with the right to be forgotten. The Bolton evidence says the right to be forgotten is typically worded poorly, allowing those charged with a violation of the right a reasonable defense so that data isn’t actually removed. The Walker evidence says a contract rule is objective and enforceable – courts regularly decide contract violations without legal confusion, proving it would be enforceable and solves better than the aff.

#### The second Walker evidence proves more solvency arguments. It aligns data protection standard with users’ expectations, which solves privacy violations. Since the counterplan penalizes violations, companies would have an incentive to comply with data protection standards. The counterplan also standardizes data protection policies, which avoids confusion that chills free speech, which means free speech is a net benefit.

#### Property rights are key to privacy rights—prerequisite to the aff

Walker 12 [Robert Kirk Walker, JD Candidate Hastings, 2012, "The Right to Be Forgotten", Hastings Law Journal, 64 Hastings L. J. 257, p. 268]

There is a line of scholarly commentary arguing that private information should be treated as a form of intellectual property.69 Proponents of this theory argue that individuals should be given the property rights to control their data,70 and that personally identifiable information should be treated as “the property or quasi-property of the individual to whom it refers.”71 In theory, intellectual property could provide a basis for a right to be forgotten, and one potential benefit of such a scheme would be that “a property approach would bind everyone, and not just those who are in contractual privity.”72 Another potential benefit is that, as a form of property, private information would be alienable, thus allowing for the creation of personal data markets where individuals could sell or barter their information.7

### 2NR Constitution DA

#### Property aspect of the counterplan means that courts won’t reject the CP

Eltis 11 [Karen Eltis, Law Professor-University of Ottawa, 2011, "Breaking Through the 'Tower of Babel': a 'Right to be Forgotten' and How Trans-Systemic Thinking Can Help Re-Conceptualize Privacy Harm in the Age of Analytics," Fordham Intellectual Property, Media & Entertainment Law Journal, 22 Fordham Intell. Prop. Media & Ent. L.J. 69, p. 77-8]

In the United States and in the common law world generally, "privacy is best treated as a property right. Property grants an owner the exclusive right to dispose of what he owns. Privacy is the exclusive right to dispose of access to one's proper (private) domain." n35 Not surprisingly therefore, "in the United States, judicial protection of privacy depends on whether an individual has a reasonable expectation that the information in question will remain private. Stated another way, the question is whether society recognizes the individual's claimed expectation of privacy as reasonable." n36 Arguably this approach discounts context.

#### Property doesn’t violate the constitution

Mayer-Schonberger 9 [Viktor Mayer-Schonberger, Professor Internet Regulation-Oxford, 2009, Delete: the virtue of forgetting in the digital age, p. 143]

Perhaps we have even misunderstood the inherent limitations of property. That is what Berkeley Law professor Paul Schwartz has recently argued impressively. He maintains that the concept of property is sufficiently flexible and adjustable to work for information privacy. Key to his model of propertized information, which seeks also to fully safeguard information privacy, is an understanding of information property as a bundle of interests that can be shaped through the legal system. This permits law to limit certain kinds of trades, most notably any further use or transfer of information unless an individual has given her consent.

### A2 Perm do CP

#### Severance – they are bound to defending the plan action. There is a functional difference between the CP and the plan, so perm do the CP isn’t legitimate.

#### Severance is a voting issue – it artificially escapes neg disad links to kill all neg ground

### ---A2 1AR Advocacy Shift

#### HOLD THE LINE on 1AR advocacy shifts – they’re unpredictable and skew neg strategy by artificially getting out of literally any offense the neg brings up in the 1AR. If I have answers to legal rights, they’ll shift to a human right, and if I have answers to human rights they’ll say they are a legal right.

#### Also, they need a definition – if they don’t define a civil right they don’t get to shift their advocacy to it – this justifies specing and entirely non-topical advocacy in the 1AR, which is obviously inconsistent with the topic

#### If the aff doesn’t read an advocacy statement, they should be forced to defend the best definition of the terms in the resolution

#### They can’t have it both ways – they choose not to specify an advocacy in the AC in order to avoid T. I obviously can’t read new T in the 2NR, and even if I did the 2AR could easily win by making 1 response and automatically winning since I have no 3NR. This means you bind them to the common understanding of the topic, since there is literally nothing else the neg can do against 1AR shifts.

