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Claremont McKenna College

Partisan Gerrymandering and The Right to Privacy

submitted to
Professor Hurley
and
Professor Thomas

by
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Abstract

This paper argues that partisan gerrymanderers violate citizens' right to privacy by using data containing sensitive information on citizens without a compelling state interest. It first details how partisan gerrymandering claims have been argued in Court in the past. Next, it discusses theories of the right to privacy, mainly exploring the tensions between James Madison's writings on privacy and Warren and Brandeis' famed *The Right to Privacy*. Then, I present originalist arguments for upholding the original meaning and principles of the right to privacy and the Fourth and Fourteenth Amendments before walking through case law related to privacy and technological advances. In conclusion, this paper holds that state legislatures violate the original meaning of the right to privacy, protected by the Fourth and Fourteenth Amendments, when they use anonymized data sets to partisan gerrymander. Resultingly, these data sets should only be accessed when a compelling state interest is identified and partisan bias is curbed.

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Introduction: Partisan Gerrymandering and Privacy

Gerrymandering, the practice of manipulating state boundaries in order to favor one party or class, has existed since early 1789 when George Washington and his Federalist allies accused Patrick Henry of gerrymandering the Virginia map so that James Madison would lose to his Anti-Federalist opponent, James Monroe.¹ However, the practice gets its name from a map manipulated by Elbridge Gerry, the Governor of Massachusetts between 1810 and 1812.² Gerry approved a map that advantaged the Republicans; one of the districts looked like a salamander as a result of cartographic manipulation, and the name “gerry”-mander stuck.³ Since that time, gerrymandering has leveraged data on citizens’ partisanship to create districts that benefit a certain party. While the Supreme Court acknowledged that gerrymandering is “incompatible with democratic principles,” the Court has repeatedly ruled that partisan gerrymandering does not violate the Constitution.⁴

Generally, the Court has upheld partisan gerrymanders because they see the issue as nonjusticiable and therefore choose not to interfere in states’ jurisdiction over elections. While the Supreme Court’s treatment of partisan gerrymandering has remained largely unchanged since 1979, the methods states use to partisan gerrymander have evolved and improved significantly. In a recent partisan gerrymandering case, *Rucho et al. v. Common Cause*, Chief Justice Roberts noted that “Partisan gerrymandering is nothing new. Nor is frustration with it.”⁵ He goes on to

¹*Rucho et al. v. Common Cause*, No. 18-422, 588 U.S. ____ (2019).

²Jessie Kratz, “The ‘Gerry’ in Gerrymandering,” *National Archives Pieces of History* (blog), June 21, 2018, <https://prologue.blogs.archives.gov/2018/06/21/the-gerry-in-gerrymandering/>.

³*Ibid.*

⁴*Rucho et al. v. Common Cause*, No. 18-422, 588 U.S. ____ (2019).

⁵*Ibid.*

cite the alleged gerrymander Henry carried out against James Madison as evidence that the Framers were familiar with the practice and did not deem it unconstitutional. Upon reading Chief Justice Roberts' opinion, I was struck by the fact that he did not mention technology a single time— though technology has drastically changed partisan gerrymandering from what the Founders once knew it to be.

In her dissenting opinion, Justice Kagan discusses technology extensively, noting that while partisan gerrymandering dates back to the Founders, “big data and modern technology... make today’s gerrymandering altogether different from the crude line drawing of the past.”⁶ While I agree that technology has altered the act and impact of partisan gerrymandering, Justice Kagan uses technology as evidence for the argument that it is so effective that it violates citizens’ rights in ways that it did not when the Founders encountered it. She argues “the right to participate equally in the political process, to join with others to advance political beliefs, and to choose their political representatives” are the rights violated.⁷ However, these would have been the same rights violated by rudimentary gerrymandering, just not as effectively. As Chief Justice Roberts notes, the Founders did not argue that these rights were violated when they were faced with the issue. This presented a puzzle: the cases indicated that partisan gerrymandering was getting more effective at subverting our democratic process, but the Founders did not dispute its constitutionality.

How does technology make partisan gerrymandering more effective and durable? Using map making software and data reflecting voting history and other third-party data beyond Census

⁶Rucho et al. v. Common Cause, No. 18-422, 588 U.S. ____ (2019).

⁷Ibid.

data, mapmakers have been able to generate thousands of map possibilities. Supplied with data that describes voters, data scientists and political consultants can predict the electoral outcomes of any given map and use that knowledge to gerrymander more effectively than before.⁸ The Founders accepted biased maps made with crude Census data as nasty politics. But, James Madison was able to overcome the alleged efforts of Patrick Henry and win the election. The Founders never dreamt that data and map making software could allow data scientists to correctly predict the winners of 97% of contested races, as Civis Analytics did in 2018.⁹ Madison may not have met the same fate if Henry had these technologies at his disposal.

I argue that state governments' use of non-census data to predict voters' behavior is a violation of the constitutional right to privacy. Supplementing census data with party registries, past voting data, and third-party data is what enables mapmakers to "determine partisan affiliation at a level of precision that did not exist in even the recent past."¹⁰ It is novel to think about privacy as a concern related to partisan gerrymandering, especially because the data they use is anonymized. I attribute this novelty to a disconnect between the original meaning of privacy that was understood by the Founders and written into the Bill of Rights and privacy as we have come to know it today, as a right that we can easily sign away by mindlessly clicking "I Agree" to the terms of service of a website.

⁸"Brief of Amici Curiae Political Science Professors" (18-726, Washington, D.C., 2019). https://www.supremecourt.gov/DocketPDF/18/18-422/91353/20190308145641704_2019-03-08%20Amicus%20Brief%20of%20Political%20Science%20Professors.pdf (Accessed October 1, 2021).

⁹Ibid.

¹⁰*Rucho et al. v. Common Cause*, No. 18-422, 588 U.S. ____ (2019).

In Chapter I of this thesis, I explain why constitutional challenges to partisan gerrymandering have largely failed and outline the reasoning offered by the Court. In Chapter II, I explore the theoretical right to privacy, and present the tension that exists between James Madison's account of privacy and modern-day notions of privacy, as articulated by Warren and Brandeis. I argue that Madison's account offers more robust privacy rights that protect one's right to exclude others from information about themselves, even if they do not legally own that information and it is not linked to their identity. In Chapter III, I first outline methods of originalist interpretation and argue that the original meaning of privacy in the Constitution was to protect citizens from the government invading their privacy in order to oppress them. I then present cases demonstrating that this right to privacy has been upheld by the Supreme Court and has been interpreted to protect citizens from the government's use of technologies that violate this right; though, the original meaning of this right has yet to be fully translated to data as it is used in redistricting. I conclude by addressing rebuttals to my argument, namely criticisms of the feasibility of protecting this right to privacy in the context of redistricting, and by underscoring the dangers our nation will face if we allow the use of data to derail the democratic process. As Justice Kagan augured:

What was possible with paper and pen—or even with Windows 95—doesn't hold a candle (or an LED bulb?) to what will become possible with developments like machine learning. And someplace along this road, “we the people” become sovereign no longer.¹¹

Justice Kagan's worry motivates this argument. By exploring how the right to privacy was conceived prior to technology using Madison's writing, examining the original meaning of privacy as it was written into our Constitution, and how the Court has translated this right in their

¹¹Ibid.

rulings, I aim to highlight a gap in our understanding of privacy when it comes to data. I argue that by failing to translate the original meaning of the right to privacy to anonymized data, we have failed to recognize that the use of citizen data to partisan gerrymander violates this right and is therefore unconstitutional.

Chapter I: How Partisan Gerrymandering Has Remained Constitutional

In this chapter I explore two questions: 1) What are the constitutional claims against partisan gerrymandering thus far? and 2) Why have they failed? In *Defining the Constitutional Question in Partisan Gerrymandering*, Richard Briffault summarizes the Supreme Courts history with partisan gerrymandering claims:

[t]he Justices have bounced back and forth between the question of justiciability and the standards of proving partisan gerrymandering without addressing, at any length, which constitutional provision or norm gerrymandering might violate.¹²

Briffault presents the four constitutional arguments normally levied against partisan gerrymandering, two of which are rooted in constitutional text and case law and two that have circulated in academic writings. The constitutional arguments are that vote dilution, an effect of partisan gerrymandering, violates the Equal Protection Clause of the Fourteenth Amendment and that partisan gerrymandering burdens political associations, which violates the First Amendment. The academic arguments are that partisan gerrymandering interferes with competitive elections which are essential to a functioning democracy and that excessive partisanship violates the legislature's obligation to legislate in the public interest. In this chapter, I focus on the constitutional arguments as they are the claims that have been argued in front of the Supreme Court.

Vote dilution in violation of the Equal Protection Clause has been the preeminent argument used from *Baker v. Carr* to *Rucho et. al v. Common Cause*. However, in some cases, like *Vieth v. Jubelirer* (2004), *Gill v. Whitford* (2018), and *Rucho et al. v. Common Cause*

¹²Richard Briffault, "Defining the Constitutional Question in Partisan Gerrymandering," *Cornell Journal of Law and Public Policy* 14, no. 3 (2005): 399, https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1915&context=faculty_scholarship.

(2019), a First Amendment claim was cited as well, though these claims are often not taken up by the Supreme Court. Briffault states that both these arguments are unlikely to succeed in the eyes of the Court because they are at odds with the use of districting to elect legislators. Vote dilution arguments assert that the Equal Protection Clause is violated when one party is denied the share of seats in the legislature that it would have won based on its share of votes in legislative elections.¹³

Baker v. Carr and *Reynold v. Sims* both dealt with vote dilution arguments, however in these cases legislative apportionment, how many people were in each district, was the issue – not proportional representation. In both cases, the Court found the issue justiciable, and in *Reynolds* the Court adopted “one-person, one-vote” as a principle stemming from the Equal Protection Clause. This decision set the precedent that states must draw district lines so districts contain as nearly equal populations as possible. Vote dilution claims arising from a lack of proportional representation are much trickier; while *Baker* and *Reynolds* involved claims that the weight of a vote in a more populated district was diluted relative to less populous districts, proportional representation claims hinge on proving that the partisan composition of the districts dilutes the votes cast for a certain party when translating votes to legislative seats. However, as the cases after *Baker* and *Reynolds* show, it is much easier to prove bias in the population sizes of different districts than to prove bias in the partisan makeup of different districts, since partisanship is more fluid and harder to quantify.

In 1986, *Davis v. Bandemer* presented the first vote dilution case involving proportional representation, but the Court ruled that the effects of the partisan gerrymander were not

¹³Ibid.

“sufficiently adverse.”¹⁴ The appellants argued that “each political group in a State should have the same chance to elect representatives of its choice as any other political group.”¹⁵ The Court rejected this claim for multiple reasons: the one-person, one-vote rule is not violated since the districts populations only differed by about 1%; the outcome of a singular election fails to serve as evidence of a consistent degradation of one’s vote; and, further, the Constitution and its one-person, one-vote principle does not require proportional representation.

