

# THE RIGHT KIND OF PRIVACY

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## I. INTRODUCTION

In the parable of The Blind Men and the Elephant, a group of blind men seek to understand what an elephant is by touching different body parts of the mammal—its trunk, its tusk, its ear. After investigating, the men perceive three different animals.<sup>1</sup> American jurists’ search for “privacy” is likewise searching.

In *Americans for Prosperity Foundation v. Bonta*, the U.S. Supreme Court broadly shielded donor identity information from a California regulation that required charitable groups to disclose donor information to the state.<sup>2</sup> *Americans for Prosperity Foundation* was seemingly a pro-privacy rejoinder to California’s disclosure regime. However, calling the decision pro-privacy only scratches the surface. The Court eschewed precedent and forcefully protected the associational privacy of the petitioners and their donors. During the same term, the Court struck a serious blow to enforcing privacy laws in federal courts by undermining the use of private rights of action to litigate privacy harms under the Fair Credit Reporting Act (FCRA).<sup>3</sup> Are these cases consistent? The Court defended privacy in one case and dismantled it in the other.

This Note proposes that the Court’s decision in *Americans for Prosperity Foundation* can be explained by understanding that associational privacy, the interest defended in *Americans for Prosperity Foundation*, aligns with conservative and libertarian values. We can make sense of the Roberts Court’s broader privacy jurisprudence by contextualizing privacy interests within political philosophy. Certain privacy interests are consistent with conservative or libertarian ideology, while others clash with one or both philosophies—and the Roberts Court rules on privacy accordingly. This Note presents this

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1. *E.g.*, THE UDĀNA & THE ITIVUTTAKA: INSPIRED UTTERANCES OF THE BUDDHA & THE BUDDHA’S SAYINGS 9 (John D. Ireland trans., 2d ed. 1997).

2. 141 S. Ct. 2373 (2021).

3. *See* *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021); Daniel J. Solove & Danielle Keats Citron, *Standing and Privacy Harms: A Critique of TransUnion v. Ramirez*, 101 B.U. L. REV. ONLINE 62, 70 (2021) (explaining how the Supreme Court undermined consumers’ ability to pursue private rights of action against companies for privacy violations).

dynamic with the hope that it will explain the Roberts Court's superficially inconsistent privacy decisions. Through this framework, we can see that the Court's privacy decisions are in fact consistent because they tend to advance conservative, and to a lesser extent, libertarian values.

This Note proceeds in three parts. Part II examines two constitutional sources of privacy protection, the First Amendment and the Fourth Amendment, and explains the unique privacy interests that each amendment protects. Part II first defines associational privacy and freedom of association and explains the relationship between these rights under the First Amendment. It also explores the origin of the constitutional right to associational privacy, which emerged in the mid-20<sup>th</sup> century. Part II then discusses the Fourth Amendment, which protects people from unreasonable government intrusion. This Part describes how government intrusion can inflict privacy harms on individuals and communities. It also describes how Fourth Amendment doctrine evolved over time to protect privacy, as opposed to merely property, from government intrusion.

Part III surveys how the Roberts Court addressed legal challenges on behalf of privacy interests before *Americans for Prosperity Foundation* and then evaluates the *Americans for Prosperity Foundation* decision itself. Section III.A analyzes three categories of rulings and demonstrates that the Roberts Court typically undervalues privacy interests. First, the Court's criminal procedure decisions vitiated a crucial remedy to Fourth Amendment violations, the exclusionary rule. By undermining an incentive for the government to abide by the Fourth Amendment, the Court endangered privacy interests protected by the Fourth Amendment. Second, in two cases brought for alleged violations of the FCRA, the Court made it more difficult to satisfy Article III standing. The new standing test articulated in these decisions threatens congressionally created private rights of action meant to protect consumer privacy interests. Third, in a 2010 case that bears significant similarities to *Americans for Prosperity Foundation*, the Court published a disjointed decision that declined to protect the associational privacy interests of referendum petition signatories in Washington state. These decisions illustrate that the Roberts Court does not typically champion privacy interests: either the Court undervalues those interests, or the justices cannot issue a coherent ruling about how to protect privacy interests.

Section III.B then examines how in *Americans for Prosperity Foundation*, the Court adopted an unusually protective approach to the associational privacy interests of charitable donors. The six justices in the majority were united in their concern for charitable donors' associational privacy. The ruling struck down California's disclosure requirement in all of its applications, eschewing

the more modest choice to strike the requirement down merely in its application to the plaintiffs. Further, the majority did not require the challengers meet an evidentiary burden typically necessary to facially invalidate a law. The result is a decision that aggressively protects charitable donors' associational privacy interests from disclosure laws.

Part IV seeks to make sense of the Roberts Court's privacy jurisprudence by placing different privacy interests in the context of conservative and libertarian values. Privacy interests are diverse and distinct because privacy protects individuals from many different types of harm. A person whose emails are secretly monitored by the government is harmed in a different way than a person whose social security number is accidentally disclosed by a credit reporting agency. Naturally, certain political ideologies could consider one type of harm intolerable, while another ideology considers that same harm justifiable. Accordingly, certain privacy interests resonate strongly with conservative-leaning and libertarian-leaning jurists, while other privacy interests do not. Part IV investigates this idea by analyzing how two different privacy interests—associational privacy and privacy from government intrusion—either advance or impede conservative and libertarian values. By looking at privacy through this lens, we can better understand why the Roberts Court protects certain privacy interests and neglects others. This analysis suggests that the Court's privacy decisions are more ideologically consistent than they initially appear.

## II. BACKGROUND

Privacy is a deeply intimate subject, at stake in every facet of our individual experience, from physical autonomy to personal reputation. Privacy is implicated in a variety of legal contexts as well—traffic stops, data breaches, and abortion care, to name a few. Since privacy touches on myriad individual and communal interests, its legal sources are just as broad, sounding in the Constitution, property law, and tort law.<sup>4</sup>

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4. DANIEL J. SOLOVE, UNDERSTANDING PRIVACY 3 (2008). The U.S. Constitution does not explicitly mention privacy; however, the Supreme Court has read privacy into the Fourth Amendment's prohibition on unreasonable government searches and seizures. *Id.* The Court has also found that the Constitution protects a "zone of privacy" encompassing sexual and reproductive decisions under the Fourteenth Amendment and safeguards privacy in the home through the Third Amendment's prohibition on quartering troops during peacetime. *See id.* at 3, 31, 58. Property law protects privacy against trespass and other intrusions on personal property. *See id.* at 175. Courts in many states recognize four torts that remedy privacy wrongs: intrusion upon seclusion, public disclosure of private facts, false light, and appropriation of name or likeness. *Id.* at 3, 101.

This Section discusses two sources of privacy protection that will figure prominently in this paper, the First Amendment and the Fourth Amendment. The First Amendment protects associational privacy, the privacy interest at issue in *Americans for Prosperity Foundation*, and the Fourth Amendment protects privacy from unreasonable government intrusion. This Section clarifies for readers what associational privacy and privacy from government intrusion are conceptually. Privacy is a broad and amorphous concept; therefore, it is important to understand how associational privacy and privacy from government intrusion are distinct, and how each interest protects people from unique types of harm.

#### A. PRIVACY UNDER THE FIRST AMENDMENT

The First Amendment protects activities that facilitate self-determination. Individuals develop communities of thought and identity through expression, speech, and religious practice.<sup>5</sup> While engaging in those activities, individuals need a power of exclusion and seclusion to form communities and develop shared meaning. As early as 1958, the Supreme Court valorized *associational privacy* as a sometimes-necessary ingredient to exercising First Amendment activities.<sup>6</sup>

Although associational privacy is closely related to freedom of association, the two concepts are distinct. Freedom of association is the right to join others in the pursuit of common objectives such as speech, assembly, petition for the redress of grievances, and religious expression.<sup>7</sup> This freedom is protected by the First Amendment because “[a]n individual’s freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State *unless* a correlative freedom to engage in group effort toward those ends were not also guaranteed.”<sup>8</sup> In comparison, associational privacy is the interest in keeping one’s associations confidential because disclosure to others could discourage free, uninhibited association.<sup>9</sup>

There is a “vital relationship” between associational privacy and freedom of association.<sup>10</sup> Without associational privacy, individuals may feel inhibited and discouraged from engaging in activities that further their beliefs and their

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5. See Owen M. Fiss, *Why The State?*, 100 HARV. L. REV. 781, 784 (1987) (“Most agree that the [F]irst [A]mendment seeks to further democracy by protecting collective self-determination . . .”).

6. NAACP v. Ala. *ex rel.* Patterson, 357 U.S. 449, 462 (1958).

7. Roberts v. U.S. Jaycees, 468 U.S. 609, 618 (1984).

8. *Id.* at 622 (emphasis added).

9. See SOLOVE, *supra* note 4, at 143.

10. 357 U.S. at 462.

freedom of association.<sup>11</sup> For example, a teacher's right to free expression would be burdened if she were required to disclose her social, political, or religious affiliations to her employer.<sup>12</sup> What if the teacher was a member of the Democratic Socialists of America in a heavily Republican community? Or what if the teacher was a member of the National Rifle Association in a liberal enclave? It is hard to imagine that the teacher would not feel "caution and timidity in [her] associations" if her associational ties were disclosed to people who had control over her livelihood.<sup>13</sup>

With that said, associational privacy is not always necessary to engage in free association. Associational privacy is essential to shield individuals whose associations would make them targets of violence or criticism.<sup>14</sup> If an individual's associations are not controversial, and publicity would not discourage them, associational privacy is not an essential condition to exercising free association.

The Supreme Court first endorsed associational privacy in 1958, when it articulated a constitutional freedom of association in *NAACP v. Alabama ex rel. Patterson*.<sup>15</sup> Arising from the civil rights movement in segregationist Alabama, *NAACP* demonstrated that disclosure of associational ties could, in certain circumstances, expose individuals to harassment or violence. In 1956, Alabama Attorney General John Patterson brought a suit against the state's chapter of the NAACP for "causing irreparable injury to the property and civil rights of the residents and citizens of the State of Alabama."<sup>16</sup> Patterson alleged that the NAACP had engaged in such injurious activities as giving legal support to black students seeking admission to the state university and supporting the 1955 Montgomery bus boycott.<sup>17</sup> On the state's motion, the Alabama Circuit Court ordered the production of the NAACP's membership lists.<sup>18</sup> Despite the NAACP's contention that Alabama could not constitutionally compel

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11. SOLOVE, *supra* note 4, at 143.

12. In *Shelton v. Tucker*, the Supreme Court ruled that an Arkansas statute requiring public school teachers to disclose all organizations to which they had belonged or contributed to unconstitutionally burdened the teachers' freedom of association. 364 U.S. 479, 487–90 (1960).

13. *See id.* at 487.

14. *See* *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984) ("According protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority."); *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647–48 (2000) ("This right is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas.").