### ---Civil Right Definition

#### Prefer the Law Institute definition---

#### Most predictable – it’s the most common use of the term civil right

#### Cites multiple legal documents including the Constitution, international treaties, and federal statutes – variety of sources means it’s more commonly used

#### first hit on Google – it’s the most accessible

#### Consensus – every other legal definition agrees with this one – their authors are fringe and unpredictable

#### Core neg ground – non-legal definitions means the neg can’t get solid links since there’s no change in the law, allowing the aff to delink disads, counterplans, and NCs which screws the neg

#### Precision – legal definitions capture civil rights as a term of art – the right to be forgotten was established in a legal decision by the EU court so legal definitions capture its meaning the best

### A2 Perm do Both

#### Legislative overbuilding DA – including more regulations and possibilities for legal action builds extremely complex legal systems – this increases noncompliance and reduces citizen participation which causes apathy

Bobertz 95 [Bradley C.Bobertz, Assistant Professor of Law, University of Nebraska College of Law. “Legitimizing Pollution Through Pollution Control Laws: Reflections on Scapegoating Theory.” Texas Law Review, Volume 73, Number 4, March 1995. Content downloaded/printed from HeinOnline (http://heinonline.org) Wed Dec 25 23:49:03 2013 SW]

The Clean Air Act's "nonattainment program" (a euphemistic name for a failing system) provides a good example. Its length and complexity increased geometrically between its initial enactment in the mid-course correction amendments of 1977 and its second, monstrously intricate iteration in the 1990 amendments. 79 Explaining the nonattainment provisions and other aspects of the 1990 Clean Air Act amendments to lawyers ordinarily accustomed to reading and understanding statutory law continues to provide lucrative business opportunities for continuing legal educators. 1t8 Overcomplexity in the law by itself imposes costs on society. Initially, regulated entities must add to their ordinary cost of compliance the cost of simply understanding what the law requires them to do. Complicated laws also increase the likelihood of noncompliance,"' undermining the attainment of environmental goals and creating pressures for extending deadlines and raising permissible emission levels-a pattern endemic in environmental law." Even more troubling is the fact that unnecessary legal complexity deprives society at large of a common, comprehensible vocabulary for debating environmental policy. A system of democratic rule implies discourse not only among a select group of experts, but also among the voting public. Environmental law has swollen into a fortress of specialized concepts and jargon practically impregnable to ordinarily informed and aware citizens." Creating barriers to public understanding of, and involvement in, environmental law frustrates the theoretical virtues of democratic self-rule and also engenders a problem of more practical import-a spirit of confusion and anger that characterizes most public encounters with environmental problems and the laws erected to correct them.1 Such encounters typically result in resignation and apathy toward the law, qualities that impoverish any legal system directed toward social reform."

#### 2. Legal precision DA – the whole point of the CP is to clarify legal misunderstandings. The presence of two sets of language only intensifies the link to legal misunderstandings, which super-charges the disad links. Perm do both means you pass the bill of the plan and the counterplan, which is 2 sets of language.

#### Hold them to the language of the perm text – lack of clarification allows 2AR shiftiness to get out of my 2NR answers which kills neg strategy.

#### 3. Links to the disads – we have disads to the aff. Even if a 2nd bill would avoid the disads, the original bill of the plan would cause the disad impacts, so perm do both would link to the disads. No new shields the link arguments in the 2AR – they’re new offense that I can’t answer

#### 4. Political unfeasible – Congress would be unable to pass a second bill that does almost the same thing as the original bill – they couldn’t rally sufficient support. At worst, it would tank the solvency of the perm since Congress would refuse to enforce both bills or roll the bills back.

### A2 Perm Non ME

#### [see a2 do both above]

#### Non-mutually exclusive means they don’t do the counterplan – the two are exclusive approaches and can’t be done together