Briffault offers a clear explanation of why the Court holds that “one-person, vote-vote” requires legislative apportionment but not proportional representation. Briffault states that proportional representation claims assume that voters fall cleanly into a discrete partisan group. However, voters switch parties without changing their registration, split tickets, or refrain from registering all together.¹⁶ Thus, the actual votes cast in a district in a legislative election may be “an artifact of the districting plan itself— in a one-party district, for example, members of the out party may not even bother to vote-or of anomalies such as an unusually charismatic or a scandal-ridden candidate.”¹⁷ Thus, critics of gerrymandering prefer to use other metrics of party strength beyond aggregate votes, like “statewide vote for a down-ticket state office,” but these measures can be highly debatable.¹⁸ Even if this wasn’t the case and every voter was registered to a party and voted down the party line, this sort of vote dilution argument is vulnerable to the claim that proportional representation is not required by the Constitution. Justice Scalia was quick to point

¹⁴Davis v. Bandemer, 478 U.S. 109 (1986).

¹⁵Ibid.

¹⁶Richard Briffault, “Defining the Constitutional Question in Partisan Gerrymandering,” *Cornell Journal of Law and Public Policy* 14, no. 3 (2005): 405, https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1915&context=faculty_scholarship.

¹⁷Ibid.

¹⁸Ibid.

out in *Vieth v. Jubelirer*, “the Constitution contains no such principle.”¹⁹ Lastly, Briffault points out that the single-member district system required for congressional elections and adopted by many state legislatures often impedes proportionality. He gives the example: “In the extreme case, with the two major parties evenly distributed throughout a state, if a party were to win 51% of the vote in every district, it would win 51% of the statewide popular vote but 100% of the statewide legislative seats.”²⁰ Thus, it is hard to argue that proportionality is a norm. Due to these theoretical tensions with districting, Fourteenth Amendment claims have failed to be upheld by the Supreme Court, with the exception of the legislative apportionment cases, *Baker v. Carr* and *Reynolds v. Sims*.

First Amendment challenges to partisan gerrymandering have had a similar fate. Though several of the cases I discuss involved First Amendment claims filed with lower courts, those claims were either not taken up by the lower courts or dismissed in the beginning of the majority's opinions. *Vieth v. Jubelirer* is a perfect example; the district court rejected all claims, including their freedom of association First Amendment claim, except their “one-person, one-vote” claim. The Court held that voters were not “denied representation, only that they would be represented by Republican officials.”²¹ They were able to vote (without legislative apportionment dilution), to be placed on the ballot box, to associate with a party, and express their political opinion, and thus the political discrimination claim failed. Briffault points out that Justice Kennedy, in his *Vieth* opinion, said that the First Amendment “may be the more relevant

¹⁹*Vieth v. Jubelirer*, 541 U.S. 267 (2003).

²⁰Richard Briffault, “Defining the Constitutional Question in Partisan Gerrymandering,” *Cornell Journal of Law and Public Policy* 14, no. 3 (2005): 406, https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1915&context=faculty_scholarship.

²¹*Vieth v. Jubelirer*, 541 U.S. 267 (2004).

constitutional provision in future cases” since the allegations involve the amendment’s “interest of not burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views.”²² This argument would build on the Court’s patronage cases “which deny the state the power to condition a government contract or governmental hiring or promotion on partisan activity.”²³ However, these claims have failed to be successful. Justice Scalia stated that if the First Amendment were to be applied in districting as it is in patronage cases it “would render unlawful all consideration of political affiliation in hiring for nonpolicy-level government jobs.”²⁴ The Court repeatedly acknowledges that, as Justice White explained in *Davis v. Bandemer*, “Politics and political considerations are inseparable from districting and apportionment.”²⁵ Thus, some partisan considerations are allowed in the eyes of the Court. If the First Amendment does not succeed in making these considerations unconstitutional altogether, then it is unclear where the line is drawn—as noted by Briffault.²⁶

Briffault neatly characterized the two leading constitutional objections to partisan gerrymandering. However, I also want to detail some of the more technical considerations in the Court cases and outline how the Court’s interpretation of partisan gerrymanders has evolved. I

²²Richard Briffault, “Defining the Constitutional Question in Partisan Gerrymandering,” *Cornell Journal of Law and Public Policy* 14, no. 3 (2005): 407, https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1915&context=faculty_scholarship.

²³*Ibid*, 408.

²⁴*Ibid*, 408.

²⁵*Davis v. Bandemer*, 478 U.S. 109 (1985).

²⁶Richard Briffault, “Defining the Constitutional Question in Partisan Gerrymandering,” *Cornell Journal of Law and Public Policy* 14, no. 3 (2005): 409, https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1915&context=faculty_scholarship.

will present this timeline and the technical considerations concurrently, before using Jacob Eisler's *The Constitutionalization of Statistics* to explain some of the most recent Court debacles over determining how much partisan gerrymandering is too much.

The first two partisan gerrymandering cases I take up, *Baker v. Carr* and *Reynolds v. Sims* were already discussed above. Importantly, they dealt with legislative apportionment, not proportional representation claims. *Baker v. Carr* presented the question of whether partisan gerrymandering cases, under the Fourteenth Amendment's Equal Protection Clause, can be tried by federal courts; the answer to this question according to the Warren Court was yes.²⁷ In *Reynolds*, the Court argued that "one person, one vote," a penumbra first delineated in *Gray v. Sanders*, supported their decision in *Reynolds*. In *Gray*, the Court held that, "The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing -- one person, one vote."²⁸

I want to pause quickly to underscore Chief Justice Warren's reasoning behind his *Reynolds* decision. First, he notes that a state can only be found in violation of the Equal Protection Clause if the rights that are violated are "individual and personal in nature" and he references *United States v. Bathgate* which established that the right to vote is indeed personal.²⁹ Next, he states that "Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests."³⁰ Therefore, Alabama's General Assembly

²⁷*Baker et al. v. Carr et al.*, 369 U.S. 186 (1962).

²⁸*Reynolds v. Sims*, 377 U.S. 533 (1964).

²⁹*Ibid.*

³⁰*Ibid.*

cannot argue, as they did, that the geographic area of counties can justify giving one larger geographic area “two times, or five times, or 10 times the weight of votes of citizens in another part of the State.”³¹ Chief Justice Warren states that the discrimination of the disfavored individual votes is easily demonstrable mathematically. He then underscores that state governments, which hold “a most important place in our Nation's governmental structure,” have a right to some autonomy, but still have to allow their citizens to fully and effectively participate in the state government.³² He continues:

We are admonished not to restrict the power of the States to impose differing views as to political philosophy on their citizens. We are cautioned about the dangers of entering into political thickets and mathematical quagmires. Our answer is this: a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us.³³

Thus, Chief Justice Warren outlined three things: that a constitutionally violated right must be individual in nature, districts must have similar populations, and if these rights are violated— it is required that the judiciary protects voters.

In *Davis v. Bandemer*, the first proportional representation case that I take up, it becomes clear that the Court found many faults in vote dilution claims extending beyond legislative apportionment. The Court has held that redistricting plans that were equal in population but gerrymandered on the basis of race were unconstitutional, as it did in *Shaw v. Reno*.³⁴ Racial gerrymandering is distinct because political preferences change while one’s race does not, nor has party preference “been subject to the same historical stigma.”³⁵ Vote dilution claims that are

³¹Ibid.

³¹Ibid.

³³Ibid.

³⁴*Shaw. v. Reno*, 509 U.S. 630 (1993).

³⁵*Davis v. Bandemer*, 478 U.S. 109 (1985).

based on proportional representation are harder to prove in relation to political groups for two reasons. First, evidence of intentional discrimination via “historical patterns of exclusion from the political processes” are generally more likely to be present for a racial group than a political party. Secondly, intentionally drawn majorities or minorities of a specific race are durable over time whereas the partisan bias in a map’s composition may be undone over time as peoples’ political views shift.³⁶ If a map dilutes the votes of individuals of a certain race, it would clearly violate the Fourteenth Amendment and proving discriminatory intent would be simpler.

However, the Court employs a higher standard of proof for claims of partisan discrimination because partisanship is inherent to redistricting. As such, the discrimination, which Justice White points out is inherent, must be “sufficiently adverse.”³⁷ Further, unconstitutional discrimination occurs only when the electoral system “is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole.”³⁸ *Davis* dealt with a group of Democrats claiming that the state apportionment scheme diluted their votes, using the results of a single election as evidence.³⁹ The majority found this evidence insufficient to prove that the Democrats couldn’t win more seats in the elections to come.

In *Vieth v. Jubelirer*, the majority decided not to intervene— though Justice Kennedy, the fifth Justice of the majority, split with them on whether partisan gerrymandering was justiciable. Writing for the four-member plurality, Justice Scalia concluded that political gerrymandering

³⁶Richard Briffault, “Defining the Constitutional Question in Partisan Gerrymandering,” *Cornell Journal of Law and Public Policy* 14, no. 3 (2005): 403, https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1915&context=faculty_scholarship.

³⁷*Ibid.*

³⁸*Ibid.*

³⁹*Davis v. Bandemer*, 478 U.S. 109 (1985).

claims are “nonjusticiable because no judicially discernible and manageable standards for adjudicating such claims exist.”⁴⁰ He argued that partisan gerrymandering dated back to colonial times and continued through the founding. The Framers chose to deal with partisan gerrymandering by giving state legislatures the power to draw federal election districts and allowing Congress to “make or alter” those districts.⁴¹ However, Scalia argued that neither Article 1, Section 2, 4, nor the Equal Protection Clause offered a judicially enforceable limit on what political considerations the states may account for when districting. Without a judicially discernible standard, the issue appears to be a “political question” which makes it nonjusticiable, contrary to the findings of *Davis*. Scalia stated, “Eighteen years of judicial effort with virtually nothing to show for it justify us in revisiting the question whether the standard promised by *Davis* exists.”⁴² The plurality “would therefore overrule [*Davis*], and decline to adjudicate these political gerrymandering claims.”⁴³

Justice Kennedy argued that in order to find partisan gerrymandering unconstitutional, the determination must rest on something more objective than proving that political considerations were used in redistricting. The decision would require proof that partisan considerations, “though generally permissible, were applied in an invidious manner or in a way unrelated to any legitimate legislative objective.”⁴⁴ Justice Kennedy argued that determining that all partisan gerrymandering claims are nonjusticiable, as the plurality wished to do, could erode confidence in the courts as much as a premature decision to intervene would.⁴⁵ Because there

⁴⁰*Vieth v. Jubelirer*, 541 U.S. 267 (2003).

⁴¹*Ibid*

⁴²*Ibid*

⁴³*Ibid.*

⁴⁴*Ibid.*

⁴⁵*Ibid.*

was only a majority for the decision to not intervene, but not for the nonjusticiable finding, partisan gerrymandering claims remained justiciable under the *Davis v. Bandemer* precedent.

After *Vieth* was decided in 2004, *Gill v. Whitford* and *Rucho et. al v. Common Cause* were decided in 2017 and 2019 respectively. Following the *Vieth* ruling, the state of mapmaking changed significantly. In both *Gill* and *Rucho*, the technology used to gerrymander had evolved significantly, and statistical evidence was submitted to the Court in attempts to prove that the partisan gerrymanders were extremely adverse. In *Gill v. Whitford*, 12 Democrats from Wisconsin argued that Act 43, a redistricting plan passed after the 2010 census, harmed the Democratic Party's ability to convert votes to seats.⁴⁶ The plaintiffs argued that this phenomenon could be measured by an "efficiency gap" that "compares each party's respective "wasted" votes—*i.e.*, votes cast for a losing candidate or for a winning candidate in excess of what that candidate needs to win—across all legislative districts."⁴⁷ The Democrats argued that the excess of wasted Democratic votes created by Act 43 violated their First Amendment right of association and their Fourteenth Amendment right to equal protection. The defendants, several members of the state election commission, argued that the plaintiffs did not have standing because "their legally protected interests extend only to the makeup of the legislative district in which they vote." The Court held that the plaintiff failed to demonstrate Article III standing. The plaintiffs argued that the efficiency gap caused a statewide injury to Wisconsin Democrats, instead of focusing on an earlier claim that four of them had made that this caused an individual harm to them.