15. 357 U.S. at 462.

16. *Id.* at 452.

17. *Id.*

18. *Id.* at 453.

disclosure, the court held the organization in contempt after it failed to produce the membership lists.<sup>19</sup> When the case came before the Supreme Court, the key legal question was whether the state could compel the NAACP to turn over the names of its members and agents.<sup>20</sup>

The majority sided with the NAACP and established First Amendment protection for *both* freedom of association and associational privacy. “Effective advocacy of both public and private points of view, particularly controversial ones,” Justice Harlan wrote, “is undeniably enhanced by group association.”<sup>21</sup> The Court understood that disclosure of NAACP members to the state would burden the organization’s ability to advocate for its beliefs by causing members to quit and discouraging new members from joining.<sup>22</sup> The Court did not explicitly name the violence and intimidation NAACP members would suffer, but it emphasized that associational privacy was essential to protecting those who challenge majority points of view. The Court wrote, “Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.”<sup>23</sup>

In the half century since *NAACP*, litigants have used associational privacy as a shield against government disclosure mandates,<sup>24</sup> including disclosure mandates targeting financial contributions. The Court has observed that “[f]inancial transactions can reveal much about a person’s activities, associations, and belief.”<sup>25</sup> Consequently, associational privacy interests come into question when the government requires individuals and organizations to disclose donor information. To preview an issue discussed in Part III, the degree to which financial donors’ associational privacy is protected depends upon how aggressively the Court polices state disclosure laws that come into conflict with the First Amendment. In *Americans for Prosperity Foundation*, the

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19. *Id.*

20. *Id.* at 451.

21. *Id.* at 460.

22. *Id.* at 462–63.

23. *Id.* at 462.

24. *See, e.g.,* *Brown v. Socialist Workers ’74 Campaign Comm.* (Ohio), 459 U.S. 87, 101–02 (1982). In 1982, the Supreme Court ruled that a disclosure provision of the Ohio Campaign Expense Reporting Law violated the associational privacy interests of individuals affiliated with the minority political party, the Socialist Workers Party (SWP). *Id.* at 88. The disclosure law required that SWP report the names and addresses of party contributors and campaign disbursement recipients. *Id.* Acknowledging existing hostility to affiliates of SWP, the Court invalidated the law as applied because compelled disclosure infringed on privacy of association protected by the First Amendment. *Id.* at 99–101.

25. *Cal. Bankers Ass’n v. Shultz*, 416 U.S. 21, 78–79 (1974) (Powell, J., concurring).

Roberts Court deviated from precedent by forcefully policing a California disclosure law targeted at charitable organizations and their donors.<sup>26</sup>

## B. PRIVACY UNDER THE FOURTH AMENDMENT

The Fourth Amendment protects people from unreasonable government searches and seizures in their persons, houses, papers, and effects.<sup>27</sup> While the amendment does not amount to a general constitutional right to privacy, it does protect individual privacy from certain kinds of *governmental intrusions*.<sup>28</sup> Specifically, the Fourth Amendment bars unreasonable government intrusion into people's homes, effects, or persons.<sup>29</sup>

Government intrusion can harm individuals in both obvious and subtle ways. First, government intrusion facilitates state surveillance and allows the state to aggregate information about people.<sup>30</sup> Indeed, the Fourth Amendment was drafted and ratified in reaction to the British colonial authority's use of writs of assistance and general warrants.<sup>31</sup> State surveillance can harm people because it causes those observed to alter their behavior.<sup>32</sup> It tends to cause self-censorship and inhibition, which can negatively impact individuals' creativity and self-development.<sup>33</sup> Second, when the government aggregates information about people, it can harm them by exposing them to abuses of power.<sup>34</sup> For example, during World War II, the American government used census data to identify Japanese Americans and transport them to internment camps.<sup>35</sup> Lastly, when the government makes an uninvited intrusion into a person's life, it disturbs that person's equilibrium.<sup>36</sup> Government intrusions harm people because they invade solitude, interrupt routines, and frequently cause unease.<sup>37</sup>

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26. See *infra* Sections III.A.3 and III.B.

27. U.S. Const. amend. IV.

28. *Katz v. United States*, 389 U.S. 347, 350 (1967).

29. Erwin Chemerinsky, *Rediscovering Brandeis's Right to Privacy*, 45 *BRANDEIS L.J.* 643, 645 (2007) (“[P]rivacy is about freedom from government intrusion into an individual’s home or on to an individual’s person. This, of course, is the focus of the Fourth Amendment and the Supreme Court frequently has spoken of it protecting a reasonable expectation of privacy.”).

30. See SOLOVE, *supra* note 4, at 109, 118.

31. See *Steagald v. United States*, 451 U.S. 204, 220 (1981) (“The Fourth Amendment was intended partly to protect against the abuses of the general warrants that had occurred in England and of the writs of assistance used in the Colonies.”).

32. SOLOVE, *supra* note 4, at 107–08.

33. *Id.*

34. See *id.* at 119 (“Aggregation can also increase the power that others have over individuals.”).

35. A. Michael Froomkin, *The Metaphor Is the Key: Cryptography, the Clipper Chip, and the Constitution*, 143 *U. PA. L. REV.* 709, 732–33 (1995).

36. See SOLOVE, *supra* note 4, at 162.

37. See *id.*

The extent to which the Fourth Amendment has protected people's privacy from government intrusion has changed over time,<sup>38</sup> but the most important shift took place in the 1960s.<sup>39</sup> Before 1967, the Fourth Amendment did not prohibit unreasonable government intrusions unless there was a *physical* intrusion on property.<sup>40</sup> But in *Katz v. United States*, the Court found that the presence or absence of physical trespass does not dictate Fourth Amendment protection.<sup>41</sup> The Court expanded the Fourth Amendment's protections, casting it explicitly as a guardian of individual privacy.<sup>42</sup> In *Katz*, the petitioner Charles Katz alleged that the FBI violated his Fourth Amendment rights by bugging a public phone booth without a warrant and recording his statements.<sup>43</sup> The government thus argued that the FBI's wiretap did not physically intrude into the phone booth and was therefore not unreasonable.<sup>44</sup> But the Court ultimately concluded that the reach of the Fourth Amendment "cannot turn upon the presence or absence of a physical intrusion into any given enclosure."<sup>45</sup> Rather, it "protects people—and not simply 'areas'—against unreasonable searches and seizures."<sup>46</sup> Justice Harlan's concurrence articulated the Court's new standard: a search within the meaning of the Fourth Amendment takes place whenever the government invades a person's "reasonable expectation of privacy."<sup>47</sup> Justice Harlan specified that a reasonable expectation of privacy exists when a person has exhibited a subjective expectation of privacy, and when that expectation is one society is willing to recognize as reasonable.<sup>48</sup>

The *Katz* framework has the advantage of focusing the Fourth Amendment on privacy, but it has also been criticized for being unpredictable and circular.<sup>49</sup> Indeed, the *Katz* framework gives the Supreme Court significant discretion to decide whether someone has a reasonable expectation of

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38. See generally Orin S. Kerr, *The Curious History of Fourth Amendment Searches*, 2012 SUP. CT. REV. 67 (2012).

39. See *Katz v. United States*, 389 U.S. 347, 351 (1967).

40. *Olmstead v. United States*, 277 U.S. 438, 466 (1928), *overruled by* *Berger v. New York*, 388 U.S. 41 (1967), *and* *Katz v. United States*, 389 U.S. 347, 353 (1967).

41. 389 U.S. at 353 ("[T]he reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.").

42. See *id.* at 351 ("[T]he Fourth Amendment protects people, not places.").

43. *Id.* at 348–49.

44. *Id.* at 352.

45. *Id.* at 353.

46. *Id.*

47. *Id.* at 360 (Harlan, J., concurring).

48. *Id.* at 361.

49. See ERWIN CHERMERINSKY, PRESUMED GUILTY: HOW THE SUPREME COURT EMPOWERED THE POLICE AND SUBVERTED CIVIL RIGHTS 106 (2021) [hereinafter PRESUMED GUILTY].



privacy.<sup>50</sup> Unfortunately, in the years since *Katz*, the Court has narrowly interpreted when a reasonable expectation of privacy exists.<sup>51</sup>

Given how discretionary the *Katz* framework is, if the Roberts Court valued privacy from government intrusion, it would expand when people have a reasonable expectation of privacy and it would reinforce remedies to Fourth Amendment violations. Further, if the Court does not value privacy from government intrusion, it would use its discretion to narrow when people have a reasonable expectation of privacy, and it would erode remedies to Fourth Amendment violations.

### III. THE ROBERTS COURT & PRIVACY

This Part demonstrates that *Americans for Prosperity Foundation v. Bonta* is an outlier in the Roberts Court's jurisprudence. Section III.A shows that the Roberts Court has had an at-best tepid relationship with privacy and has frequently ruled against strong privacy protections. Section III.B. explores the reasoning in the Court's extremely pro-privacy *Americans for Prosperity Foundation* ruling. Taken together, this Part show that *Americans for Prosperity Foundation* is a doctrinal aberration, which Part IV seeks to explain as a function of the Court's political ideology.

#### A. THE ROBERTS COURT'S TYPICAL TREATMENT OF PRIVACY

This Section examines the Roberts Court's typically tempered approach to privacy interests. While the Court has a reputation for consistently defending, for example, business interests,<sup>52</sup> the Court is not dedicated to protecting privacy interests. In fact, if anything, the Roberts Court has eroded privacy protections over time. Privacy interests are diverse and varied, so this Section profiles decisions in three legal categories that touch on different privacy interests: criminal procedure decisions that impact individual privacy from government intrusion, FCRA decisions that impact consumer privacy, and one First Amendment decision that impacts associational privacy.

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50. *See id.* at 106–08.

51. *See, e.g.,* *Florida v. Riley*, 488 U.S. 445 (1989); *California v. Ciraolo*, 476 U.S. 207 (1986); *California v. Greenwood*, 486 U.S. 35 (1988); *Oliver v. United States*, 466 U.S. 170 (1984); *California v. Carney*, 471 U.S. 386 (1985).

52. *See, e.g.,* *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011) (interpreting Federal Rule of Civil Procedure 23 to make it more difficult for litigants to certify class actions); *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63 (2010) (interpreting the Federal Arbitration Act to make it more difficult for parties to challenge the validity of arbitration agreements in court); *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013) (enforcing a party's waiver of class arbitration despite evidence that the costs of individually arbitrating an antitrust claim would far exceed potential recovery).