1. *. See* Volokh, *supra* note 72, at 1051 (“While privacy protection secured by contract is constitutionally sound, broader information privacy rules are not easily defensible under existing free speech law.”). *But cf.* Jessica Litman, *Information Privacy/Information Property*, 52 Stan. L. Rev. 1283, 1308–12 (2000) (arguing for tort action against unauthorized disclosure of personal data based on “breach of trust”). [↑](#footnote-ref-1)
2. . Volokh, *supra* note 72, at 1061. [↑](#footnote-ref-2)
3. *. See* *Cowles Media*, 501 U.S. at 670–72. This holding also applies to promises that are enforceable under the equitable doctrine of promissory estoppel and to implied contracts. [↑](#footnote-ref-3)
4. *. See* Volokh, *supra* note 72, at 1051 (“While privacy protection secured by contract is constitutionally sound, broader information privacy rules are not easily defensible under existing free speech law.”). *But cf.* Jessica Litman, *Information Privacy/Information Property*, 52 Stan. L. Rev. 1283, 1308–12 (2000) (arguing for tort action against unauthorized disclosure of personal data based on “breach of trust”). [↑](#footnote-ref-4)
5. . Volokh, *supra* note 72, at 1061. [↑](#footnote-ref-5)
6. *. See* *Cowles Media*, 501 U.S. at 670–72. This holding also applies to promises that are enforceable under the equitable doctrine of promissory estoppel and to implied contracts. [↑](#footnote-ref-6)
7. . *See* Restatement (Second) of Contracts § 4 cmt. a (1979); Volokh, *supra* note 72, at 1058 – 59; Pamela Samuelson, *A New Kind of Privacy? Regulating Uses of Personal Data in the Global*  [↑](#footnote-ref-7)
8. *. See* Harry Kalven, Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, Law & Contemp. Probs., Winter 1966, at 326, 335–38 (noting a substantial growth in the newsworthiness exception since *The Right of Privacy* was published); Rodney A. Smolla, *Privacy and the First Amendment Right to Gather News*, 67 Geo. Wash. L. Rev. 1097, 1101 (1999) (arguing that the privacy tort has little relevance to law practice today); Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis’s Privacy Tort*, 68 Cornell L. Rev. 291, 293 (1983) (“[Privacy tort law] cannot coexist with constitutional protections for freedom of speech and press.”). *See generally* David A. Anderson, *The Failure of American Privacy Law*, in Protecting Privacy 139 (Basil S. Markesinis ed., 1999). *But cf.* James Gordley, *When Is the Use of Foreign Law Possible? A Hard Case: The Protection of Privacy in Europe and the United States*, 67 La. L. Rev. 1073, 1099–100 (2007) (arguing that the reluctance of the Supreme Court to delineate public and non-public value in invasion of privacy cases led to overexpansion of free speech at the expense of legitimate privacy interests). [↑](#footnote-ref-8)
9. . Snyder v. Phelps, 131 S. Ct. 1207, 1219 (2011) (quoting Boos v. Barry, 485 U.S. 312, 322 (1988)). [↑](#footnote-ref-9)
10. . 420 U.S. 469, 493–96 (1975) (holding that the state cannot impose liability on a media outlet for publishing information found in a public record). [↑](#footnote-ref-10)
11. . 443 U.S. 97, 105–06 (1979) (holding that there is no liability for publishing information lawfully acquired and in the public interest unless state interest is “of the highest order”). [↑](#footnote-ref-11)
12. . 491 U.S. 524, 541 (1989) (“[W]here a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order . . . .”). [↑](#footnote-ref-12)
13. *. Cox*, 420 U.S. at 472–74. [↑](#footnote-ref-13)
14. *. Id.* at 491. [↑](#footnote-ref-14)
15. *. See id.* at 487–97. [↑](#footnote-ref-15)
16. *. Id.* at 494–95. [↑](#footnote-ref-16)
17. *. Id.* at 491. [↑](#footnote-ref-17)
18. *. See* 430 U.S. 308, 311–12 (1977). [↑](#footnote-ref-18)
19. . Smith v. Daily Mail Publ’g Co., 443 U.S. 97, 103 (1979). [↑](#footnote-ref-19)
20. *. Id.* [↑](#footnote-ref-20)
21. *.* Fla. Star v. B.J.F., 491 U.S. 524, 541 (1989) (emphasis added). The Court cabined this holding slightly: “We do not hold that truthful publication is automatically constitutionally protected, or that there is no zone of personal privacy within which the State may protect the individual from intrusion by the press . . . .” *Id.* [↑](#footnote-ref-21)
22. *. Id.* at 550 (White, J., dissenting). [↑](#footnote-ref-22)
23. *. See* Franz Werro, *The Right to Inform v. the Right to Be Forgotten: A Transatlantic Clash*, Georgetown University Center for Transnational Legal Studies Colloquium, May 2009, at 285, 296, *available at* http://ssrn.com/abstract=1401357 (“After *Florida Star*, it appears there is little the states can do to prevent the media from disseminating sensitive information so long as that information is legally acquired . . . evinc[ing] a clear preference for broad First Amendment protections of the press over the privacy interests of individuals.”). [↑](#footnote-ref-23)
24. . Jacqueline R. Rolfs, The Florida Star v. B.J.F*.: The Beginning of the End for the Tort of Public Disclosure*, 1990 Wis. L. Rev. 1107, 1127–28 (1990). [↑](#footnote-ref-24)
25. *. See* Texas v. Johnson, 491 U.S. 397, 404 (1989) (“The First Amendment literally forbids the abridgment only of ‘speech,’ but we have long recognized that its protection does not end at the spoken or written word . . . . [W]e have acknowledged that conduct may be ‘sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.’”). [↑](#footnote-ref-25)
26. . The term “content aggregator” is being used here to denote passive compilers of data who use automated processes (for example, search engine algorithms) rather than manual selection to populate their databases. While many sites both aggregate and create data, those that actively create, edit, or publish original content would fall in the creator category in this taxonomy, rather than in the content aggregator category. Therefore, journalistic websites such as online newspapers, magazines, blogs, et cetera are creators, even if their First Amendment rights differ from those enjoyed by private individuals. While these differences are not insignificant from the standpoint of First Amendment doctrine, they do not affect our analysis here. *See* Chris Conley, *The Right to Delete*, ACLU of Northern California 53, 56 (last modified Mar. 23, 2010), *available at* http://www.aaai.org/ocs/ index.php/SSS/SSS10/paper/view/1158 (“[A] right to delete may have additional impact on freedom of the press, in the sense that a right to delete incriminating records from one’s past reduces or eliminates the press’s ability to (re)publish these incidents if they return to relevance.”). [↑](#footnote-ref-26)
27. . This taxonomy is derived, in part, from questions posed by Peter Fleischer, Global Privacy Counsel for Google. *See* Peter Fleischer, *Foggy Thinking About the Right to Oblivion*,