⁴⁶*Gill v. Whitford*, No. 16-1161, 585 U.S. (2018).

⁴⁷*Ibid.*

In *Rucho*, while the plaintiffs had standing, the Court affirmed, in a 5-4 split, that partisan gerrymandering claims are nonjusticiable. While the Court can answer various questions related to districting—like racial gerrymandering— it is beyond its power to answer when partisan considerations have gone too far in the absence of a “constitutional directive or legal standards to guide us in the exercise of such authority.”⁴⁸ Further, in response to the statistical tests presented by the appellants, Chief Justice Roberts, writing for the majority, stated that none of these tests “[meet] the need for a limited and precise standard that is judicially discernible and manageable.”⁴⁹ Chief Justice Roberts notes multiple reasons why these statistical tests fail. First, he argued that the statistical tests all rely on “different visions of fairness,” which raises questions that are political, not legal.⁵⁰ Second, Chief Justice Roberts writes that using these tests to “prove” that gerrymanders are durable is unreliable since “experience proves that accurately predicting electoral outcomes is not so simple.”⁵¹ He points out that in both *Davis* and *Vieth* the parties that were allegedly harmed by unconstitutional gerrymanders went on to win seats.⁵² Finally, he stated that these tests fail to provide “a solid grounding for judges to take the extraordinary step of reallocating power and influence between political parties.”⁵³ The Court, as Briffault explained, found that the claim was not rooted in a constitutional principle that would make the case clearly justiciable. Ultimately, in both *Gill* and *Rucho*, the statistical evidence used to make arguments that vote dilution distorted proportional representation and violated citizens’ Fourteenth Amendment rights failed in the eyes of the Court.

⁴⁸*Rucho et al. v. Common Cause*, No. 18-422, 588 U.S. ____ (2019).

⁴⁹*Ibid.*

⁵⁰*Ibid.*

⁵¹*Ibid.*

⁵²*Ibid.*

⁵³*Ibid.*

Transitioning to the conclusion of this chapter, I want to present Jacob Eisler's *The Constitutionalization of Statistics* to explain in broad strokes why the statistical tests failed in *Gill* and *Whitford*, and detail the technological advances in redistricting that contextualize my argument in Chapter II. Eisler argues that while statistical analysis can be useful evidence in partisan gerrymandering cases, it poses a grave danger if we attempt to use statistical metrics to define rights violations. He writes, "Without a clear relationship to a legal principle, the efficiency gap, partisan symmetry, or any other metric is constitutionally empty. If courts define illegal partisan gerrymandering by metrics, it would produce fragile precedent and betray the rule of law."⁵⁴ He explains that "rights are best understood as creating zones of protection that provide non-conditional weight to certain characteristics or activities."⁵⁵ While non-conditional rights may be weighed against with other rights and state interests, Eisler argues that a constitutional right cannot be rooted in a quantitative threshold. When rights violations are defined by quantitative outcomes, as they were in *Gill* with efficiency gaps or in *Rucho* with partisan symmetry, the Court is expected to become policy regulators, making rulings when maps violate a certain metric rather than by identifying an unconstitutional act. However, Eisler does not argue that statistical modeling has no place in partisan gerrymandering as "disregarding the information provided by the new quantitative methods would deprive courts of powerful evidentiary tools."⁵⁶ For example, quantitative data may be relevant to arguments regarding the balancing of rights. However, Eisler argues that partisan gerrymandering law "needs a new principle, not new metrics."⁵⁷ While I agree with him here, he proposes that this new principle is

⁵⁴Jacob Eisler, "Partisan Gerrymandering and the Constitutionalization of Statistics," *Emory Law Journal* 68, no. 6 (2019): pp. 981-1035, <https://doi.org/10.2139/ssrn.3145191>.

⁵⁵*Ibid.*

⁵⁶*Ibid.*

⁵⁷*Ibid.*

“the right to fair representation [is] violated when legislatures seize partisan advantage in democratic processes.”⁵⁸ However, I believe this principle runs into the same problem as *Gill* and *Rucho*, where they argued vote dilution violated the Fourteenth Amendment. Since statistics can only evidence how much partisan advantage was seized, but not whether it crossed a constitutional standard, I argue the case against partisan gerrymandering needs a new principle that can overcome the shortcomings of vote dilution arguments that the Court spelled out in the cases detailed in this chapter.

Regardless of where Eisler and I disagree, his ideas still prove useful to my argument. He states that:

The fevered condition of partisan gerrymandering litigation can be attributed to the intersection of three factors: the application of sophisticated data analysis to ruthlessly gerrymander legislative districts; the use of similar tools by leading anti-gerrymandering reformers and courts to identify and classify such politicized districting; and the confused state of the partisan gerrymandering precedent thanks to *Davis v. Bandemer* and *Vieth v. Jubelirer*.⁵⁹

Where Eisler sees a statistical fire storm, I see a privacy rights violation that cropped up between the *Davis* ruling in 1986 and the *Vieth* verdict in 2004. While the gerrymanders of *Baker*, *Reynolds*, and *Davis* used cartographers and census information to create districts that would benefit their party, by the 1990 redistricting cycle, the process had begun to go digital.⁶⁰

However, the redistricting software ran on enormous computers, was extremely expensive, and

⁵⁸Ibid, 1.

⁵⁹Ibid, 8.

⁶⁰Vann R Newkirk, “How Redistricting Became a Technological Arms Race,” The Atlantic, Atlantic Media Company, October 31, 2017, <https://www.theatlantic.com/politics/archive/2017/10/gerrymandering-technology-redmap-2020/543888/>.

was prone to error. Around this time, the Caliper Corporation, a mapping software company, created a mapping software that, intended for transportation officials, turned out to be compatible with the cumbersome data type that census information came in (raw TIGER files).⁶¹ The program was sold to state officials as GIS Plus, a redistricting software that, for the first time, could run on desktops. By the 2000 districting cycle, Caliper was fully committed to redistricting and sold a new, more advanced redistricting product called Maptitude, which “allowed even people who had very little training in mapping or programming to get their hands dirty and import voting data with ease.”⁶² The Republicans adopted Maptitude in their redistricting efforts nationwide in 2000, and employed it as a tool in their REDMAP campaign, a campaign meant to target state legislative races in 2010 so that they could control the states’ upcoming redistricting cycle.⁶³ While this redistricting revolution started with a new type of software, eventually the software became capable of running on more than census data— and the more information it had on voters, the better it predicted their votes.

Van R. Newkirk II wrote in *The Atlantic*,

According to Michael Li, senior counsel at the Brennan Center for Justice, “certainly, technology has gotten a lot more sophisticated, and it’s enabled map drawers to draw much more durable gerrymanders than they have in the past. That’s because state mapmakers now know a lot more about voters. That’s just an extension of the big data revolution that you also see in marketing and other politics.”⁶⁴

The big data revolution, I argue, is where gerrymandering crossed the line from a political evil to a clear constitutional violation. Today, partisan gerrymandering thrives on its ability to violate

⁶¹Ibid.

⁶²Ibid.

⁶³“2012 REDMAP Summary Report,” The RSLC Redistricting Majority Project – REDMAP, January 4, 2013, <http://www.redistrictingmajorityproject.com/>.

⁶⁴Ibid.

voters' privacy and predict their voting behaviors with increasing accuracy. The article goes on to say that the field of big data has grown to include "the use of consumer data and other huge political datasets in order to achieve one of the holy grails of redistricting: microtargeting below precinct lines."⁶⁵ This data is anonymized so to avoid privacy concerns, but is still used to manipulate the districts where the subjects of the anonymized data reside. As I will develop in the next chapter, this is a violation of citizens' privacy and it presents a distinct unconstitutional act that was not present in the pesky gerrymanders of before. In *Rucho*, Chief Justice Roberts said that "experience proves that accurately predicting electoral outcomes is not so simple," however, this violation makes accurate predictions much simpler. My account does not tackle data privacy *generally*, rather it focuses on a zone of privacy that any citizen constitutionally holds against its government.

Ultimately, technology, namely data sets and statistical modeling, complicated the argument surrounding the standards of partisan gerrymandering because, while it provided new evidence, it was used to make the same vote dilution arguments the Court had previously rejected. However, it is possible to disarm partisan gerrymandering and impede its newfound effectiveness, by identifying the constitutional right to privacy, as effective gerrymanders rely on the violation of this right. A violation of one's privacy in order to dilute their vote meets the standards of justiciability that all the cases I've outlined have failed to: it is an individual harm, it provides a clear violation without requiring an unmanageable standard, it is not reliant on election results, and lastly— regardless of the partisanship that is allowed in the state map making process— it is unconstitutional to violate citizens' privacy without a compelling state interest. In

⁶⁵Ibid.

Chapter II, I detail this right to privacy, whose original meaning should protect even anonymized data, and the tensions that underlie modern day conceptions of privacy. In Chapter III, I aim to prove that this right is protected by the Constitution and has been applied in precedent to protect citizens' zone of privacy and halt government use of technologies that threaten this zone.

Chapter II: An Account of Data Privacy Rights

I argue that state legislatures violate a citizen's right to privacy when they use citizen's data to gerrymander electoral maps. This argument hinges on proving 1) that citizens retain a right to privacy over their data even when it is anonymized and 2) that these rights are protected by the Constitution. In this chapter, I will articulate my account of our right to privacy in regards to data. While data is a modern invention and our data privacy rights are still developing, I believe this right has evolved from thoroughly developed discussions on intellectual property and privacy. However, there is an interesting split in the discussion on privacy rights that has muddled the concept at times. This debate arises again in the Supreme Court opinions I present in the next chapter, when Justice Scalia and Justice Alito debate where the right to privacy stems from. In this chapter, I present this conceptual split in privacy scholarship and examine the differences. Understanding both conceptions of privacy helps offer us a clearer understanding of how we should conceptualize our right to data privacy in the realm of partisan gerrymandering, where anonymous data is being used to manipulate the districts where the subjects of the data reside.

James Madison's and Samuel D. Warren and Louis D. Brandeis' accounts of privacy illustrate the divide in privacy writings. Generally, Warren and Brandeis' account has reigned supreme in modern debates, and thus I discuss Cameron F. Kerry and John B. Morris' *Why Data Ownership is The Wrong Approach to Protecting Privacy*, which applies the modern conception of privacy to data specifically. Kerry and Morris animate the differences between Madison's and Warren and Brandeis' accounts. Finally, I discuss Chris Evans' *It's the Autonomy, Stupid: Political Data-Mining and Voter Privacy in the Information Age* to begin and conclude this

chapter as it helps contextualize data privacy within the political landscape and highlight why the government's use of aggregated data is a privacy violation.