### 1. *Criminal Procedure Decisions*

Much of criminal procedure law turns on the Fourth Amendment, which protects individuals from unreasonable government intrusion.<sup>53</sup> If Fourth Amendment protections are robust, privacy is protected. But the more leeway the Court gives to law enforcement to investigate and surveil people without Fourth Amendment strictures, and the weaker remedies are for constitutional violations, the more privacy deteriorates.<sup>54</sup>

Since it began in 2005, the Roberts Court has always had at least five justices who consistently rule in favor of law enforcement in criminal procedure cases.<sup>55</sup> As a result, the Roberts Court's criminal procedure decisions have dramatically restricted the remedies available to those whose Fourth Amendment rights are violated. Two major remedies are available when the government violates the Fourth Amendment: excluding evidence obtained illegally through the exclusionary rule, and suing law enforcement officers or the government that employs them for money damages.<sup>56</sup>

Over the years, the Roberts Court has determinedly eroded the exclusionary rule. For example, in *Hudson v. Michigan*, the Court ruled that the exclusionary rule no longer applied to evidence obtained after police violate the Fourth Amendment's knock-and-announce requirement.<sup>57</sup> The knock-and-announce rule requires police to knock and announce their presence before entering a home to execute a search warrant unless there are exigent circumstances.<sup>58</sup> In 1995, the Supreme Court concluded that, pursuant to the Fourth Amendment, police must usually knock and announce before executing a warrant.<sup>59</sup> But in *Hudson v. Michigan*, the Court vitiated this requirement. Writing for the majority, Justice Scalia acknowledged that the knock-and-announce rule protects crucial privacy and dignitary interests, noting that it is a "serious matter" when police "violate the sanctity of the home"<sup>60</sup> and that "[t]he brief interlude between announcement and entry with a warrant may be the opportunity that an individual has to pull on clothes or

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53. *See supra* Section II.B.

54. *Cf.* PRESUMED GUILTY, *supra* note 49, at 31 ("The Court can constrain the police by interpreting the Constitution to create clear rules and by providing remedies for violations of rights. Or it can enable police arbitrariness and bias by limiting the rights of criminal suspects and criminal defendants and by failing to provide remedies when there are constitutional violations.").

55. *Id.* at 219.

56. *Id.* at 243.

57. 547 U.S. 586, 599 (2006).

58. *Id.* at 589–90.

59. *Wilson v. Arkansas*, 514 U.S. 927, 929 (1995).

60. 547 U.S. at 603.

get out of bed.”<sup>61</sup> Justice Scalia nonetheless concluded that knock-and-announce violations do not justify applying the exclusionary rule.<sup>62</sup>

In *Hudson*, the Court conveniently divorced the exclusionary rule from the role it plays in protecting privacy. The majority justified its holding by arguing that the knock-and-announce rule has “never protected” one’s interest in stopping the government from seeing or taking evidence listed in a warrant.<sup>63</sup> But the majority ignored the dynamic between the exclusionary and knock-and-announce rules. Stopping the government from capitalizing off evidence it collects while invading privacy interests is in fact consistent with the knock-and-announce rule’s goal that the government only engage in *reasonable* searches and seizures.<sup>64</sup>

With *Hudson*, the Court eliminated one of the major remedies available to individuals whose homes are invaded unconstitutionally. Constitutional scholar Erwin Chemerinsky argues that after *Hudson*, there is virtually “no reason for police ever to meet the Fourth Amendment’s requirements for knocking and announcing before entering a dwelling.”<sup>65</sup>

In the fifteen years following *Hudson*, the Court further eroded the exclusionary rule. First, in *Herring v. United States*, the Court ruled that the exclusionary rule may apply only in cases where the police intentionally or recklessly violate the Fourth Amendment, or where the violations are a product of systemic error.<sup>66</sup> Chemerinsky notes that *Herring* is perhaps the most significant change to the exclusionary rule in the past fifty years, since it substantially narrows the circumstances in which the rule applies.<sup>67</sup> As Justice Ginsburg pointed out in her dissent in that case, “[t]he exclusionary rule . . . is often the only remedy effective to redress a Fourth Amendment violation.”<sup>68</sup> Since victims of Fourth Amendment violations will rarely be able to

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61. *Id.* at 594.

62. *Id.* at 599.

63. *Id.* at 594.

64. *See id.* at 606 (Breyer, J., dissenting) (“[W]e held that the ‘common-law ‘knock and announce’ principle forms a part of the reasonableness inquiry under the Fourth Amendment.” (quoting *Wilson*, 514 U.S. at 929)).

65. Erwin Chemerinsky, *The Roberts Court and Criminal Procedure at Age Five*, 43 TEX. TECH L. REV. 13, 22 (2010) [hereinafter *The Roberts Court*].

66. 555 U.S. 135, 144 (2009).

67. PRESUMED GUILTY, *supra* note 49, at 246 (“The case, *Herring v. United States*, is the most important change in the exclusionary rule since *Mapp v. Ohio* applied it to the states in 1961.”).

68. 555 U.S. at 153 (Ginsburg, J., dissenting).

successfully sue police for damages, there is virtually no recourse if police violate the Fourth Amendment in good faith or through negligence.<sup>69</sup>

Seven years later, in *Utah v. Strieff*, the Court ruled that the exclusionary rule does not apply to evidence gained from an illegal stop as long as the person stopped has a pre-existing warrant out for their arrest.<sup>70</sup> The Court's decision dramatically undermined the Fourth Amendment's privacy protections because the new rule incentivizes the police to arbitrarily stop individuals, knowing that judges may not toss out evidence even if the stop is pretextual or illegal.<sup>71</sup> In dissent, Justice Sotomayor emphasized the inherent degradation and intrusion a person suffers during a police stop, and listed the numerous additional intrusions that can legally take place during a stop.<sup>72</sup> With fewer consequence for unconstitutional police stops, intrusion by law enforcement and attendant privacy harms stand to multiply.

The Roberts Court's criminal procedure decisions reflect a pronounced disregard for privacy interests protected by the Fourth Amendment in the criminal justice context. Privacy interests are protected when courts apply robust remedies that deter Fourth Amendment violations. But the Roberts Court gutted the primary incentive for the police to abide by the Fourth Amendment.<sup>73</sup> The only alternative remedy to the exclusionary rule is a civil suit, which offers little hope to a constitutionally wronged individual.<sup>74</sup> Without any viable remedy for unconstitutional searches and seizures, there is no

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69. See PRESUMED GUILTY, *supra* note 49, at 247 (“Rarely will a victim of a Fourth Amendment violation, such as the one in *Herring*, be able to successfully sue the officers for monetary damages. Without the exclusionary rule, nothing remains to deter police misconduct.”).

70. See 579 U.S. 232, 242 (2016).

71. See PRESUMED GUILTY, *supra* note 49, at 211 (“This ruling greatly incentivizes police to illegally stop individuals, knowing that if an outstanding arrest warrant surfaces, they can search, and anything they find will be admissible as evidence.”).

72. 579 U.S. at 252–53 (Sotomayor, J., dissenting) (“The indignity of the stop is not limited to an officer telling you that you look like a criminal. The officer may next ask for your consent to inspect your bag or purse without telling you that you can decline. Regardless of your answer, he may order you to stand helpless, perhaps facing a wall with [your] hands raised. If the officer thinks you might be dangerous, he may then frisk you for weapons.” (internal citations and quotation marks omitted)).

73. See *The Roberts Court*, *supra* note 65, at 25 (“The primary incentive for the police to comply with the Fourth Amendment is their knowledge that violations will be counter-productive because illegally obtained evidence will be suppressed.”).

74. Chemerinsky has written extensively about how the Rehnquist and Roberts Courts made the only alternative remedy to the exclusionary rule—civil suits for monetary damages—more difficult to successfully bring against police officers and cities. See PRESUMED GUILTY, *supra* note 49, at 249–72 (explaining how the Supreme Court's liberal application of qualified immunity undermines suits brought against individual police officers and how the Court has made it harder for plaintiffs to hold cities liable for wrongs committed by their employees).

incentive for police to respect the privacy protections that the Fourth Amendment affords. This degrades privacy from government intrusion for all people, not just those who have committed crimes.<sup>75</sup> In these decisions, the Roberts Court made a value judgment: expanding police discretion to investigate crime is more important than protecting privacy from government intrusion under the Fourth Amendment.

To be sure, the Roberts Court also decided *Carpenter v. United States*, which protects a person's privacy in their cell site location information (CSLI).<sup>76</sup> But as the Court itself emphasized, the holding in *Carpenter* is narrow.<sup>77</sup> In *Carpenter*, the police accessed 127 days of CSLI—a type of locational metadata collected by recording “hits” from service towers in a cellphone's physical range—from Timothy Carpenter's phone.<sup>78</sup> The issue before the Court was whether accessing this information was a search under the Fourth Amendment, or if the information was not protected by the Fourth Amendment because the third-party doctrine applied.<sup>79</sup> The third-party doctrine holds that people have no legitimate expectation of privacy in the information they voluntarily share with third parties.<sup>80</sup> Consequently, Fourth Amendment protections, including requiring police to obtain a warrant, do not apply when the government obtains such information. The third-party doctrine drastically undermines privacy in the age of the internet because digital information—a person's emails, photos, search engine history, subscriber information, cloud-stored documents, biometric data—is virtually always disclosed to a third party.<sup>81</sup>

In *Carpenter*, the Court declined to extend the third-party doctrine to seven days of CSLI associated with one mobile phone user, holding that law enforcement could not access such information without a search warrant.<sup>82</sup> In its reasoning, the Court grappled with how the third-party doctrine poses an

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75. See *The Roberts Court*, *supra* note 65, at 25 (“All of our privacy, not just the privacy of those who have committed crimes, is protected by the Fourth Amendment, which limits when the police can engage in searches or arrests. Without the Fourth Amendment, there is nothing to keep the police from stopping and searching any person, or searching anyone's home, anytime they want.”).

76. 138 S. Ct. 2206, 2221 (2018).

77. See *id.* at 2220 (“Our decision today is a narrow one.”).

78. *Id.* at 2211–12.

79. *Id.* at 2216–17.

80. See *Smith v. Maryland*, 442 U.S. 735, 743–44 (1979).

81. See Matthew Tokson, *The Aftermath of Carpenter: An Empirical Study of Fourth Amendment Law, 2018-2021*, 135 HARV. L. REV. 1790, 1799 (2022) (“Historically, the disclosure of one's personal information beyond a close circle of trusted persons was relatively rare. But in the internet era, data disclosed to internet service providers or other third parties encompasses virtually every type of digital information. . .”).

82. 138 S. Ct. at 2217 n.3.

obstacle to protecting sensitive digital information. Chief Justice Roberts, writing for the Court, acknowledged that CSLI creates a “detailed chronicle of a person’s physical presence” and that chronicle unduly exposes the “privacies of life” to law enforcement.<sup>83</sup> Despite promising pro-privacy language, the Chief Justice clarified that the decision was “a narrow one.”<sup>84</sup> The Court did not extend its reasoning to the collection of real-time CSLI or data from cell tower dumps.<sup>85</sup> It also explicitly did not “disturb the application” of *Smith v. Maryland*<sup>86</sup> and *United States v. Miller*,<sup>87</sup> two touchstone decisions affirming the third-party doctrine.<sup>88</sup>

*Carpenter* provided narrow Fourth Amendment protection for a specific type and quantity of digital data, but it was far from a line in the sand in favor of privacy from government intrusion. The Court did not provide a concrete test for future courts to evaluate whether technologically advanced surveillance techniques constitute searches under the Fourth Amendment.<sup>89</sup> This means that lower courts continue to rule that Fourth Amendment protections do not apply to numerous circumstances where the police use novel technology to gather individuals’ personal information.<sup>90</sup> *Carpenter* was ultimately consistent with *Hudson*, *Herring*, and *Strieff*. Each of these decisions reflect the Roberts

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83. *Id.* at 2217, 2220.