    Privacy . . . ? (Mar. 9, 2011), http://peterfleischer.blogspot.com/2011/03/foggy-thinking-about-right-tooblivion.html (arguing that a “right to be forgotten” is a concealed form of censorship). [↑](#footnote-ref-27)
28. *. See* Conley, *supra* note 120, at 54–57. [↑](#footnote-ref-28)
29. *. See* Texas v. Johnson, 491 U.S. 397, 404 (1989) (“The First Amendment literally forbids the abridgment only of ‘speech,’ but we have long recognized that its protection does not end at the spoken or written word. . . . [W]e have acknowledged that conduct may be ‘sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.’”). Similarly, the fact that photographs are sexually explicit does not preclude them protection under the First Amendment. *See* Sable Commc’ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989) (“Sexual expression which is indecent but not obscene is protected by First Amendment . . . .”); Miller v. California, 413 U.S. 15, 39 (1973) (“Today we would add a new three-pronged test [for obscenity]: (a) whether the average person, applying contemporary community standards would find the work, taken as a whole, appeals to the prurient interest, . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether [↑](#footnote-ref-29)
30. . The situation might be different if Allison was a well-known person, in which case a state right-of-publicity tort might be applicable. [↑](#footnote-ref-30)
31. *. See Fla. Star*, 491 U.S. at 541. [↑](#footnote-ref-31)
32. *. See* Volokh, *supra* note 72, at 1051 (“While privacy protection secured by contract is constitutionally sound, broader information privacy rules are not easily defensible under existing free speech law.”). *But cf.* Jessica Litman, *Information Privacy/Information Property*, 52 Stan. L. Rev. 1283, 1308–12 (2000) (arguing for tort action against unauthorized disclosure of personal data based on “breach of trust”). [↑](#footnote-ref-32)
33. . Volokh, *supra* note 72, at 1061. [↑](#footnote-ref-33)
34. *. See* *Cowles Media*, 501 U.S. at 670–72. This holding also applies to promises that are enforceable under the equitable doctrine of promissory estoppel and to implied contracts. [↑](#footnote-ref-34)
35. . *See* Restatement (Second) of Contracts § 4 cmt. a (1979); Volokh, *supra* note 72, at 1058 – 59; Pamela Samuelson, *A New Kind of Privacy? Regulating Uses of Personal Data in the Global*  [↑](#footnote-ref-35)
36. , 2012, 4:30 PM), http://bits.blogs.nytimes.com/2012/01/24/google-to-update-its-privacy-policies-andterms-of-service. [↑](#footnote-ref-36)
37. *. See, e.g.*, Caroline McCarthy, *Do Facebook’s New Privacy Settings Let It off the Hook?*, CNET News(May 26, 2010, 12:07 PM), http://news.cnet.com/8301-13577\_3-20006054-36.html; Jon Swartz, *Facebook Draws Protests on Privacy Issue*, USA Today (May 13, 2010, 9:31 PM), http://www.usatoday.com/money/media/2010-05-14-facebook14\_ST\_N.htm; Jessica E. Vascellaro, *Facebook Grapples with Privacy Issues*, Wall St. J. (May 19, 2010), http://online.wsj.com/article/ SB10001424052748704912004575252723109845974.html. [↑](#footnote-ref-37)
38. *. See Advertising Network*, Wikipedia, http://en.wikipedia.org/wiki/Advertising\_network (last visited Oct. 2, 2012). [↑](#footnote-ref-38)
39. . Julia Angwin, *The Web’s New Gold Mine: Your Secrets*, Wall St. J. (July 30, 2010, 5:59 PM), http://online.wsj.com/article/SB10001424052748703940904575395073512989404.html. [↑](#footnote-ref-39)
40. *. See* Gramm-Leach-Bliley Act, 12 U.S.C. §§ 24, 78, 248, 377, 1831, 1848, 2908 (2006); 15 U.S.C. § 80 (2006); Fair Credit Reporting Act, 15 U.S.C. § 1681 (2006). [↑](#footnote-ref-40)
41. *. See* Health Insurance Portability and Accountability Act, 29 U.S.C. § 1181 (2006), 42 U.S.C.