In James Madison's essay *On Property*, written in 1792, he writes that the term "property," in its more commonly used narrower sense, is "that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual."⁶⁶ However, in its "larger and juster meaning" it encapsulates everything that one can attach a value to and have a right to, leaving everyone else a similar advantage.⁶⁷ In this sense, his conception of property is very Lockean; when an individual, who owns themselves and their liberty, mixes their labor with something and gives it value, the product is then their property.⁶⁸ Under its narrower meaning, Madison writes that an individual's land, merchandise, or money is considered property. However, in its broader and more just interpretation, one "has a property in his opinions and the free communication of them."⁶⁹ This broad Madisonian property extends to the property one holds in their religious beliefs, in the safety and liberty of one's person, and in the "free use of his facilities and free choice of the objects on which to employ them."⁷⁰ Madison continues "as a [person] is said to have a right to [their] property, [they] may be equally said to have a property in [their] rights."⁷¹ The sort of property right Madison is articulating differs from the traditional view of property. Property is often associated with external things an individual

⁶⁶ James Madison, *The Papers of James Madison*, ed. William T. Hutchinson et al. (Chicago and London: University of Chicago Press, 1962-77), Ch. 16.

⁶⁷ Ibid.

⁶⁸ Kyle Swan and Jacob Vargas, "Lockean Property Rights," Sage Encyclopedia of Business Ethics and Society, last modified 2018, <https://www.csus.edu/faculty/s/kyle.swan/docs/Lockean%20property%20rights-revised.pdf>.

⁶⁹ James Madison, *The Papers of James Madison*, ed. William T. Hutchinson et al. (Chicago and London: University of Chicago Press, 1962-77), Ch. 16.

⁷⁰ Ibid.

⁷¹ Ibid.

has control over and can choose to sell. However, in Madison's account, first comes our property, the property we hold in ourselves, our liberty, and objects we mix with, and from property and liberties comes our right to privacy. Violating our privacy is violating the property right we hold in ourselves and infringing on the property right we hold in our liberties.

After offering this account of property, Madison writes about the government's role in this system of property:

Government is instituted to protect property of every sort; as well that which lies in the various rights of individuals... that alone is a *just* government, which *impartially* secures to every man, whatever is his *own*.⁷²

Understanding the right to privacy in property that Madison articulates, the government's role is much simplified and the reach of the Bill of Rights is greatly broadened. Namely, the government is meant to protect individuals, their rights to themselves and their dominion, and the property that extends from the person and their rights. While this may seem very similar to what the Constitution and the Bill of Rights already does—there is an important difference that is perfectly illustrated by the case of privacy rights. Today, property rights and privacy rights are two distinct sets of rights. People think of *privacy* as something that has to do with one's specific identity, keeping their identity private from the public view. Property rights are generally associated with land, objects, and intellectual property and one's right to exclude others from access to their property. These rights have been separated and thus when data on an anonymous person is used, it is not an issue of their privacy because their identity is not revealed. However, Madison's account inherently connects these two concepts. If data on an anonymous person is used, but their identity is not attached to the object, it is a violation of their property right over

⁷²Ibid (emp. my own).

themselves and the privacy right that stems from it. Since their person and actions are their property, it violates their right to exclude others from the property they hold in themselves—a violation of property is inherently a privacy violation regardless of if their identity was revealed. On Madison’s account, any violation of property violates one’s privacy, privacy is not linked to identity per se but it is linked to one’s liberty to exist and exercise their free choice over their property. It is a pervasive theory of privacy that does not track with modern ideas of keeping one’s identity private but instead is constituted of the property we hold in ourselves that allows us to keep our existence, actions, and objects private.

In *The Right To Privacy*, Samuel D. Warren and Louis D. Brandeis argue that the right to privacy is a right that exists separately from intellectual property rights. They write that a wide range of intangible rights arose from physical property over the years.⁷³ This reference seems to overlap with Madison’s account, but as they go on their conception of privacy becomes distinct from property rights. Warren and Brandeis point out that right to privacy is secured by Common Law, which “each individual has the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others” – as is demonstrated by the fact that an individual cannot be compelled to express these thoughts (except on the witness stand).⁷⁴ They write that “the existence of this right [to privacy] does not depend upon the particular method of expression adopted. It is immaterial whether it be by word or by signs, in painting, by sculpture, or in music.”⁷⁵ Warren and Brandeis state that “the right is lost only when

⁷³Samuel D. Warren and Louis D. Brandeis, “The Right to Privacy,” *Harvard Law Review* 4, no. 5 (1890): p. 194, <https://doi.org/10.2307/1321160>.

⁷⁴Ibid.

⁷⁵Ibid, 194.

the author himself communicates his production to the public, – in other words, publishes it.”⁷⁶ They argue that the right to privacy is an inherent right distinct from slander, contract, or other intellectual property laws, since when one’s privacy is violated they are subject to an emotional harm that “demands legal recognition.”⁷⁷ In this sense, while privacy rights arose from property, they argue that the right to privacy is distinct from the right one holds over their property.

Warren and Brandeis present arguments revolving around contract law in English Courts to demonstrate the distinction between privacy rights and rights arising from contracts or property. In the cases they present, photographs or portraits of individuals were used by the person who took or printed the photos without the subject's consent. In the English cases, the Court repeatedly protected the plaintiff’s right to property over images of their likeness because the defendants use or distribution of those images violated an expectation or contract that was established when the plaintiff used the defendant to retain the individual for the photo service.⁷⁸ Warren and Brandeis argue that implying that a contract is what protects one’s privacy is “nothing more nor less than a judicial declaration that public morality, private justice, and general convenience demand the recognition of such a rule.”⁷⁹ While this “narrower doctrine” may have worked when photographs and portraits could only be created in a situation that required consent, Warren and Brandeis explain that modern technology allows privacy violations to take place without “any participation by the injured party.”⁸⁰ Therefore, they conclude that the right to privacy is truly rooted, not in contract law nor property law, but in a right we hold

⁷⁶Ibid.

⁷⁷Ibid, 195.

⁷⁸Ibid, 208.

⁷⁹Ibid, 210.

⁸⁰Ibid.

“against the world.”⁸¹ They note that this right must yield to “public welfare or... private justice” when courts, legislative bodies, or municipal assemblies need the information to pursue general interests.⁸²

These two conceptions of privacy, Madison’s extending from the property we hold in ourselves and Warren and Brandeis’ existing as a standalone right, create a tension in how privacy ought to be protected. If Madison were to engage with Warren and Brandeis’ photography example, he would likely argue that duplicitous attempts to take photographs of an individual would infringe on their liberty to not be photographed if they please or on their right to exclude others from the property one holds in themselves. The need for an independent privacy right, separate from the property right one holds in themselves, would be redundant. However, Warren and Brandeis see the need for this right to exist independently of property and contract laws that do not consider the emotional harm that results from privacy violations. Madison’s account pairs these two harms together, since a property violation under his reading would violate *both* the person whose liberty is mixed in with the property (an emotional, private harm) and the property itself, which may have economic value to the person as well. This disconnect can be boiled down to viewing property as inanimate, economically valuable things, as Warren and Brandeis do, versus viewing property as an all-encompassing part of one’s personhood, as Madison does. I argue that Madison’s account offers a fuller understanding of why violating one’s privacy, or using their data, is a serious rights violation against the property one holds in themselves, even when this data is anonymized as it often is in the redistricting process. However, much of the literature on privacy rights follows the school of thought birthed

⁸¹Ibid.

⁸²Ibid, 214.

by Warren and Brandeis' account. As such, property rights largely determine if one has a right to exclude others, while privacy rights have been used to protect individuals' identities. Privacy rights, and the tensions between these two conceptions, are further obfuscated when applied to the fledgling concept of data and data privacy.

I will now present these competing conceptions in the context of the data privacy issues that this argument is focused on. Technology has evolved so that the internet, computers, and cameras can collect individuals' information in ways unforeseen by privacy scholars.⁸³ Chris Evans writes that "cameras, cell-phones, consumer transactions, Global Positioning System (GPS) devices in cars, toll booths, email, monitoring software, cookies, and other technologies" are compiled so that simple transactions— that may appear harmless to consumers — can be amassed into digital dossiers.⁸⁴ These dossiers reveal facts about individuals that extend "far beyond anything they expected when they gave out the data."⁸⁵ These pieces of data, while seemingly benign, are aggregated in order to identify population trends and describe individual habits or behaviors. Even when this data does not reveal the individual's identity, the information can help data scientists create things that will affect the population that the individual resides in—like gerrymandered maps or, more frequently, advertisements. Evans explains that aggregation has yet to be identified as a privacy concern because it has only come about in recent

⁸³Chris Evans, "It's the Autonomy, Stupid: Political Data-Mining and Voter Privacy in the Information Age," *Minnesota Journal of Law, Science & Technology* 13, no. 2 (2012): pp. 874, <https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1130&context=mjlst>.

⁸⁴Ibid, 874.

⁸⁵Ibid, 875.

decades.⁸⁶ Aggregation violates one's privacy "by revealing aspects of a person's private life [they] might prefer to be kept private."⁸⁷

In *Political Data-Mining and Voter Privacy*, Chris Evans helps connect Warren and Brandeis' account to the modern data landscape. Evans notes that data differs from public statements, or portraits taken by a photographer, in an important way. While Warren and Brandeis argue that publicly shared information is exempt from privacy concerns because the individual deliberately gave up their right to privacy, aggregation presents a violation of one's right to choose to interact and consent to a situation where information, or a photo of them, is being collected. This aligns with Warren and Brandeis' criticism of contracts or trust as an inadequate reason for protecting privacy since technology allows portraits to be taken surreptitiously. While one may agree to the terms and conditions of the initial moment of data collection (the justness of which is another matter), they don't consent to the evolving technology of aggregation which takes that initial situation out of context, unbeknownst to them and creates a digital file on the individual.

Others argue that this realm of personal information should be considered the property of the individual. The idea that an object is created because a unique individual interacts with it and gives it value is the basis of James Madison's understanding of property and is at the core of intellectual property laws that Warren and Brandeis mention in building their account. However, in *Why Data Ownership is the Wrong Approach to Protecting Privacy*, Kerry and Morris write that viewing data as property is a misrepresentation of its public and private value as a source of

⁸⁶Ibid.

⁸⁷Ibid.

information. Kerry and Morris argue that “personal information is in demand precisely because it has value to others and to society across a myriad of uses.”⁸⁸ Kerry and Morris’ conception of data privacy follows the line of thinking that Warren and Brandeis articulate: that privacy rights and property rights are two distinct rights. Following Madison’s account this conception seems to minimize the essential role of the individual who is the source of the data’s information. The problem arises that property is now generally thought of as an inherently transactional class of objects that don’t align with the all-encompassing person-based property that Madison writes of.

Kerry and Morris argue that the property-privacy conception is ill-fitting because: 1) data is often the product of an interaction involving more than one person 2) that data becomes valuable once it is aggregated at the individual and public level, and 3) that data has an intrinsic personal value that would be diminished if it is treated as a commodity. These nuances better fit the conceptions of privacy and property that most people hold today. However, these three points would not be in tension with property as Madison defines it— as something that is not a commodity but is an extension of one’s personhood that, like one’s body, does not have to be on the market solely because it is considered property. I will examine Kerry and Morris’ points, demonstrating how their conception of property differs from Madison’s. However, upon finishing this examination, the issue arises that if these definitions of property and privacy are so ingrained in society’s lexicon, it may be more productive for this argument to work with these

⁸⁸Cameron F. Kerry and John B. Morris, “Why Data Ownership Is the Wrong Approach to Protecting Privacy,” *Brookings*, June 26, 2019, <https://www.brookings.edu/blog/techtank/2019/06/26/why-data-ownership-is-the-wrong-approach-to-protecting-privacy/>.

common definitions while using Madison's account as background for understanding the deeper right underlying privacy and property as society understands them.