84. *Id.* at 2220.

85. *Id.* Real-time cell site location information allows the police to actively monitor a suspect by having a wireless communications provider share the user’s location information to the police in real time. Shea Denning, *Conducting Surveillance and Collecting Location Data in a Post-Carpenter World, Part II*, N.C. CRIM. LAW (Oct. 5, 2020, 3:27 PM), <https://nccriminallaw.sog.unc.edu/conducting-surveillance-and-collecting-location-data-in-a-post-carpenter-world-part-ii/>. Tower dumps take place when a wireless communications provider, upon the government’s request, provides a report of the wireless devices that connected to a specific cell tower during a specific period. *See* Shea Denning, *Conducting Surveillance and Collecting Location Data in a Post-Carpenter World, Part I*, N.C. CRIM. LAW (Sep. 28, 2020, 10:36 PM), <https://nccriminallaw.sog.unc.edu/conducting-surveillance-and-collecting-location-data-in-a-post-carpenter-world-part-i/>.

86. 442 U.S. 735 (1979).

87. 425 U.S. 435 (1976).

88. 138 S. Ct. at 2216, 2220.

89. *See id.* at 2220; Tokson, *supra* note 81, at 1805 (“The Supreme Court [in *Carpenter*] gave no concrete test to guide future decisions; it simply discussed several principles that appeared important in the context of cell phone location tracking.”).

90. *See, e.g.*, *United States v. Trader*, 981 F.3d 961, 967–69 (11th Cir. 2020) (ruling that the third-party doctrine applies to collecting the email address and internet protocol (IP) address records associated with a particular messaging app user); *United States v. Tuggle*, 4 F.4th 505, 525–56 (7th Cir. 2021) (ruling that collecting eighteen months of pole camera surveillance footage of the exterior of the defendant’s home was not a search under the Fourth Amendment); *United States v. Rosenow*, 50 F.4th 715, 737–38 (9th Cir. 2022) (ruling that the third-party doctrine applies to obtaining a Facebook user’s subscriber and IP log-in information).

Court's resistance towards protecting individuals' privacy from government intrusion in the law enforcement context. If anything, the Roberts Court has progressively undermined the privacy interests of those subject to the criminal justice system.

## 2. *Fair Credit Reporting Act Decisions*

The FCRA protects consumer privacy by regulating consumer reporting agencies and dictating how they can assemble and disseminate sensitive personal information.<sup>91</sup> In the statute, Congress granted individuals a private right of action to enforce the FCRA's provisions against consumer reporting agencies that willfully or negligently fail to comply with the law.<sup>92</sup> But in *Spokeo, Inc. v. Robins* and *TransUnion LLC v. Ramirez*, the Court held that courts could block plaintiffs' FCRA claims on standing grounds even in cases where Congress explicitly allowed plaintiffs to pursue such claims.<sup>93</sup> Not only are *Spokeo* and *TransUnion* about privacy interests in a very direct sense—both cases are about corporations disseminating inaccurate information about members of the public<sup>94</sup>—they are also about privacy interests in a general sense. Both cases give insight into the Roberts Court's understanding of when an intrusion into an individual's privacy rises to the level of a judicially cognizable injury.

Standing is a justiciability doctrine created by the Supreme Court and derived from Article III.<sup>95</sup> It is a notoriously thorny doctrine, with some scholars calling it “confused”<sup>96</sup> and “contradictory.”<sup>97</sup> To establish standing, a plaintiff must first show that they suffered an “injury in fact” that is concrete

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91. See 15 U.S.C. §§ 1681–1681x.

92. *Id.* §§ 1681n–o.

93. See *Spokeo, Inc. v. Robins*, 578 U.S. 330, 341 (2016) (“Congress’ role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right.”); *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2205 (2021) (“But even though ‘Congress may ‘elevate’ harms that ‘exist’ in the real world before Congress recognized them to actionable legal status, it may not simply enact an injury into existence, using its lawmaking power to transform something that is not remotely harmful into something that is.” (internal citation omitted)).

94. See SOLOVE, *supra* note 4, at 160 (explaining that spreading false or inaccurate information about a person constitutes a privacy injury).

95. See ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* 42 (8th ed. 2020) (“Each of these justiciability doctrines was created and articulated by the U.S. Supreme Court. Neither the text of the Constitution, nor the Framers in drafting the document, expressly mentioned any of these limitations on the judicial power.”).

96. *Id.* at 55.

97. Danielle Keats Citron & Daniel J. Solove, *Privacy Harms*, 102 B.U. L. REV. 793, 801 (2022).

and particularized and actual or imminent.<sup>98</sup> Next, there must be a fairly traceable causal connection between the defendant's action and the injury.<sup>99</sup> Finally, it must be "likely, as opposed to merely speculative" that the injury will be redressed by a favorable decision by the court.<sup>100</sup> In the FCRA context, then, plaintiffs suing to enforce their privacy interests must demonstrate that the FCRA violation fits within the judicial conception of an injury-in-fact. If the plaintiffs do not do so, they cannot enforce compliance with the FCRA and vindicate their rights in federal court.

In *Spokeo, Inc. v. Robins*, the Court evaluated whether allegations of a statutory violation of the FCRA gave rise to an injury-in-fact.<sup>101</sup> The plaintiff alleged that Spokeo, a consumer reporting agency, violated the FCRA by publishing incorrect data about him.<sup>102</sup> His allegation is an example of a privacy violation that damages, or creates a future risk of damaging, a person's reputation.<sup>103</sup> Spokeo's dossier was rife with false information and the plaintiff alleged that those errors hurt his employment prospects by making him appear overqualified for jobs or unwilling to move for work.<sup>104</sup> The Ninth Circuit had previously ruled for the plaintiff, finding that he satisfied standing's injury-in-fact requirement because Congress explicitly authorized individuals in the text of the law to sue for any violation of the FCRA's provisions.<sup>105</sup>

The Supreme Court overruled the Ninth Circuit, stating that, while Congress has a role in identifying and elevating "intangible harms" to be judicially cognizable, congressional authorization was not enough to establish an injury-in-fact.<sup>106</sup> The Court explained that standing doctrine imposed an additional threshold: the intangible harm in question must still be "concrete," and the Ninth Circuit had failed to address the concreteness inquiry.<sup>107</sup> The Court did not provide a clear answer as to what harms are capable of being

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98. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

99. *Id.*

100. *Id.* at 561 (internal quotations omitted).

101. 578 U.S. 330, 340–42 (2016).

102. *Id.* at 333. The FCRA requires sites like Spokeo to follow "reasonable procedures to assure maximum possible accuracy of information" about the subject of the report. 15 U.S.C. § 1681e(b).

103. *See Citron & Solove, supra* note 97, at 837–41 (discussing reputational privacy harms).

104. 578 U.S. at 350 (Ginsburg, J., dissenting) ("Spokeo's report made him appear overqualified for jobs he might have gained, expectant of a higher salary than employers would be willing to pay, and less mobile because of family responsibilities.")

105. *See Robins v. Spokeo, Inc.*, 742 F.3d 409, 413–14 (9th Cir. 2014), *vacated and remanded*, 578 U.S. 330 (2016).

106. 578 U.S. at 341.

107. *See id.* at 340.



both intangible and concrete.<sup>108</sup> Justice Alito, writing for the majority, clarified that a “*risk* of real harm” can satisfy concreteness.<sup>109</sup> He also wrote that the inquiry could turn on whether the intangible harm has a “close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts.”<sup>110</sup> The Court did not decide whether the plaintiff’s allegations indeed gave rise to a concrete injury, instead remanding the case to the Ninth Circuit to make a determination.<sup>111</sup> Nonetheless, the Court’s decision teed up standing challenges to congressionally-created private rights of action that defend privacy interests.

Five years later, the Court revisited standing for claims based on FCRA violations in *TransUnion LLC v. Ramirez*.<sup>112</sup> In that case, a class of 8,185 individuals alleged that credit reporter TransUnion violated multiple provisions of the FCRA after falsely labeling the individuals as potential terrorists in their credit reports.<sup>113</sup> The Court ultimately ruled that only a fraction of the plaintiffs who alleged FCRA violations had standing to sue in federal court, and the rest failed to allege a concrete injury-in-fact.<sup>114</sup> The Court explained that only those plaintiffs whose credit reports were disseminated to third-party businesses alleged a concrete injury that conferred standing to sue.<sup>115</sup> The rest lacked a sufficiently concrete injury to sue, even though TransUnion had allegedly failed to take reasonable steps to assure these consumers’ credit reports were accurate, a harm for which Congress explicitly authorized a private right of action.<sup>116</sup>

What do two decisions that principally address Article III standing have to do with consumer privacy interests? Beyond throwing cold water on FCRA claims, these decisions threaten privacy interests because the standing test articulated in *Spokeo* and *TransUnion* does not recognize numerous consumer privacy harms. While some privacy harms are economic or physical, many other injuries to privacy interests are not “concrete” and will not register under

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108. See generally Rachel Bayefsky, *Constitutional Injury and Tangibility*, 59 WM. & MARY L. REV. 2285 (2018) (investigating the categories of harm that are outlined in *Spokeo*, including tangible harm, intangible harm, and concrete harm).

109. 578 U.S. at 341 (emphasis added).

110. *Id.*

111. *Id.* at 343.

112. 141 S. Ct. 2190, 2200 (2021).

113. See *id.* at 2201–02. The allegations included failing to follow reasonable procedures to ensure maximum possible accuracy in consumer reports and failing to accurately disclose to the consumer information in the consumer’s file at the time the of the consumer request. See *id.* at 2202.