    §§ 1320, 1395 (2006). [↑](#footnote-ref-41)
42. *. See* Children’s Online Privacy Protection Act, 15 U.S.C. § 6501 (2006). [↑](#footnote-ref-42)
43. . Some scholars have argued that this lack of regulation is preferable from both a market and public policy perspective. *See* Cate, *supra* note 6, at 131. [↑](#footnote-ref-43)
44. *. See, e.g.*, Lothar Determann, *Data Privacy in the Cloud: A Dozen Myths and Facts*, Computer & Internet Lawyer, Nov. 2011, at 1, 2–3. [↑](#footnote-ref-44)
45. . Joseph Turow et al., Contrary to What Marketers Say, Americans Reject Tailored Advertising 14, 23, *available at* http://ssrn.com/abstract=1478214. [↑](#footnote-ref-45)
46. . Those surveyed were aged 18 to 24. [↑](#footnote-ref-46)
47. *. See* Chris Hoofnagle et al., How Different Are Young Adults from Older Adults When It Comes to Information Privacy Attitudes and Policies?11 tbl.5 (2010), *available at* http://ssrn.com/abstract=1589864. [↑](#footnote-ref-47)
48. *. Id.* at 11 tbl.4; *see also* Danah Boyd & Alice Marwick, *Social Privacy in Networked Publics: Teen’s Attitudes, Practices, and Strategies* (June 2, 2011) (Privacy Law Scholar’s Conference working paper). [↑](#footnote-ref-48)
49. . Hoofnagle, *supra* note 159, at 3. [↑](#footnote-ref-49)
50. *. See* FTC, Protecting Consumer Privacy in an Era of Rapid Change: Recommendations for Businesses and Policymakers 46–47 (2010) [hereinafter FTC Staff Report]. [↑](#footnote-ref-50)
51. *. See* Angwin, *supra* 151; *see also* FTC Staff Report, *supra* note 162, at 36–52. [↑](#footnote-ref-51)
52. *. See, e.g.*, Nick Clayton, *‘Deleted’ Facebook Photos Still Online After Three Years*, Wall St. J. (Feb. 7, 2012, 7:13 AM), http://blogs.wsj.com/tech-europe/2012/02/07/deleted-facebook-photos-stillonline-after-three-years. [↑](#footnote-ref-52)
53. . This, in many respects, is an example of the economic public goods problem, where society as a whole would benefit from the creation of a good or service (for example, a lighthouse), but no individual actor has incentive to create this good because of the disproportionate burden of doing so relative to the individual benefit. [↑](#footnote-ref-53)
54. *. See* *Commission Proposal*, *supra* note 106, arts. 79(5)(c), (6)(c) (failure to comply with the regulation by any data controller could result in fines up to one million euros or two percent of the operator’s annual worldwide income). [↑](#footnote-ref-54)