Kerry and Morris hold that data is often the product of an interaction. Viewing data as property one individual holds is complicated by the fact that merchants, social media companies, or other organizations are also stakeholders in the interaction. Kerry and Morris write that "the digital economy operates in broad ecosystems of data-sharing for diverse uses."⁸⁹ When you purchase something, the record of your purchase is kept by the merchant. This is a form of data. Kerry and Morris offer examples of these sorts of mutual rights to one's information: credit reporting, bank clearing, know-your-customer rules, and fraud monitoring.⁹⁰ These interactions are regulated by laws, like the Fair Credit Reporting Act, the EU's General Data Protection Act, and California's Consumer Privacy Act.⁹¹ The law often requires that records of these transactions be kept by third parties involved in these transactions. Thus, if data from these sorts of transactions was considered property, it would be owned by two parties according to Kerry and Morris. However, the mutual nature of data does not justify the fact that data is sold off to entities that were not part of the initial transaction. This is a violation of our right to privacy, regardless of whether it should be considered property. This point is the least in tension with Madison's account, though his understanding would likely hold that the property rights we hold in the information created from these interactions grants us a right to forbid the third parties from sharing this data without our consent.

⁸⁹Ibid.

⁹⁰Ibid.

⁹¹Ibid.

Next, Kerry and Morris argue that data is valuable because it can identify a person who exists within the context of a broader population. Kerry and Morris use the example of a name to illustrate this value. One's name is fundamental to their identity and is one of the first items protected by established privacy laws, like the Protection of Identity of Child Witnesses and Victims, Health Insurance Portability and Accountability Act of 1996 (HIPAA), or Family Educational Rights and Privacy Act (FERPA). While individuals hold a value in their name and the identity and properties linked to that name this value is not exclusive.⁹² Names are "essential social and economic currency that is valuable to others" as they are the way that we are recognized by our friends and family, by society for voting registration, property deeds, financial accounts, and the list goes on.⁹³ As such, Kerry and Morris argue that while we retain some privacy rights over our name and our persons, they are also essential to the functioning of society. Names are valuable because they can identify an individual among a population of other named individuals. Social security numbers perform the same function, but are protected by a greater expectation of privacy as they are more unique and secure. Data likely lies somewhere in between these two forms of identification, but Kerry and Morris' point is that it is *information* not an intellectual property that is valuable solely because of a single person's inputs. The complexities of data as a shared entity and the privacy rules that apply to it have been considered in Court, as in *Carpenter v. United States* which I detail in the next chapter, and some privacy protections have been codified in law as mentioned above (HIPAA, FERPA, etc.). These areas of precedent on the protection of information indicate that the government is still bound by constitutional edicts to respect individual privacy rights, regardless of data's status as

⁹²Ibid.

⁹³Ibid.

information or property. Madison's account is in tension with Kerry and Morris' conception. First, the value in data, whether from aggregation or the piece of data itself, would stem from the property individuals hold in themselves and the choice they made to create the data. Just because it is a piece of information that has some need to be shared, would not immediately conflict with its status as a piece of a person's property, in the broad sense. As property under Madison's definition, data should still be granted the privacy considerations that Kerry and Morris speak of but its value as a shared information, even when the individual's identity is protected, does not erase the broad property right that an individual has in data that is describing them, and the right to exclude that stems from that right. Kerry and Morris believe that viewing data as information respects an inherent right to keep data private— a right that becomes saleable once data is classified as property. Madison's account rejects this dichotomy.

Finally, Kerry and Morris argue that data should not be a commodity.⁹⁴ While data sets are currently sold to third parties, Kerry and Morris argue that stronger privacy rights, property rights, would better protect citizens from these transactions. Monetizing a single person's data, Kerry and Morris argue, may “induce people to trade away their privacy rights for very little value” while impeding other uses that could be beneficial to public causes and be better protected by unsaleable privacy rights. Under a property-based understanding of data, Kerry and Morris explain that individuals are allowed to sign away their rights in exchange for the service a website or app can offer. If this property right is eventually monetized, it is estimated that a person could be paid around \$0.0005 for a piece of information, and this could increase slightly depending on how much data they sell or how profitable the information could be (like

⁹⁴Ibid.

information on a person who is in the market for a car).⁹⁵ Kerry and Morris articulate the worry that a right to data privacy rooted in a property right will allow one to sell their data which runs the risk of many harms to one's privacy, without adequate reward. This, I argue, is the key tension with Madison. Madison does not assume that all property is on the market. Under Madison's account it would not follow that, solely because data is considered property one holds as an extension of themselves, it is something that the individual must have a right to sell. He writes that, in its broader meaning, one has a "property very dear to him in the safety and liberty of his person," but if it is illegal to sell one's body on the market, it does not diminish the individual's property right to have liberty over his body, even if the law forbids them from selling their body. It is not clear that classifying data as a property requires that it be saleable on a market. Our bodies are our property, but it would be inappropriate, and illegal, to sell your body or body parts. These sorts of properties are so intrinsic to your personhood that they cannot be for sale. While Kerry and Morris make a compelling argument that data should not be protected at the will of consumer choice, it is not clear that this forbids it from being considered property. Further, stronger privacy rights may only protect individuals' identity from being sold, while the information on them that is useful for predicting and profiting off of their behaviors is still available to third parties purchasing these anonymized data sets. It is true that the right to privacy is easily signed away with terms and conditions out of convenience. However, if the inherent right to privacy we hold in our data was better protected, it would be unacceptable for companies to force an individual to choose between signing away their data rights or not using their service, many of which are essential to living in the modern world like email or internet

⁹⁵Emily Steel et al., "How Much Is Your Personal Data Worth?," *The Financial Times*, June 12, 2013, <https://ig.ft.com/how-much-is-your-personal-data-worth/>.

browsers. Robust privacy rights would recognize the inherent non-monetary value in data, whether it was considered private information or private property, and this right as conceived by Madison would go beyond solely protecting our identities.

With Kerry and Morris' three points presented, I return to the question of how data privacy ought to be conceptualized. I argue that Madison's account of privacy stemming from property better internalizes the inherent privacy right we hold in our data regardless of its mutuality, its aggregated value, or its price tag. In decoupling privacy and property, as Warren and Brandeis do, I believe it becomes more complicated to make the claim that data, even if it only describes your behavior and omits your name, should not be shared unless you consent to it. As presented by Kerry and Morris, privacy relates to the protection of one's identity and property relates to the commodification of an object, or the right to exclude or share it. It then follows that data should still be allowed to be shared, if one's name and personal information are protected. Warren and Brandeis' use of the photography examples don't easily extend to cases where one's private information does not involve their image or evoke their name. The property one holds in the data documenting their actions is left unprotected once anonymized, and this property, or description of the anonymized individual, is still able to predict and be used to coerce the population that the anonymous individual resides in. In this way, Madison's account allows for much more robust privacy protections. However, tackling this issue within this argument would impede my account from engaging with all the materials that define property as a commodity and privacy as a standalone right as Warren and Brandeis do. Thus, I will use Madison's property-privacy account to at times contrast the popular understanding, but my argument will not hinge on rejecting the generally-accepted Warren and Brandeis definitions of privacy and property.

Returning once again to data privacy, I will revisit the right to data privacy within the political sphere, namely as it relates to partisan gerrymandering. While the initial disclosure of one's data could be seen as one making information public on Warren and Brandeis' account, the compilation of this information presents an obvious departure that aligns with the technological advances in photography that first inspired Warren and Brandeis' account. Their account of a right to privacy argues that the right exists independent of contract law, libel protections or private property. The question stands: is there evidence that states are using aggregated information to, beyond solely Census data, to redistrict? Chris Evans holds that campaigns have "become voracious collectors of personal data" to profile voters and predict voting habits. However, beyond campaigns, according to an Amicus Brief of Political Science Professors used by the Supreme Court, mapmakers have access to "expansive data sets that [allow] them to predict voter behavior accurately" and to new software like "Citigate GIS, Mapitude,... and ArcGIS" that enable them to create "durably biased maps."⁹⁶ While the initial partisan gerrymandering cases revolved around maps using Census data, the introduction of big data, described above as aggregated data, presents a unique violation of the right to privacy. I will argue that this right to privacy, despite being forfeited to third parties and often anonymized, is still retained by citizens against federal and state governments when a compelling state interest is absent.

⁹⁶"Brief of Amici Curiae Political Science Professors," (18-726, Washington, D.C., 2019). https://www.supremecourt.gov/DocketPDF/18/18-422/91353/20190308145641704_2019-03-08%20Amicus%20Brief%20of%20Political%20Science%20Professors.pdf (Accessed October 1, 2021).

Chris Evans argues that when data mining is employed the political sphere ““it begins to pull back the curtain of one of the most protected locations in America, the voting booth.””⁹⁷ Evans' account focuses on political data mining in the context of political campaigns, which are harder to regulate as many of their actions are justified as political speech under the First Amendment's robust protections. The same does not apply to the government, which is meant to act in the public's interest. Using a citizen's aggregated, anonymized data to predict their behaviors and lessen the weight of their votes is a violation of their right to privacy as it uses private information on them in order to manipulate the democratic process.

⁹⁷Chris Evans, “It's the Autonomy, Stupid: Political Data-Mining and Voter Privacy in the Information Age,” *Minnesota Journal of Law, Science & Technology* 13, no. 2 (2012): pp. 883, <https://doi.org/https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1130&context=mjlst>.

Chapter III: A Constitutional Case for Privacy Rights

I claim that states violate citizens' right to privacy when they use citizen data to gerrymander. In this chapter I explore if this claim has any legal backing in the Constitution and in case law. Before beginning, I discuss states' laws regarding the data used in mapmaking in more detail. I then discuss the originalist accounts of Randy Barnett and Lawrence Lessig; while data is a modern invention, there are originalist methods of interpretation that can inform the application of the Constitution to modern developments, while ensuring fidelity to its original meaning and underlying principles. Finally, I present precedent where the right to privacy has been protected under the Fourteenth Amendment and then present how privacy rights have been applied to technological advances, namely under Fourth Amendment case law. Ultimately, I find that there is ample constitutional backing to support a right to privacy that protects us from state legislatures' use of voting data and third-party data when they are using this data to serve partisan interests and not to further compelling state interests; though the Court's interpretation of these amendments must be extended to protect citizens from the use of anonymized data if the original meaning of privacy in the Constitution is to be fully realized today.