114. See *id.* at 2200.

115. *Id.*

116. See *id.*; Solove & Citron, *supra* note 3, at 63.

the Court's test.<sup>117</sup> Take for example the privacy harm at issue in *TransUnion*. The majority of the plaintiffs were incorrectly labeled as potential terrorists, but their credit files were not provided to third-party businesses.<sup>118</sup> Writing for the majority, Justice Kavanaugh explained that “[t]he mere presence of an inaccuracy in an internal credit file, if it is not disclosed to a third party, causes no concrete harm.”<sup>119</sup> In contrast, the Court held that those plaintiffs whose files were disseminated to third-party businesses did suffer a concrete harm, one with a “close relationship” to the common law tort of defamation.<sup>120</sup>

Privacy scholars Danielle Citron and Daniel Solove have explained why the harm that the first group of *TransUnion* plaintiffs suffered is a genuine injury. They label the harms at issue in *TransUnion* and *Spokeo* “data quality” harms and explain that sloppy and incorrect records create a significant risk of future reputational harm.<sup>121</sup> Citron and Solove write, “[i]naccuracies create risk of future harm that are difficult to predict,” regardless of whether the records are disseminated, because inaccuracies chill consumer behavior and damage data hygiene.<sup>122</sup> Poor data hygiene also causes its own harm in the present. When data is tainted with incorrect or misleading information, “the contamination can be difficult to eradicate. It can be hard for individuals to find out about errors, and, when they do, third parties will ignore requests to correct them without the real risk of litigation costs.”<sup>123</sup>

In *Spokeo* and *TransUnion*, the Roberts Court promulgated an excessively narrow definition of concrete injuries-in-fact, which fails to recognize the very real privacy harms that consumers suffer. The Court's standing doctrine will ultimately shut plaintiffs out of federal court who have had their privacy interests violated. It will also undermine federal legislation like the FCRA that seek to protect consumers.

### 3. *First Amendment Associational Privacy Decision*

The First Amendment protects associational privacy from encroachment by the government.<sup>124</sup> Eleven years before *Americans for Prosperity Foundation* was decided, the Supreme Court heard another case that pitted citizens'

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117. See Citron & Solove, *supra* note 97, at 830–861 (providing a typology of privacy harms, including intangible harms like psychological harms, autonomy harms, discrimination harms, and relationship harms).

118. See 141 S. Ct. at 2200–01.

119. *Id.* at 2210.

120. *Id.* at 2209.

121. Citron & Solove, *supra* note 97, at 839–40.

122. *Id.* at 840–41.

123. *Id.* at 841.

124. See *supra* Section II.A.

associational privacy interests against government disclosure laws.<sup>125</sup> But in that case, *Doe v. Reed*, the justices in the majority expressed sharply different attitudes about how closely the First Amendment safeguards associational privacy. Whereas the *Americans for Prosperity Foundation* decision signaled a clear commitment to defending associational privacy, the *Doe v. Reed* Court conveyed mostly confusion.

*Doe v. Reed* began with a Washington State petition to put referendum R-71 on the ballot.<sup>126</sup> R-71 challenged the extension of marital rights to couples in domestic partnerships, including same-sex partnerships.<sup>127</sup> The Washington citizens who signed the petition worried that their identities and personal information could be discovered through a state disclosure law that made petitions publicly available.<sup>128</sup> Concerned that they may be targeted for supporting the petition, these citizens sued for an injunction preventing the public release of *all* referendum petitions under the disclosure law—not merely the R-71 petition.<sup>129</sup> They alleged the disclosure law violated their associational privacy rights guaranteed by the First Amendment.<sup>130</sup> The Court rejected the plaintiffs’ facial challenge—which sought to strike down the disclosure law in its application to all referendum petitions<sup>131</sup>—though the Court noted that the plaintiffs could later litigate the narrower claim that R-71 alone should be exempted from disclosure.<sup>132</sup> In an 8–1 decision, the Court ruled that the disclosure law did not violate the First Amendment associational privacy rights of those who sign referendum petitions.<sup>133</sup>

The case produced seven different opinions, illustrating a spectrum of views about how extensively the First Amendment protects associational privacy in the context of referendum petitions.<sup>134</sup> On one end of the spectrum, Justice Scalia rejected the notion that there is any constitutional basis to protect

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125. See *Doe v. Reed*, 561 U.S. 186, 200 (2010).

126. *Id.* at 191–92.

127. *Id.*

128. See *id.* at 192–93.

129. See *id.* at 193.

130. See Reply Brief at 12, *Doe v. Reed*, 561 U.S. 186 (2010) (No. 09-559).

131. 561 U.S. at 201–02. While there was a dispute about whether the plaintiffs’ challenge should be classified as a facial challenge or as-applied challenge, the Court concluded that plaintiffs needed to satisfy the Court’s standards for a facial challenge because their claim reached beyond specific circumstances of the plaintiffs. *Id.* at 194.

132. *Id.* at 201–02.

133. See *id.* at 189, 202.

134. Chief Justice Roberts, and Justices Kennedy, Ginsburg, Breyer, Alito, and Sotomayor signed on to the majority opinion. *Id.* at 189. Justice Breyer, Justice Alito, and Justice Sotomayor filed concurring opinions. *Id.* Justice Stevens filed an opinion concurring in part and concurring in judgment. *Id.* Justice Scalia filed an opinion concurring in judgment. *Id.* Finally, Justice Thomas filed a dissenting opinion. *Id.*

petition signatories' associational privacy.<sup>135</sup> In an opinion concurring in judgment, he argued that the First Amendment does not protect the anonymity of people who exercise "legislative power," in light of the United States' "longstanding traditions" of legislating and voting in public.<sup>136</sup> Justice Scalia asserted that a voter who signs a referendum petition acts as a legislator because her signature seeks to advance the measure's legal force.<sup>137</sup> Consequently, in his view, petition signatories have no constitutional right to remain anonymous, regardless of whether they are subject to harassment or intimidation.<sup>138</sup>

The majority did not go as far as Justice Scalia—but it did not strenuously protect petition signatories' associational privacy either. Writing for himself and five others, Chief Justice Roberts acknowledged that signers of "controversial" petitions could be entitled to associational privacy protection under the First Amendment.<sup>139</sup> But the petitioners sought to invalidate the disclosure law as applied to *all* referendum petitions, not merely controversial ones.<sup>140</sup> Chief Justice Roberts deemed it unlikely that disclosure of "typical" referendum petitions—those pertaining to unemployment insurance and charter schools, for example—would impermissibly burden signatories' freedom of association.<sup>141</sup> He wrote that signatories to typical referendum petitions would suffer only "modest burdens" following public disclosure.<sup>142</sup> The Court applied exacting scrutiny,<sup>143</sup> explaining that, to satisfy such scrutiny, there must be a substantial relation between a disclosure requirement and a sufficiently important government interest.<sup>144</sup> Ultimately, the Court concluded that the burdens on signatories' associational privacy interests were too modest to justify an injunction in light the government's countervailing interests in rooting out mistakes and fraud.<sup>145</sup>

Justice Alito and Justice Sotomayor both joined Chief Justice Roberts' opinion, but their separate concurrences illustrate how fractured the majority

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135. *Id.* at 227–28 (Scalia, J., concurring in judgment).

136. *Id.* at 221.

137. *Id.* at 221–22.

138. *See id.* at 227–28.

139. *See id.* at 201 (majority opinion).

140. *Id.* at 194.

141. *Id.* at 200–01.

142. *Id.* at 201.

143. Exacting scrutiny has emerged as a fourth tier of constitutional scrutiny, though its precise requirements remain unclear. *See generally* Alex Chemerinsky, *Tears of Scrutiny*, 57 *TULSA L. REV.* 341, 372–74 (2022) (discussing the emergence of exacting scrutiny and arguing that the Supreme Court has failed to define it and apply it consistently).

144. 561 U.S. at 196.

145. *Id.* at 201.

coalition was. Both Justices addressed a narrower issue not directly before the Court, whether the First Amendment entitled the R-71 petition signatories alone to an exemption from Washington's disclosure law.<sup>146</sup> Justice Alito emphatically argued in favor of associational privacy protection for referendum petition signers who, like the plaintiffs, face threats of harassment.<sup>147</sup> He wrote that exceptions to disclosure requirements are critical to protecting First Amendment freedoms and urged courts evaluating as-applied challenges to disclosure laws like Washington's to be "generous" in granting relief.<sup>148</sup>

In contrast, Justice Sotomayor, joined by Justices Ginsburg and Stevens, wrote that *even* when petition signatories fear harassment, a State's interest in protecting the integrity of the referendum process "remain[s] undiminished."<sup>149</sup> She concluded that courts should be "deeply skeptical" when they evaluate as-applied challenges to laws like Washington's on associational privacy grounds.<sup>150</sup> Even though both justices signed onto the majority opinion, they disagreed forcefully over how much the First Amendment protects individuals' associational privacy in the political referendum context.

Finally, Justice Thomas demonstrated the greatest sensitivity to petition signers' privacy interests. In dissent, he criticized the majority's disinterest in protecting the associational privacy of signatories to "typical" referendum petitions.<sup>151</sup> Justice Thomas pointed out that, "the state of technology today creates at least some probability that signers of *every* referendum will be subjected to threats, harassment, or reprisals if their personal information is

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146. *See id.* at 202–03 (Alito, J., concurring); *id.* at 214–15 (Sotomayor, J., concurring).

147. *See id.* at 203–04 (Alito, J., concurring). Justice Alito highlighted that the internet facilitates intimidation and harassment of private persons. *See id.* at 208. He wrote that if the names and addresses of petition signatories are posted on the internet,

anyone with access to a computer could compile a wealth of information about all of those persons, including in many cases all of the following: the names of their spouses and neighbors, their telephone numbers, directions to their homes, pictures of their homes, information about their homes (such as size, type of construction, purchase price, and mortgage amount), information about any motor vehicles that they own, any court case in which they were parties, any information posted on a social networking site, and newspaper articles in which their names appeared (including such things as wedding announcements, obituaries, and articles in local papers about their children's school and athletic activities).

*Id.*

148. *Id.* at 203, 206.

149. *Id.* at 214–15 (Sotomayor, J., concurring).

150. *See id.* at 215.

151. *See id.* at 243. (Thomas, J., dissenting).

disclosed.”<sup>152</sup> Further, he criticized the majority’s assumption that “some referendum measures are so benign that the fact of public disclosure will not chill protected First Amendment activity.”<sup>153</sup> Justice Thomas pointed out the “difficulty in predicting which referendum measures will prove controversial,” and argued that even benign-looking referendum initiatives may invite political retaliation.<sup>154</sup>

*Doe v. Reed* exposed the Roberts Court’s uncertain attitude towards associational privacy. The Court did not communicate a single unified vision about associational privacy in the context of political speech. Five of the eight justices who voted to uphold the Washington law wrote separate concurring opinions that contradicted one another. Chief Justice Roberts wrote a narrow majority opinion that did not give lower courts meaningful guidance about how to evaluate future as-applied challenges to disclosure laws on First Amendment grounds.<sup>155</sup> This fractured ruling stands in stark contrast the enthusiastically pro-associational privacy decision that the Court produced in *Americans for Prosperity Foundation*.