Before going into what legally protects our data privacy from partisan gerrymanderers, I first need to lay out what is known about what information states currently use to draw these maps. There are no federal laws requiring states to use certain data for redistricting. The Constitution solely states, in Article 1, Section 2, that congressional apportionment be based on an "enumeration" of the U.S. population.⁹⁸ The standard practice over the last few decades has

⁹⁸ "Article I," Legal Information Institute, accessed November 28, 2021, <https://www.law.cornell.edu/constitution/articlei>.

been to use federal decennial census data.⁹⁹ The National Conference of State Legislatures indicates that currently 22 states require the use of census data for legislative and/or congressional redistricting; 17 states do not explicitly identify a data source for redistricting; and five states allow for the possibility of using other data sources, depending on the circumstances.¹⁰⁰ New York and Ohio allow for other data sources if the federal census is unavailable; Arkansas, Hawaii, Texas, and Indiana require federal census data be used for one purpose, but do not specify all purposes.¹⁰¹

In a brief filed by political scientists in the *Rucho et al v. Common Cause* case, the political scientists argued that gerrymandering today is more accurate and durable due to:

an explosion in granular voter data—now widely available—that allow mapmakers to predict partisan behavior with a high degree of accuracy, coupled with advancements in map-drawing software that allow mapmakers to entrench maximal partisan bias.¹⁰²

In the best-case scenario of data privacy violations, state mapmakers have a wealth of voter data that allows them to draw maps with a granular breakdown of broader Census data, which I argue is a violation. However, worst case scenario they are supplementing voting data with additional information such as ““data from frequent-buyer cards at supermarkets and pharmacies, hunting- and fishing license registries, catalog- and magazine-subscription lists, membership rolls from unions, professional associations, and advocacy groups.””¹⁰³ These datasets are normally

⁹⁹“Redistricting and Use of Census Data,” National Conference of State Legislatures, last modified May 26, 2021, <https://www.ncsl.org/research/redistricting/redistricting-and-use-of-census-data.aspx>.

¹⁰⁰Ibid.

¹⁰¹Ibid.

¹⁰²“Brief of Amici Curiae Political Science Professors” (18-726, Washington, D.C., 2019). https://www.supremecourt.gov/DocketPDF/18/18-422/91353/20190308145641704_2019-03-08%20Amicus%20Brief%20of%20Political%20Science%20Professors.pdf (Accessed October 1, 2021).

¹⁰³Ibid.

anonymized, as Census data is, to avoid privacy concerns— though I dispute that this truly avoids a violation of the right to privacy. ProPublica investigators also revealed that often non-governmental redistricting groups get involved in the process. These nongovernmental organizations are funded by “corporations, unions and other special interests” who “provide cash for voter data, mapping consultants and lobbyists to influence state legislators.”¹⁰⁴ Further, these groups “fund the inevitable lawsuits that contest nearly every state's redistricting plan after it is unveiled.”¹⁰⁵ All this to say, there is evidence that state legislatures, either through groups proposing maps, or through their own internal mapmaking processes, use data ranging from voter data to third party data. Either use, I argue, violates a citizen's right to privacy as protected by the Fourth and Fourteenth Amendments. Further in this chapter I will outline how regulating the use of these data sources can protect citizens' privacy and increase transparency in the redistricting process.

Before moving onto case law that supports the right to data privacy, I want to touch on the mode of constitutional interpretation that I find useful in understanding how the right to privacy, which I locate in the Fourth and Fourteenth Amendments, ought to be applied to data. Originalism helps contextualize the Constitution based on the original meaning of its text and principles as understood at the time of its framing. That is, by looking at the principles behind and meanings of the text at the time it was written, one can understand how the text ought to be applied to modern issues. Randy Barnett and Lawrence Lessig both offer arguments detailing this interpretative method. Applying Madison's understanding of property-privacy rights to their

¹⁰⁴Jeff Larson, Olga Pierce, and Lois Beckett, “The Hidden Hands in Redistricting: Corporations and Other Powerful Interests,” *ProPublica*, September 23, 2011, <https://www.propublica.org/article/hidden-hands-in-redistricting-corporations-special-interests>.

¹⁰⁵*Ibid.*

arguments helps highlight the meaning of the robust privacy rights the Bill of Rights was meant to protect.

In *Restoring the Lost Constitution*, Barnett argues that to understand the legitimacy of any legal system, there must be 1) a procedural conception of legitimacy and 2) a theory of justice with which the procedures are assessed.¹⁰⁶ Barnett holds that the Founders premised our Constitution on the idea that “natural rights” preceded the formation of the United States government.¹⁰⁷ The Founders view was that “first comes rights, and then comes the Constitution.”¹⁰⁸ According to Barnett, the Constitution is legitimated by its ability to “provide protection for the preexisting rights retained by the people.”¹⁰⁹ As such, any reading of the Constitution must uphold its legitimating original meaning, and where it is vague it must be construed in a way that “enhances its legitimacy without contradicting the meaning that does exist.”¹¹⁰

James Madison’s writings on property indicate the “larger and juster meaning” of property includes a property in one’s actions and opinions and the resulting right to exclude other individuals from accessing these sorts of broad property. This right to exclude others from using personal information was held by citizens, in the eyes of Madison, prior to the Constitution as it is a natural right we hold due to the property we hold in our persons. The Fourth Amendment right to “be secure in their persons, houses, papers, and effects, against unreasonable searches

¹⁰⁶Randy E. Barnett, *Restoring the Lost Constitution : The Presumption of Liberty - Updated Edition* (Princeton: Princeton University Press, 2013), 4.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

¹¹⁰James Madison, *The Papers of James Madison*, ed. William T. Hutchinson et al. (Chicago and London: University of Chicago Press, 1962-77), Ch. 16.

and seizure” was meant to protect the property citizens had in their persons and thus a right to privacy to be “secure” in their actions and opinions, unless warranted by probable cause.¹¹¹ The Constitution must be read as protecting this right retained by the people in order to remain legitimate. Madison argues that because the government is “instituted to protect property of every sort, “a praise-worthy government cannot solely protect “the possessions of individuals” but must also “protect them in the enjoyment and communication of their opinion” in which they have an equally, or potentially more, valuable property.¹¹² Relating this to Barnett, when questioning how privacy rights ought to be applied to data, Madison’s writings indicate that the meaning of the right to privacy should extend beyond the legal possession of one’s data, since people hold a natural right to guard their “enjoyment and communication of their opinions.”¹¹³ Construing the Constitution to only protect possessions, and not privacy stemming from one’s possession of themselves, fails to enhance the legitimacy of the Constitution based on the meaning of our natural property rights.

Barnett’s argument also presents the original meaning of the Fourteenth Amendment. The Fourteenth Amendment states that “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States” nor “deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”¹¹⁴ Barnett argues that in writing the Fourteenth Amendment,

¹¹¹“Fourth Amendment,” Legal Information Institute, accessed November 29, 2021, https://www.law.cornell.edu/constitution/fourth_amendment.

¹¹²James Madison, *The Papers of James Madison*, ed. William T. Hutchinson et al. (Chicago and London: University of Chicago Press, 1962-77), Ch. 16.

¹¹³*Ibid.*

¹¹⁴“Fourteenth Amendment,” Legal Information Institute, Accessed November 29, 2021, <https://www.law.cornell.edu/constitution/amendmentxiv>.

Senator John A. Bingham “used the words privileges and immunities as a shorthand description of fundamental or constitutional rights.”¹¹⁵ This wording was linked to Blackstone’s division of rights and liberties of Englishmen into “privileges” and “immunities,” “that were the residuum of natural liberties and those “privileges” that society had provided in lieu of natural rights.”¹¹⁶ The framers of the Fourteenth Amendment chose this wording because its meaning included natural rights but was also broad enough to include additional rights. Thus, the meaning of the Fourteenth Amendment includes the natural property-privacy rights Madison outlines in his writing. Barnett argues that we must understand the theory of justice underpinning the Constitution in order to uphold the original meaning of the Constitution and legitimate it. In reference to the Fourteenth Amendment specifically, this means that the privileges and immunities, or natural rights, that the Founders meant to protect in signing the Constitution should inform our modern-day interpretations of the text.

Beyond the general underpinnings of the Constitution touched on by Barnett, Lawrence Lessig explores how the Constitution ought to be translated while upholding fidelity to its original meaning. Lessig argues that constancy is the virtue of originalism, however phrases have different meanings depending on the time in history that they are applied to. Lessig uses a piano to illustrate his point. If a concert pianist is performing a series of concerts and their piano falls out of tune, is it more faithful to the original composer of the song to leave it out of tune or to tune it so that it sounds “the same”?¹¹⁷ Is this tuning the same infidelity as “changing the tempo

¹¹⁵Randy E. Barnett, *Restoring the Lost Constitution : The Presumption of Liberty - Updated Edition* (Princeton: Princeton University Press, 2013), 61.

¹¹⁶ Ibid.

¹¹⁷Lawrence Lessig, “Fidelity in Translation ,” *Texas Law Review* 71, no. 1165 (1993): pp. 1170, https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=11689&context=journal_articles;Fidelity.

or cutting some particularly dark passages so the music sounds better?”¹¹⁸ Lessig argues that there is an important difference between interpretive fidelity and interpretive change. Context matters, and in applying constitutional principles to a changing world, the same words have very different meanings if the context of application is not accounted for. Fidelity, Lessig argues, should be an act of translating as a “translator's task is always to determine how to change one text into another text, while preserving the original text's meaning.”¹¹⁹

Interpretive fidelity helps to explain how the Fourth Amendment ought to be applied to personal data. Madison and the Founders instilled a privacy right in the Constitution via the Fourth Amendment because the British Monarchy had allowed “general warrants,” warrants that gave government officials free range regardless of their reasoning, to justify searching a British subject's private quarters.¹²⁰ This offers meaning to the Fourth Amendment's protection of one's “persons, houses, papers, and effects.”¹²¹ The sensitive information contained in these sorts of physical possessions is now often stored digitally. As data has become a prevalent way to store this sort of information, interpretive change has occurred that has, as Kerry and Morris argue for, conceptualized data not as property but merely as a form of information, often owned and stored by third parties. When anonymized, it is claimed that this information does not violate citizens' privacy. However, anonymous data still contains the sensitive information on citizens that the Founders once held in their persons, houses, papers, and effects. Thus, sensitive information

¹¹⁸Ibid.

¹¹⁹Ibid.

¹²⁰Brian Frazelle and David Gray, “What the Founders Would Say about Cellphone Surveillance,” *American Civil Liberties Union*, June 28, 2019, <https://www.aclu.org/blog/privacy-technology/location-tracking/what-founders-would-say-about-cellphone-surveillance>.

¹²¹“Fourth Amendment,” Legal Information Institute, accessed December 4, 2021, https://www.law.cornell.edu/constitution/fourth_amendment.

today is not always the property of the individual that the data describes nor does it always reveal the individual's identity. But, this does not preclude the data from being used to affect the anonymous citizen's life via partisan gerrymandering, as the British Monarch once oppressed citizens by violating the sensitive information they stored in their houses, papers, and effects. Regardless of the traditional property rights society has allowed third parties to retain, upholding interpretive fidelity requires that this modern form of sensitive information be protected from government invasion unless there is probable cause for doing so. By separating privacy rights and property rights, as Warren and Brandeis' account does, interpretations of the amendments protecting privacy, like the Fourth Amendment, have lost interpretive fidelity because the sensitive information one once stored in one's property, their houses, papers, and effects, is now able to be anonymized and owned by third parties.

In regards to the Fourteenth Amendment, the context of our "privileges and immunities" and "life, liberty, or property" have changed drastically since the signing of the amendment in 1868. As Barnett indicated, "privileges and immunities," at the time the amendment was framed, denoted a broad set of rights, written and natural, that were to be protected when states wrote laws.¹²² If the meaning of natural rights included the property-privacy rights detailed by Madison, then privacy rights should be understood to be part of one's privileges and immunities. Translating the original meaning explained in Madison's writings to a modern context, when information describing citizens' is used without their consent, they are being deprived of the liberty to control who invades the property they hold in their person as well as being deprived of this property, since their liberty over their property and the property itself are intertwined.

¹²²Randy E. Barnett, *Restoring the Lost Constitution : The Presumption of Liberty - Updated Edition* (Princeton: Princeton University Press, 2013), 61.

In explaining some of the Constitution's original meaning, Barnett and Lessig help frame how the Fourth and Fourteenth Amendments should be applied to the case of state legislators using maps that have been drawn using either data sets containing voting information on citizens or data sets collected by third parties. The meaning of the privileges and immunities clause protects citizens from any law that abridges a voter's right to privacy over data as the government could have never accessed this sort of information at the time of the Fourteenth Amendment's framing. Beyond the privileges and immunities clause, one's right to exclude others from infringing on their person and to hold a property right in themselves, their actions, and opinions are both abridged when one's data privacy is violated in order to draw a map that distorts the democratic process. Regardless of the traditional property rights one holds over their data in relation to third parties, Madison's writings and the meaning of the Fourth Amendment indicate that the Founders' believed that one's personal information should not be infringed upon by the government without probable cause or Due Process. The information the Founders once stored in their houses, papers, and effects is now digital. While sensitive information was invariably stored in physical possessions (papers and effects) and linked to the identity of its owners, it can now be owned by third parties and describe an individual without revealing their identity. However, the government's ability to use this information to manipulate the citizenry remains the same, and has arguably become more powerful thanks to technological advances. Ignoring this modern translation of privacy rights threatens to delegitimize our Constitution if the original meaning of the right to privacy is mistranslated to the digital world.

While these rights are evident by appealing to the Constitution's original meaning, I argue that the right to privacy has been recognized by the Supreme Court through Fourteenth Amendment case law on our zone of privacy; further, this zone of privacy has been construed to

include personal data under Fourth Amendment case law on the government's use of technology, though this zone is still threatened by the use of anonymous data. Notably, the rights violation as articulated in the Fourth and Fourteenth Amendment case law would overcome the issues facing proportional representation gerrymandering claims that I outlined in Chapter I. In the following paragraphs I will move through the cases that offer precedent for this framework of privacy, briefly touching on how the Court's rulings in *Griswold v. Connecticut*, *Roe v. Wade*, and *Lawrence v. Texas* articulated the foundation of citizens' right to privacy. Then I will present *United States v. Jones* and *Carpenter v. United States* to demonstrate how this right to privacy has been interpreted to apply to technological advances.

In *Griswold v. Connecticut*, Justice William Orville Douglas stated that, "the specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees to help give them life and substance. Various guarantees create "zones of privacy" and he cites the First, Third, Fourth, Fifth, and Ninth Amendments as delineating this zone of privacy.¹²³ Citing this right to privacy, the Court ruled against states that wished to prohibit the use of contraceptives for married couples.¹²⁴ *Griswold* created precedent to protect this "zone of privacy", despite the fact that it must be "inferred from several amendments in the Bill of Rights."¹²⁵ Justice William Orville Douglas notes that the case deals "with a right of privacy older than the Bill of Rights" that is meant to bar the government from employing means that "sweep unnecessarily broadly and thereby invade the area of protected freedoms."¹²⁶ His writing touches on Barnett's argument, which indicates that the rights that were meant to be protected by

¹²³*Griswold v. Connecticut*, 381 U.S. 479 (1965).

¹²⁴*Ibid.*

¹²⁵*Ibid.*

¹²⁶*Ibid.*

the Constitution when it was written predate the Constitution, and the Constitution's legitimacy relies on its ability to uphold these rights. Justice Orville Douglas' insistence that this right is upheld by multiple provisions of the Constitution reflects James Madison's conception of privacy as an essential right stemming from the property right one holds in themselves which affords them many liberties throughout the Constitution. *Griswold* enumerated a zone of privacy that should protect our voting registries, cellular data, and any aspect of our personal lives from the government's unnecessarily broad means of redistricting with partisan bias.

This right to privacy was outlined further eight years later in *Roe v. Wade*. This time, however, the Majority found that abortion violates one's privacy due to the Due Process clause of the Fourteenth Amendment instead of the list of amendments and zone of penumbras cited by the majority in *Griswold v. Connecticut*. In a concurring opinion, Justice Stewart quoted Justice Harlan in reference to the liberty guarantee of the Due Process Clause:

This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a **rational continuum** which, broadly speaking, includes a freedom from **all substantial arbitrary impositions** and purposeless restraints . . . and which also recognizes, what a reasonable and sensitive judgment must, **that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.**¹²⁷

In order to secure our "life, liberty or property," the Fourteenth Amendment must be read as ensuring a zone of privacy allowing us to function on a "rational continuum" free from "all substantial impositions."¹²⁸ Again, this reading of a privacy right in the Constitution echoes Madison's argument that the right to privacy is so deeply rooted in the property right one holds

¹²⁷Roe v. Wade, 410 U.S. 113 (1973).

¹²⁸Ibid.

in themselves that, among other liberties stemming from the property right, that the Constitution cannot be read to protect a series of isolated points— but it must protect the rational continuum that includes all of these natural rights. Justice Blackmun, writing for the majority, notes that while the right to privacy is not explicitly mentioned in the Constitution, the Court has recognized this zone of privacy in past cases. However, he argues that the right is not unlimited and the case law upholding privacy rights “acknowledge[s] that some state regulation in areas protected by that right is appropriate” when the state has an important interest in safeguarding health, or a “compelling state interest.”¹²⁹ *Roe* restates the zone of privacy protected in *Griswold*, but helps to clarify that its protections do not only include the bedroom, but encapsulates the various liberties individuals should hold against all substantial arbitrary impositions of the government. Further, Justice Blackmun's opinion in *Roe* indicates that if states have compelling state interest to violate an individual's rational continuum of privacy, the government's action may be justified.

In *Lawrence v. Texas*, the Court held that the bounds of this rationally continual zone of privacy extended “beyond spatial bounds.”¹³⁰ In this case, two men were arrested because they took part in consensual “deviate sexual intercourse” in the privacy of one of their homes.¹³¹ The Court ruled that the men were “entitled to respect for their private lives” and thus the law forbidding their consensual, private act violated the Due Process Clause's protection of liberty. This ruling colored in the precedent on privacy even further, with the Court enumerating that:

[f]reedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant

¹²⁹Ibid.

¹³⁰Lawrence et al. v. Texas, 539 U.S. 558 (2002).

¹³¹Ibid.

case involves liberty of the person both in its spatial and more transcendent dimensions.¹³²

This opinion of the court establishes that our right to privacy, as implied throughout the Bill of Rights, is a zone with borders that are a rational continuum, protected from interferences besides those that serve compelling state interests, and composed of both concrete property and spatially transcendent liberties. *Lawrence* helps to illuminate how this rational continuum of privacy should extend to data. Data, often revealing our thoughts, beliefs, expressions, or private actions, should be protected by the Constitution's privacy provisions as it is an extension of our autonomy. Further, this spatially transcendent zone of privacy should shield information on us that is not linked to our identities (or our physical person). Again, this is reminiscent of the property we hold in ourselves that justifies our liberty to choose what information about ourselves we want to keep private.

Under Fourth Amendment case law the right to privacy has protected citizens from the government's use of new technologies to encroach on their zone of privacy. I primarily look at *United States v. Jones*, *Carpenter v. United States*, and the precedent cited in those cases to demonstrate how the Supreme Court has understood technology in terms of the original meaning of the right to privacy. However, I note that this right to privacy must be interpreted to include information that describes our beliefs or behaviors but does not include our identity if the original meaning of the Fourth Amendment is to be realized fully.

In *United States v. Jones*, Antoine Jones was arrested for drug possession after police had tracked his vehicle with a GPS tracking device for a month without a warrant.¹³³ The Court

¹³²Ibid.

¹³³*United States v. Jones*, 565 U.S. 400 (2012).

unanimously found that the installation and subsequent use of the tracking devices was an unlawful search in violation of Jones' Fourth Amendment right. While the GPS tracking device was physically placed on his car, I believe the Court's reasoning behind the decision, which revolved around an individual's reasonable expectations of privacy, offers important parallels to the right to data privacy when it comes to redistricting.

Delivering the opinion of the Court, Justice Scalia said the Fourth Amendment protects a person's right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."¹³⁴ Scalia goes on to argue that the government's placement of the tracking device was a physical occupation of Jones' private property. However, the specifics of *how* Jones was violated was disputed by Justice Sotomayor and Justice Alito who believed the violation was better conceptualized as a privacy violation than a violation of property, a disagreement that I will revisit. Justice Scalia goes on to cite the precedent of *Katz v. United States* which held that "the Fourth Amendment protects people, not places" and found that an eavesdropping device placed in a public telephone booth also violated the Fourth Amendment.¹³⁵ In *Katz*, Justice Harlan wrote in concurrence that the government commits a Constitutional violation when an individual's "reasonable expectation of privacy is violated."¹³⁶ Justice Scalia's opinion held that the intrusive device placed on Jones' car violated his personal property and his reasonable expectation of privacy over that property. Further, Scalia referenced the precedent set in *Kyllo v. United States*, that the Court must preserve the degree of privacy against the government that existed when the Fourth Amendment was adopted since it was meant to embody

¹³⁴ Ibid.

¹³⁵ Ibid.

¹³⁶ Ibid.

a pronounced concern for government trespass upon the areas the amendment enumerates.¹³⁷ The protected areas specifically enumerated include one's "persons, houses, papers, and effects" as those were the areas where the government could find sensitive information on individuals at the time of the Fourth Amendment's framing.¹³⁸ This point is underscored by Lessig's idea of fidelity in translation, since the Court is translating the original meaning of the Fourth Amendment to a modern context. This suspicion initially led them to protect "persons, houses, papers, and effects", but the Court's interpretation of the Fourth Amendment aims to protect new forms of sensitive information and new methods of government invasion. This attempt at upholding the Constitution's original meaning is also supported by Barnett's argument that a legal system's procedures must be assessed by the theory of justice that underlies them, which in the Founders' case was that "first comes rights, and then comes the Constitution."¹³⁹ Scalia states that past rights are preserved when one's reasonable expectation of privacy is protected, since an expectation is rooted in concepts of personal property law or to understandings that have been deemed reasonable by society.

While Scalia's opinion, and his use of reasonable expectations and Fourth Amendment originalism, can support a case for data privacy protections against partisan gerrymandering, Justice Alito's concurrence offers a distinction that nearly predicts the issue of data privacy. First, Justice Alito presents multiple reasons why categorizing the tracking device as a search under the Fourth Amendment is erroneous. He argues that placing the device on the car would not be originally understood to be a search since the invasion relied on the device

¹³⁷Ibid.

¹³⁸Ibid.