#### B. AN OUTLIER: AMERICANS FOR PROSPERITY FOUNDATION

In light of the Roberts Court’s sometimes-conflicted,<sup>156</sup> sometimes-hostile<sup>157</sup> treatment of privacy interests, court watchers could have reasonably predicted that the *Americans for Prosperity Foundation* decision would turn out differently. But the Court’s decision in *Americans for Prosperity Foundation* was a remarkable departure from precedent. In contrast to past decisions, the majority was united and committed to protecting the plaintiffs’ associational privacy interests from an “indiscriminate” state disclosure law.<sup>158</sup> Ultimately, the Court aggressively defended charitable donors’ associational privacy interests in its ruling.

Between 2014 and 2016, Americans for Prosperity Foundation and the Thomas More Law Center sued California to bar the state from collecting their Internal Revenue Service (IRS) Schedule B forms.<sup>159</sup> Charitable organizations

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152. *Id.* at 242 (emphasis added).

153. *Id.* at 243.

154. *Id.* at 243–45.

155. See Clark Jennings, *Constitutional Law—First Amendment—Shield or Spotlight? Doe v. Reed and the First Amendment’s Application to Petitioners and Disclosure Requirements in the Citizen Lawmaking Process*, 33 U. ARK. LITTLE ROCK L. REV. 263, 286–87 (2011) (explaining that the majority opinion in *Doe v. Reed* was devoid of guidance for lower courts as to how to evaluate claims seeking constitutional exemptions to disclosure laws).

156. See *supra*, Section III.A.3.

157. See *supra*, Sections III.A.1.

158. *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2389 (2021).

159. *Id.* at 2380–81.

must disclose the names and addresses of significant donors—typically persons that contribute more than \$5,000 per tax year—in their Schedule B documents.<sup>160</sup> California required charitable organizations like the two litigants to submit their Schedule B documents annually to operate and raise money in California.<sup>161</sup>

The petitioners alleged that California’s disclosure regime violated both the organizations’ and their donors’ freedom of association and associational privacy. They argued that disclosure would have a chilling effect on donors and potential donors because, “[w]henver the government collects broad swaths of information . . . there is an inherent risk that the confidential information will be stolen, leaked, or otherwise publicized.”<sup>162</sup> Lending credibility to this concern, California had previously inadvertently published almost 2,000 confidential Schedule B documents on the Attorney General’s website.<sup>163</sup> The petitioners alleged that risk of publication in combination with the petitioners’ controversial causes,<sup>164</sup> would discourage people from associating with either organization.<sup>165</sup>

The petitioners asserted both an as-applied challenge and a broader facial challenge to California’s disclosure regime on First Amendment grounds.<sup>166</sup> After losing in the Ninth Circuit, they sought review by the Supreme Court, which granted certiorari.<sup>167</sup>

The Supreme Court ruled that California’s disclosure regime was facially unconstitutional after concluding the regime imposed “a widespread burden” on donors’ associational privacy.<sup>168</sup> The Court’s conservative bloc backed the

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160. *Id.* at 2380 (citing 26 C.F.R. §§ 1.6033-2(a)(2)(ii)(f), (iii) (2020)).

161. *Id.* at 2379–80.

162. Brief for Petitioner at 41–42, *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373 (2021) (No. 19-251).

163. 141 S. Ct. at 2381.

164. Both organizations advance divisive, controversial agendas. For example, the Thomas More Law Center has repeatedly filed lawsuits against public schools for teaching students about Islam. Deena Mousa, *Schools Teach about Islam – and are Accused of Indoctrination*, CHRISTIAN SCI. MONITOR (Feb. 19, 2021), <https://www.csmonitor.com/Commentary/2021/0219/Schools-teach-about-Islam-and-are-accused-of-indoctrination>. Americans for Prosperity Foundation is part of a network of nonprofit groups that the conservative billionaires David and Charles Koch have used to oppose environmental regulations, expansion of social services, and taxes increases. *See* Jane Mayer, *Covert Operations*, NEW YORKER (Aug. 23, 2010) <https://www.newyorker.com/magazine/2010/08/30/covert-operations>.

165. 141 S. Ct. at 2380–81.

166. Brief for Petitioner at 1–2, *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373 (2021) (No. 19-251).

167. 141 S. Ct. at 2381–82.

168. *Id.* at 2389.

6–3 ruling, while the three liberals signed onto the dissent. Chief Justice Roberts authored the majority opinion, which Justices Kavanaugh and Barrett joined in its entirety.<sup>169</sup> Justice Thomas and Justice Alito both filed opinions concurring in part and concurring in judgment.<sup>170</sup> Finally, Justice Sotomayor authored the dissent.<sup>171</sup>

Writing for the majority, Chief Justice Roberts applied exacting scrutiny and concluded there was a “dramatic mismatch” between the state’s interest in preventing charitable fraud and the “widespread” burden the law placed on donors’ privacy interests.<sup>172</sup> Exacting scrutiny is a more lenient standard than strict scrutiny, which requires the government to use the “least restrictive means of achieving a compelling state interest.”<sup>173</sup> Here, the Court stated that exacting scrutiny requires the law have substantial relation to a sufficiently important governmental interest *and* that the law be narrowly tailored to the government’s interest.<sup>174</sup> Precisely what exacting scrutiny requires remains subject to debate. Following the *Americans for Prosperity Foundation* decision, one scholar claimed that “exacting scrutiny has gone from merely confusing to nearly unintelligible.”<sup>175</sup> What we can glean is that the version of exacting scrutiny the majority applied is more rigorous than either the Ninth Circuit or the dissent envisioned.<sup>176</sup> In dissent, Justice Sotomayor argued that the majority’s decision to require narrow tailoring under exacting scrutiny is not supported by precedent. She claimed that the majority “cherry-picked” quotes and cases while ignoring context to justify the narrow tailoring requirement.<sup>177</sup> Ultimately, the version of exacting scrutiny that the majority articulated presents a high bar for the government to clear when defending challenges to disclosure laws, and California failed to clear that threshold.<sup>178</sup>

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169. *Id.* at 2377–78.

170. *Id.* at 2389, 2391.

171. *Id.* at 2392.

172. *Id.* at 2386, 2389.

173. *See id.* at 2383.

174. *Id.* at 2385.

175. Alex Chemerinsky, *Tears of Scrutiny*, 57 TULSA L. REV. 341, 373 (2022).

176. *See* *Ams. for Prosperity Found. v. Becerra*, 903 F.3d 1000, 1008–09 (9th Cir. 2018), *rev’d and remanded sub nom.* *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373 (2021) (declining to apply a narrow tailoring requirement while applying exacting scrutiny to California’s disclosure law); 141 S. Ct. at 2392 (Sotomayor, J., dissenting).

177. *See id.* at 2399 (“[T]he Court decides that it will indiscriminately require narrow tailoring for every single disclosure regime. The Court thus trades precision for blunt force, creating a significant risk that it will topple disclosure regimes that should be constitutional, and that, as in *Reed*, promote important governmental interests.”).

178. *Id.* at 2389.



Considering the Roberts Court's past ambivalence towards privacy interests, it is notable that the majority in *Americans for Prosperity Foundation* heavily emphasized the "gravity of the privacy concerns" at play.<sup>179</sup> It underscored how many donors would be caught in California's "dragnet."<sup>180</sup> Chief Justice Roberts wrote "60,000 charities renew their registrations each year," and each of those charities may have "hundreds" of top donors.<sup>181</sup> The majority also highlighted how tenuous privacy is in the digital age, writing that threats "seem to grow with each passing year, as 'anyone with access to a computer can compile a wealth of information about' anyone else."<sup>182</sup>

Further, the majority rebuked California's attorney general for "tr[ying] to downplay the burden on donors."<sup>183</sup> California argued that the numerous donors who give money to uncontroversial charities are unlikely to care about disclosure to the state.<sup>184</sup> In response, the majority said this was "irrelevant" because the law still indiscriminately swept up information on "every major donor with reason to remain anonymous."<sup>185</sup> California also argued that the law would not chill donor activity because the state must keep Schedule Bs confidential.<sup>186</sup> The Court rejected this too, concluding "disclosure requirements can chill association 'even if there is no disclosure to the general public.'"<sup>187</sup> It even argued that that California's assurances of confidentiality "are not worth much," given past leaks and the possibility of hacking.<sup>188</sup> Finally, the majority dismissed California's argument that the disclosure regime would not chill donor activity because Schedule Bs were already disclosed to the IRS.<sup>189</sup> It held that "each governmental demand for disclosure brings with it an additional risk of chill."<sup>190</sup>

Perhaps the most drastic feature of the Court's opinion was its decision to facially invalidate the disclosure law, as opposed to simply sustaining the petitioners' as-applied challenge. The majority ignored precedent<sup>191</sup> and held that because the disclosure law was not narrowly tailored, the petitioners did not need to show that it was unconstitutional in a substantial number of

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179. *See supra* Section III.A; 141 S. Ct. at 2388.

180. *Id.* at 2387.

181. *Id.* at 2386.

182. *Id.* at 2388 (quoting *Doe v. Reed*, 561 U.S. 186, 208 (2010) (Alito, J., concurring)).

183. *Id.* at 2387.

184. *Id.*

185. *Id.* at 2388 (emphasis omitted).

186. *Id.*

187. *Id.* at 2388 (quoting *Shelton v. Tucker*, 364 U.S. 479, 486 (1960)).

188. *Id.* at 2388 n.\*.

189. *Id.* at 2389.

190. *Id.*

191. *See Doe v. Reed*, 561 U.S. 186, 200–01 (2010).

applications.<sup>192</sup> In dissent, Justice Sotomayor criticized this “radical departure from precedent.”<sup>193</sup> She pointed out that facially invalidating the disclosure law directly conflicted with the Court’s decision in *Doe v. Reed*. To briefly review, the majority in *Doe* ruled that a California disclosure law was not facially invalid because the plaintiffs did not demonstrate that signatories of “typical” petitions would suffer First Amendment privacy harms.<sup>194</sup> The plaintiffs only produced evidence that signatories of “controversial petitions,” like the ones they signed, would suffer First Amendment burdens.<sup>195</sup> But the petitioners in *Americans for Prosperity Foundation* did not provide concrete evidence that California’s regime would burden the First Amendment rights of donors to typical charities either.<sup>196</sup> They only provided evidence that the regime threatened the First Amendment rights of donors to their own admittedly controversial organizations.<sup>197</sup>

In sum, the Roberts Court departed from its previous privacy jurisprudence when it decided *Americans for Prosperity Foundation*. It expressed genuine worry about the privacy risks associated with California’s disclosure law and the six justices in the majority were united in their effort to vigorously protect charitable donors’ associational privacy.<sup>198</sup> The Court’s procedural decisions also point to this conclusion. The Court elected to facially invalidate California’s law, ignoring the more modest option to strike the requirement down merely in its application to the plaintiffs. Further, it did not require the challengers meet an evidentiary burden typically necessary to facially invalidate a law. Taken together, *Americans for Prosperity Foundation* is a surprising and decidedly pro-privacy decision.

#### IV. THE RIGHT PRIVACY

The campaign for privacy rights, like many other civil liberties movements, obscures important debates about the meaning of privacy and the interests that are at stake. Consider, for instance, The Privacy Coalition, “a nonpartisan

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192. See 141 S. Ct. at 2389.

193. *Id.* at 2404 (Sotomayor, J., dissenting).

194. See 561 U.S. at 200–01.

195. See *id.* at 201 (“[Plaintiffs] have provided us scant evidence or argument beyond the burdens they assert disclosure would impose on R–71 petition signers or the signers of other similarly controversial petitions.”).

196. See 141 S. Ct. at 2404 (Sotomayor, J., dissenting).

197. See *id.*

198. See *id.* at 2389. Admittedly, the justices that signed onto the majority opinion did not agree about whether to apply exacting scrutiny or strict scrutiny to disclosure laws challenged under the First Amendment. *Id.* at 2391 (Alito, J., concurring). Still, both levels of scrutiny provide robust protection to associational privacy interests. See *id.*

coalition of consumer, civil liberties, educational, family, library, labor, and technology organizations that have agreed to the *Privacy Pledge*.<sup>199</sup> The Privacy Coalition's membership spans from the U.S. Public Interest Research Group and the United Auto Workers to the American Conservative Union and the Phyllis Schlafly-founded Eagle Forum.<sup>200</sup> Is it possible that all of these groups share the same conception of "privacy?" Privacy's multifaceted nature enables these groups to unify under its banner, but privacy's opaque meaning allows decisionmakers to single out privacy interests that comport with what they think is important.

This Part seeks to make sense of *Americans for Prosperity Foundation* by exploring how certain privacy interests resonate with jurists who have conservative or libertarian leanings, while other privacy interests obstruct conservative or libertarian jurists' priorities.<sup>201</sup> First, this Part argues that associational privacy, the interest at issue in *Americans for Prosperity Foundation*, is aligned with both libertarian and conservative goals. It also delves into why the Roberts Court would defend associational privacy in *Americans for Prosperity Foundation*, while leaving it out in the cold in *Doe v. Reed*. Then, this Part demonstrates that privacy from government intrusion tends to advance libertarian goals, but conflicts with conservative priorities. This understanding contextualizes the Roberts Court's criminal procedure jurisprudence. The Court's reasoning for weakening remedies to Fourth Amendment violations in decisions like *Hudson* and *Herring* reflect conservative ideas about privacy from government intrusion.

By exploring how certain privacy interests are either consistent with or in conflict with conservative or libertarian values, we can better understand the Roberts Court's underlying reasons for protecting certain privacy interests but not others. Mapping privacy interests onto different political philosophies reveals how a group could champion one strand of privacy but forsake another and remain ideologically consistent. This approach is one way to explain the Roberts Court's seemingly anomalous decision in *Americans for Prosperity Foundation*.

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199. THE PRIVACY COALITION, <https://www.privacycoalition.org/about-privacy-coalition> (last visited Apr. 15, 2023).

200. *See id.*; EAGLE FORUM, <https://eagleforum.org/> (last visited Apr. 15, 2023).

201. This Note analyzes libertarian and conservative values, but it is worth noting that conservatism and libertarianism frequently have different justifications for similar positions, or conflict entirely. *See generally* VARIETIES OF CONSERVATISM IN AMERICA (Peter Berkowitz ed., 2004); DAVID BOAZ, LIBERTARIANISM: A PRIMER 19–20 (1997).

## A. ASSOCIATIONAL PRIVACY

Conservative and libertarian principles intertwine with associational privacy in both simple and surprising ways. Take for instance conservatives' skepticism towards change, a root value in conservative thought.<sup>202</sup> Pillar of American conservatism Russell Kirk explained that a core tenet of the Anglo-American conservative tradition is the understanding that, while society must evolve, "innovation is a devouring conflagration more often than it is a torch of progress."<sup>203</sup> Conservatives believe progress should be prudent and temperate, otherwise citizens will endanger traditions and existing institutions.<sup>204</sup> Traditions and existing institutions should not be discarded because they are the product of an intentional evolution and therefore tend to provide value.<sup>205</sup>

Associational privacy serves conservative values because it helps slow changes ushered in by the digital revolution. Modern technology has upended the status quo that allowed travelers, voters, and charitable donors to operate in relative obscurity.<sup>206</sup> Yet associational privacy rights under the First Amendment provide a legal mechanism to preserve anonymity and obscurity.<sup>207</sup> Consider the digital revolution from a conservative's point of view: digital technology has caused a sudden and seismic reduction in personal

202. See KIERON O'HARA, CONSERVATISM 16–18, 20 (2011) ("Conservatism is an ideology concerned with change. Those unconcerned with, or actively supportive of, change, whatever else they are, are not conservative."). But see David Y. Allen, *Modern Conservatism: The Problem of Definition*, 43(4) REV. POL. 582, 583 (1981) (criticizing writers on conservatism for centering definitions of it on the desire to conserve values and institutions).

203. See RUSSELL KIRK, THE CONSERVATIVE MIND: FROM BURKE TO SANTAYANA 8 (1953) [hereinafter THE CONSERVATIVE MIND]. In his widely influential book, Kirk explicated the Anglo-American conservative intellectual tradition and crystallized six canons of conservative thought. *Id.* at 7–8; see also Lee Edwards, *The Conservative Mind of Russell Kirk*, THE HERITAGE FOUND.: MAKERS OF AM. POL. THOUGHT (Oct. 23, 2014), <https://www.heritage.org/political-process/report/the-conservative-mind-russell-kirk>.

204. See THE CONSERVATIVE MIND, *supra* note 203, at 9.

205. See *id.* at 33–34 (explaining Edmund Burke's belief that humans inherit collective wisdom that are reflected in customs and tradition). Kirk wrote, "[Burke's] reverence for the wisdom of our ancestors, through which works the design of Providence, is the first principle of all consistent conservative thought." *Id.* at 57.

206. See generally Daniel J. Solove, *Access and Aggregation: Public Records, Privacy and the Constitution*, 86 MINN. L. REV. 1137 (2002). Solove writes that federal, state, and local governments keep records of sensitive personal information. *Id.* at 1139. Until recently, such records were challenging to access, but the advent of digital technology means that public records are easy to obtain and to aggregate. *Id.*; see also Woodrow Hartzog & Evan Selinger, *Surveillance as Loss of Obscurity*, 72 WASH. & LEE L. REV. 1343, 1347–49 (2015) (highlighting the myriad technologies that encroach on individual privacy in unprecedented ways, including facial recognition technology, license plate readers, and drones).

207. See *supra* Section II.A.

privacy. Less than fifty years before *Americans for Prosperity Foundation*, data was difficult to access and aggregate, meaning individuals enjoyed obscurity even when corporations and governments collected personal information.<sup>208</sup> People, including wealthy charitable donors, could make financial, associational, and medical decisions in relative obscurity.<sup>209</sup> But the digital age rapidly subverted this long-standing sociocultural framework. Today, enormous quantities of data can be accessed, aggregated, stored, and searched with ease, meaning a person's information can readily be used to exploit, intimidate, or humiliate him or her.<sup>210</sup> This rapid transformation, from a framework that permitted obscurity to one that imposes transparency, is the type of change that alarms conservatives, who prefer gradual and discerning progress.<sup>211</sup> Conservatives generally oppose revolutions—digital or political.<sup>212</sup>

In this context, *Americans for Prosperity Foundation* can be interpreted as the Supreme Court preserving the obscurity that charitable donors enjoyed before far-flung hackers could remotely access state records. The ruling prevents the government from collecting information about donors because doing so would exact a high price on donors' privacy. Recall, before *Americans for Prosperity Foundation*, California had inadvertently posted 2,000 confidential Schedule documents to the Attorney's General's website.<sup>213</sup> By enforcing robust First Amendment associational privacy protections, the Court made it less likely that donor-identifying information would be hacked or leaked. Associational privacy served a conservative goal, protecting the *Americans for Prosperity Foundation* petitioners, and their donors, from sudden and disruptive change.

Associational privacy also serves core libertarian values. Libertarianism stems from the central idea that each individual has the natural right to live life however she chooses, so long as she doesn't infringe on the equal rights of others.<sup>214</sup> According to libertarians, government action presumptively infringes

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208. See Solove, *supra* note 206, at 1152.

209. See *id.*

210. See Daniel Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 530 (2006) (explaining how disclosure of true information about people can cause harm).

211. See THE PORTABLE CONSERVATIVE READER xvi (Russell Kirk ed., 1982) ("Burke's reminder of the social necessity for prudent change is in the minds of conservatives. But necessary change, they argue, ought to be gradual and discriminatory . . . Revolution slices through the arteries of a culture, a cure that kills.").

212. See *id.*

213. *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2381 (2021).

214. See BOAZ, *supra* note 201, at 27.

on individual liberty and the law's only valid role is to prevent people from violating the liberty of others.<sup>215</sup>

Associational privacy under the First Amendment accords with this philosophy. It protects private association among individuals from government interference. Moreover, proponents of libertarianism and advocates of free association share fundamental views about why association is important. Libertarians believe that inter-personal association is essential to self-determination and must be engaged in free from outside coercion.<sup>216</sup> In essence, this is the same justification used by free association advocates. Civil liberties theorist Thomas Emerson wrote that association “is a method of making more effective, of giving greater depth and scope to, the individual's needs, aspirations and liberties.”<sup>217</sup> Given the intersection of libertarianism, freedom of association, and associational privacy, it is unsurprising that some libertarians believe compelled disclosure laws are examples of the government impermissibly encroaching on individual liberty.<sup>218</sup>

If associational privacy is consistent with conservative and libertarian values, why would the Roberts Court protect it in *Americans for Prosperity Foundation*, but not in *Doe v. Reed*? Below are two possible explanations for the inconsistent decisions. First, the Court's composition in 2021 was more conservative than it was in 2010. In 2021, there were six reliably conservative justices while in 2010, there were only four reliably conservative justices.<sup>219</sup> Additionally, the justice at the Court's ideological center in 2021 was Brett Kavanaugh, a conservative, whereas in 2010 it was Anthony Kennedy,<sup>220</sup> a

215. *See id.* at 105–06.

216. M. van Staden, *Spontaneous Order or Central Planning? A Brief Overview of the Libertarian Approach to Law*, 84 THRH 53, 56 (2021) (“It is a fundamental *essentiale* of libertarianism that individuals should and do have the right to associate freely with one another on whatever lines they choose. From a libertarian perspective this freedom is the bedrock for the development of a sustainable, stable community; a voluntarily and freely chosen association.”).

217. Thomas I. Emerson, *Freedom of Association and Freedom of Expression*, 74 YALE L.J. 1, 4 (1964).

218. *See, e.g.*, Bradley A. Smith, *Americans for Prosperity Foundation v. Bonta: A First Amendment for the Sensitive*, 2021 CATO SUP. CT. REV. 63.

219. *See Martin-Quinn Ideological Scores of Supreme Court Justices in the United States from 2005 to 2021*, STATISTA (2023), <https://www.statista.com/statistics/1323015/supreme-court-justices-ideological-scores-us/>; *see also* Andrew D. Martin & Kevin M. Quinn, *Measures, MARTIN-QUINN SCORES*, <https://mqscores.lsa.umich.edu/measures.php> (last visited Apr. 15, 2023). The Martin-Quinn score places U.S. Supreme Court justices on an ideological continuum. *See* Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999*, 10 POL. ANALYSIS 134 (2002).

220. *See Martin-Quinn Ideological Scores of Supreme Court Justices in the United States from 2005 to 2021*, STATISTA (2023), <https://www.statista.com/statistics/1323015/supreme-court-justices-ideological-scores-us/>.

centrist whose votes frustrated conservatives and liberals alike.<sup>221</sup> It is also important to note that the ruling in *Doe v. Reed* was not a repudiation of associational privacy. Rather, it was a jumble of inconsistent opinions about how heavily to weigh associational privacy interests against state interests in disclosure.<sup>222</sup> Justice Alito and Justice Thomas wrote opinions in *Doe v. Reed* that foreshadowed their votes in *Americans for Prosperity Foundation*.<sup>223</sup> Perhaps the inconsistency between the two cases can be explained this way: the more conservative Court made a more uniformly conservative ruling in *Americans for Prosperity Foundation*. Unfortunately, Justice Scalia complicates this tidy conclusion. Justice Scalia, an indisputably conservative justice, wrote separately in *Doe v. Reed* to forcefully oppose protecting petition signatories' associational privacy interests under the First Amendment.<sup>224</sup>

This leads to a second, alternative explanation: perhaps conservatives' support for associational privacy depends on the domain in which associational privacy is asserted. In *Doe v. Reed*, the individuals seeking associational privacy protection were referendum petition signatories participating in the electoral process.<sup>225</sup> As Justice Scalia emphasized, elections and lawmaking were traditionally public acts in the United States up until the late-19<sup>th</sup> century.<sup>226</sup> Americans voiced their political opinions publicly by participating in town meetings, *viva voce* voting, or publicly petitioning Congress.<sup>227</sup> With this historical context, a conservative might not believe it is necessary or preferable to preserve petition signatories' obscurity. Still, it is hard to square Justice Scalia's position with Justice Alito's and Justice Thomas's. Perhaps the discrepancy among the three justices reflects the complexity of conservative values, and the notion that conservative principles can yield contradictory answers to the same question.

Placing associational privacy in conversation with libertarianism and conservatism illustrates that associational privacy advances values that are central to both political philosophies. This sheds light on why the Roberts Court defended associational privacy in *Americans for Prosperity Foundation*, despite the Court's tepid treatment of privacy interests in other areas of law.

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221. See Mitchell N. Berman & David Peters, *Kennedy's Legacy: A Principled Justice*, 46 HASTINGS CONST. L.Q. 311, 312 (2019).

222. See *supra* Section III.A.3.

223. See *Doe v. Reed*, 561 U.S. 186, 202–03 (2010) (Alito, J., concurring); *id.* at 228 (Thomas, J., dissenting).

224. See *id.* at 219 (Scalia, J., concurring in judgment).

225. *Id.* at 190–91. (majority opinion).

226. See *id.* at 223–25 (Scalia, J., concurring in judgment).

227. *Id.* at 223–24.

## B. PRIVACY FROM GOVERNMENT INTRUSION

Privacy from government intrusion poses a more complicated analysis. While associational privacy aligns well with both conservative and libertarian values, privacy from government intrusion exposes a rift between conservative and libertarian ideologies. Libertarians desire strong protection for privacy from government intrusion because they seek to limit the state's power to intrude into people's lives.<sup>228</sup> In contrast, conservatives do not always favor strong protection for this privacy interest because they heavily value countervailing interests like security and stability.<sup>229</sup>

Privacy from government intrusion aids libertarian interests. First, libertarians believe that the individual is the basic unit of society and government should be minimal, limited to enforcement of contracts and protection of individual rights.<sup>230</sup> For libertarians, protecting privacy against government intrusion helps constrain state power and keep it in check.<sup>231</sup> Second, libertarians are generally suspicious of the government's unique power to violate individual rights, including *privacy* rights.<sup>232</sup> Libertarians support firm limits on government power to intrude into individuals' lives because a permissive attitude towards government intrusion would lead to abuse and misuse of state power.<sup>233</sup> Government intrusion facilitates surveillance, as well as information collection and information aggregation about members of the public.<sup>234</sup> Libertarians are acutely aware that surveillance and information collection can lead to egregious abuses of power when it is deployed in tandem with the government's unique power to arrest, try, and incarcerate people.<sup>235</sup> Consequently, libertarians seek strict protection for privacy from government intrusion to control threats to individual liberty.

In comparison to libertarians, conservatives have a high tolerance for government intrusion, specifically when it is justified by security interests. Maintenance of order is core to conservative ideology.<sup>236</sup> Russell Kirk wrote,

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228. See Solveig Singleton, *Privacy*, in THE ENCYCLOPEDIA OF LIBERTARIANISM 390, 391 (Ronald Hamowy ed., 2008).

229. See O'HARA, *supra* note 202, at 104.

230. See, e.g., BOAZ, *supra* note 201, at 94, 244.

231. See *id.*

232. Singleton, *supra* note 228, at 391 ("As with other liberties, libertarians are particularly concerned about the government's singular powers to violate privacy rights, particularly through the use of its police powers.")

233. See *id.*

234. See *id.*

235. See *id.* ("To control the threat to human rights from the unique powers of government to arrest, try, and imprison members of the public, libertarians have consistently supported strict limits on the powers of government to collect information.")

236. See O'HARA, *supra* note 202, at 112.



“In every culture, what does the imaginative conservative aspire to conserve? Why, to conserve order: both order in the soul and order in the state.”<sup>237</sup> Underlying this principle is the conservative belief in the fallibility of humans.<sup>238</sup> Without order, conservatives believe that people will give into their selfish impulses and society will inch towards anarchy.<sup>239</sup> As a result, conservatives believe that individuals benefit from “socially imposed restraint and identity.”<sup>240</sup>

Given conservatives’ desire for order, we can see why they do not always embrace privacy from government intrusion. The government, through law enforcement and military forces, tends to preserve order.<sup>241</sup> And while privacy from government intrusion has the benefit of protecting civil liberties, it also constrains the government’s ability to conduct criminal investigations or monitor threats to national security. Conservatives *do* value civil liberties, but they are also vigilant to the fact that civil liberties can be misused.<sup>242</sup> The conservative is willing to curb protection for individual rights if it is necessary to secure important competing social benefits like order.<sup>243</sup> Consequently, unlike the libertarian, the conservative would reject strong protections for privacy from government intrusion if those strong protections would frustrate security interests.

The Roberts Court’s Fourth Amendment decisions reflect a conservative approach to privacy from government intrusion. For example, in *Hudson v. Michigan*, the majority challenged the very existence of the exclusionary rule—a Fourth Amendment remedy that deters police misconduct—because it impedes law enforcement interests.<sup>244</sup> In the majority opinion, the Court balanced the exclusionary rule’s “substantial social costs” against its benefits, explicitly pitting the public’s security interests against individuals’ privacy interests.<sup>245</sup> The Court found that the rule’s costs, like “releasing dangerous criminals into society,” tended to outweigh the rule’s deterrence benefits.<sup>246</sup>

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237. THE PORTABLE CONSERVATIVE READER, *supra* note 211, at xxxv.

238. *See id.* at xvii (“[C]onservatives are chastened by their principle of imperfectability. Human nature suffers irremediably from certain faults, the conservatives know.”).

239. *See id.* at xviii.

240. JERRY Z. MULLER, CONSERVATISM: AN ANTHOLOGY OF SOCIAL AND POLITICAL THOUGHT FROM DAVID HUME TO THE PRESENT 18 (1997).

241. *See* O’HARA, *supra* note 202, at 174.

242. *See id.* at 185 (“[C]onservatives value security and stability which tend to be threatened most by people working in secret, abusing freedoms and working below the social and official radar.”).

243. *See id.* at 104.

244. *See Hudson v. Michigan*, 547 U.S. 586, 591 (2006).

245. *Id.* at 596.

246. *See id.* at 591, 595.

Similarly, in *Herring v. United States*, the Court reiterated that the exclusionary rule is a “last resort” and should only be applied when the rule’s deterrent effect outweighs “any harm to the justice system.”<sup>247</sup> In both *Hudson* and *Herring*, the Roberts Court limited the exclusionary rule, an important remedy to Fourth Amendment privacy violations, because it impeded law enforcement interests. The Court’s reasoning in both rulings echoed conservative principles: sometimes society’s interest in security and order must outweigh privacy from government intrusion.

Privacy from government intrusion decisively advances libertarian principles, however, it has a more nuanced relationship with conservative principles. While conservatives value civil liberties, including privacy from government intrusion, they are willing to withhold protection for civil liberties to advance competing benefits like social order. The Roberts Court’s Fourth Amendment jurisprudence mirrors a distinctly conservative attitude towards privacy from government intrusion.

## V. CONCLUSION

This Note set out to demonstrate that different people can have different—even contradictory—ideas of privacy, and that they all might be correct. Conservatives, libertarians, liberals, and anarchists can all advocate for “privacy,” but they likely will not agree on what *kind* of privacy deserves protection. Indeed, some groups might seek to weaken certain privacy interests that are deemed dangerous or disruptive to the group’s goals.

Mapping privacy interests onto conservatism and libertarianism helps us better understand the Roberts Court’s privacy jurisprudence. At first blush, the Court’s erosion of Fourth Amendment remedies and its decision in *Americans for Prosperity Foundation* appear inconsistent. But after putting associational privacy and privacy from government intrusion in conversation with conservatism and libertarianism, it becomes clear that the Roberts Court’s decisions are ideologically consistent. Associational privacy advances both conservative and libertarian principles, which is why the Court zealously protected First Amendment associational privacy in *Americans for Prosperity Foundation*. In contrast, privacy from government intrusion impedes crucial conservative priorities, which explains why the Court has steadily weakened Fourth Amendment protections.

Putting privacy interests in conversation with different political philosophies gives us a deeper understanding of privacy’s multifaceted nature, and of the Supreme Court’s decisions over time. For example, this approach

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247. 555 U.S. 135, 140, 147 (2009).

can be used to identify the principles that guided the liberal Warren Court's privacy jurisprudence. What drove the Warren Court to expand the scope of Fourth Amendment protection?<sup>248</sup> What prompted it to rule that the Constitution provides a "right to privacy" that prevents the government from prohibiting married couples from using contraceptives?<sup>249</sup> The approach employed in this Note can hopefully serve as a framework to provide coherent and insightful answers to questions like this.

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248. See PRESUMED GUILTY, *supra* note 49, at 92, 101.

249. See *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