¹³⁹Randy E. Barnett, *Restoring the Lost Constitution : The Presumption of Liberty - Updated Edition* (Princeton: Princeton University Press, 2013), 4.

communicating Jones' location to the government electronically.¹⁴⁰ The device did not affect the cars functioning in any way and if the device had failed to work it is unclear how its mere presence on the vehicle, without relaying any information to the government, would be considered a search. Justice Alito argues that classifying the placement and use of the device as a search strains the language and case law of the Fourth Amendment. Additionally, he notes that it conflicts with much of the post-Katz precedent which does not require a physical trespass to find a Fourth Amendment violation and points out that trespass-based precedent has been heavily criticized.¹⁴¹ Justice Alito still concurred with the Court's ruling because he agreed that it was an intrusion on Jones' reasonable expectation of privacy. Justice Alito underscores that the ruling in *Katz* held that Fourth Amendment claims no longer relied solely upon property rights "but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place."¹⁴²

Justice Alito meditates on the future privacy concerns preempted by the Court's ruling. He notes that the Court's reliance on the law of trespass will be troublesome when surveillance can be carried out electronically without any need for a physical property violation to place a tracker, as it can be carried out today.¹⁴³ His criticism for the majority's physical trespassing argument is in line with Madison's argument that people have property in themselves and a right to privacy stemming from the property rights they hold in themselves. The Majority separated property rights from privacy rights by classifying the tracking device as a search by physical trespass instead of articulating that the violation was of Jones property in himself and his

¹⁴⁰United States v. Jones, 565 U.S. 400 (2012).

¹⁴¹Ibid.

¹⁴²Ibid.

¹⁴³Ibid.

whereabouts and his right to keep these broadly defined properties private. This sort of differentiation muddles one's right to privacy because it erroneously separates intrusion on physical property from an intrusion on a person's deep-rooted privacy that stems from the property they hold in themselves. In this way, while the Majority indeed protected Jones' expectation of privacy, their argument muddles the reasons why Jones could have this expectation, beyond the right to exclude others from the property he held in his car. Under Justice Alito's reasoning, this privacy right fundamentally protects the individual.

Finally, Justice Alito considered how society's reasonable expectations would evolve as technology advanced. He wrote:

“Dramatic technological change may lead to periods in which popular expectations are in flux and may ultimately produce significant changes in popular attitudes. New technology may provide increased convenience or security at the expense of privacy, and many people may find the tradeoff worthwhile. And even if the public does not welcome the diminution of privacy that new technology entails, they may eventually reconcile themselves to this development as inevitable.”¹⁴⁴

Justice Alito's opinion raises important questions about the standard of reasonable expectations. His predictions lend themselves to the idea that even if popular attitudes towards privacy change out of convenience or are shaped by the ubiquity of technology and data collection, the government should not “confuse their own expectations of privacy with those of the hypothetical reasonable person.”¹⁴⁵ Further, it is important to note that popular expectations are *currently* in flux. Kerry and Morris' argument indicates that data's characterization as property or as

¹⁴⁴Ibid.

¹⁴⁵Ibid.

information is a recent subject of debate. Further, anonymous data is not generally thought to violate citizens' privacy, but, as I argue, when anonymous data can still affect the lives of those it describes, it is still violating its subjects' privacy. Technology has changed even in recent years and thus popular expectations have not settled on what is reasonable when it comes to data privacy. Thus, the Katz test is faced with its own difficulties and the meaning of the Fourth Amendment's protections as understood by the Framers should guide the application of the Fourth Amendment to modern contexts.

Setting the debate between Justice Scalia and Justice Alito aside, applying the *Jones* precedent to redistricting is helpful in understanding why using citizens' data to predict how they will vote is a violation of the Fourth Amendment's privacy protections when applied to technological advances. Detailed information about citizens' party identification and other third-party data are types of information that far exceed the degree of privacy that existed at the time the Fourth Amendment was adopted.

The considerations in *Jones* were again illuminated in *Carpenter v. United States* when the Court decided whether the warrantless seizure of cell phone records also violated the Fourth Amendment. Up until *Carpenter*, information shared with a third party (i.e. a bank or a cell phone carrier) did not violate this zone of privacy because citizens "assumed the risk" of a loss of privacy by sharing the information with the third party due to the precedent set in *Smith v. Maryland* and *United States v. Miller*. However technological advancements at the time of *Carpenter v. United States* led the Court to argue that new forms of "personal location information maintained by a third party—does not fit neatly under existing precedents" (585 U.S. __ (2018)). The Court ruled that "warrantless search and seizure of cell phone records" of four suspects of robbery violated their Fourth Amendment right because cellphone information

has evolved since *Miller* and *Smith* and had become “detailed, encyclopedic, and effortlessly compiled.”¹⁴⁶

In deciding the case, the Court held that, following the *Katz* ruling, the Constitution protects people and not places. From this, the Court understood the Fourth Amendment to protect people’s expectations of privacy in order “to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials” even in the absence of a property right violation.¹⁴⁷ The Court noted that “personal location information maintained by a third party does not fit neatly under existing precedent,” but shared similarities with *Jones*. Since 2018 when the ruling in *Carpenter* was handed down, “the fact that the information is held by a third party does not by itself overcome the user’s claim to Fourth Amendment protection.”¹⁴⁸ With these advancements in precedent, the zone of privacy rationally extends to data that is “detailed, encyclopedic, and effortlessly compiled,” regardless if it has been shared with a third party for other purposes.¹⁴⁹ Ultimately, the Court recognized the Madisonian property citizens hold in their data, even if the citizen does not legally possess the data. Sharing this information with a third party is irrelevant to the constitutional barriers meant to prevent the government from invading citizens’ property and the zone of privacy which protects it. *Carpenter* imports the original meaning outlined by Madison’s writings by recognizing the privacy rights individuals should have over their data even if they do not legally own it; in this way, *Carpenter* acknowledges citizens’ Madisonian property stored in third party data regardless of it being their legal property.

¹⁴⁶*Carpenter v. United States*, 585 U.S. ____ (2018).

¹⁴⁷*Ibid.*

¹⁴⁸*Ibid.*

¹⁴⁹*Ibid.*

Carpenter offers backing to the argument that one's data should be protected from state legislatures looking to use it for partisan purposes. *Carpenter* created a precedent that supports citizens' right to privacy that protects their data from government interference unless the state has a compelling state interest to use the data. However, the Court's interpretation of the Fourth Amendment must go further if it is to uphold the original meaning of the Fourth Amendment. In *Carpenter*, the four men's cellular records revealed information that was linked to their identities. While this is in line with the original meaning of the amendment, the sensitive information stored in anonymized data still falls in line with the original meaning of the Fourth Amendment. Sensitive information on an individual can be anonymized, while still allowing the government to use it to manipulate the democratic process that the individual partakes in. *Carpenter* partially advanced this original meaning, but in the case of redistricting the original meaning of the right to privacy and the Fourth Amendment has yet to be fully translated to protect citizens' information that is detached from their names.

The constitutional cases just outlined dealt with issues ranging from reproduction, sexual relations, tracking devices, and cellular location data. These ranging topics are all linked by the privacy concerns raised in the cases. The privacy arguments made under the Fourth and Fourteenth Amendments all tie back to Barnett and Lessig's originalist interpretive methods. The Fourteenth Amendment's protection of the zone of privacy in *Griswold*, *Roe*, and *Carpenter* was rooted in the Bill of Rights' guarantee of liberty, a principle the Founders enshrined in the amendments' protection of individuals from arbitrary government action. *Griswold* affirmed that there is a zone of privacy, created throughout various amendments and penumbras in the Bill of Rights, that shields the bedroom, or an individual's marriage, from government interference. In noting that the case dealt with a "right of privacy older than the Bill of Rights," Justice Douglas

classifies the right to privacy as a natural right that existed prior to the Constitution and that must be upheld in order to legitimate the founding document. Justice Douglas' statement echoes the argument of Barnett.¹⁵⁰ *Roe* clarified that the Due Process Clause of the Fourteenth Amendment protects this right to privacy, since a state regulating abortion violates a woman's private choice to terminate her pregnancy; the ruling also reiterated that without a legitimate state interest, states cannot intrude on individuals' zone of privacy. *Roe* upheld the preexisting privacy right identified in *Griswold*, but also aimed to demonstrate that if the state had had a legitimate interest in banning abortion, then it could have outweighed the privacy concern. This aligns with Barnett since he argues that a legitimate legal system must have a procedural conception of legitimacy that is then assessed by the preexisting theory of justice endorsed by the Founders. In *Lawrence*, the decision mirrored the ruling in *Roe*; in *Griswold* and *Roe*, regulations on pills and abortions violated this zone of privacy, however, *Lawrence* showed that intruding on one's thoughts, beliefs, and expressions, like one's sexuality, also violated this zone. In extending this zone of privacy to "enjoyment and expression of beliefs," the Court upheld Madison's understanding of an individual's privacy right stemming from the property they hold in their expressions; additionally, as Barnett argues, this ruling legitimated the Constitution by upholding the original meaning behind the Fourteenth Amendment which aimed to protect both the natural and constitutional rights of citizens.

Lessig's account of interpretive fidelity is also demonstrated by the Fourth Amendment case law of *Jones* and *Carpenter*. *Jones* demonstrated that the government's use of new technologies to track an individual is in violation of their reasonable expectation of privacy and the privacy protections that were included in the original meaning of the Fourth Amendment.

¹⁵⁰*Roe v. Wade*, 410 U.S. 113 (1973).

When new technologies enable innovative privacy violations, reasonable expectations and the original meaning of the amendment still protect the zone of privacy. As I discussed earlier in this chapter, Lessig's account shows that by translating the Founder's circumstance, general warrants used to search houses, papers, and effects, to the government's warrantless electronic tracking of Jones' car, the Supreme Court maintained interpretive fidelity. Finally, *Carpenter* indicated that regardless of a third-party's possession of data on an individual, when the data is extensively intrusive the government's acquisition of the information violates the citizen's reasonable expectation of privacy and the original meaning of the Fourth Amendment. This ruling again translated the original meaning of the Fourth Amendment to a modern context. The ruling also partially realized Madison's notion of property-privacy because it recognized the personal nature of the information and the privacy right inherent to information of this sort, even though the data was not the individual's property in the narrow sense. This does not fully unite the broad property rights and fundamental privacy rights Madison detailed, as I explained anonymized data should be protected by this original meaning, but it let the privacy right of the individual stand even though the data was not the individual's legal property.

Taking this precedent and the originalist backing for these rulings, I want to apply these interpretations to the voting data and third-party data that states use, which I presented in the beginning of this chapter. The meaning of the Fourth Amendment was to protect from the sort of arbitrary searches and seizures the British government conducted. The British government used general warrants as a "tool of oppression" to target "disfavored religious minorities and political opponents, such as those who published pamphlets criticizing the government."¹⁵¹ In these cases,

¹⁵¹Brian Frazelle and David Gray, "What the Founders Would Say about Cellphone Surveillance," *American Civil Liberties Union*, June 28, 2019,

targeted individuals were charged with crimes. The Framers may not have imagined that the right to privacy would eventually be violated in order to create more accurate and effective partisan gerrymanders. However, the tool of oppression, violating citizens' privacy rights, used then and now achieves similarly oppressive ends. The ends being to maintain political power and subvert opposing political forces. Further, the case of redistricting shows that data that is not linked to citizens identity can still violate the original meaning of right to privacy. When it comes to criminal charges, the identity of the individual that is described is essential to charging them with a crime. However, information on the beliefs and behaviors of anonymous individuals who reside in a state is enough to manipulate their legislative maps and their identity is not needed. However, the original meaning of the right to privacy was to protect sensitive information that the government could use against individuals. Anonymous data is still characterized by this original meaning because it contains sensitive information that can achieve the same manipulative end even if identities are not revealed. While extending privacy rights as a protection against partisan gerrymandering would be a new application of the Fourth and Fourteenth Amendments' privacy protections, the precedent of the cases outlined in this chapter indicates that the Court has begun to apply the original meaning of these amendments to modern privacy violations, and thus it is not implausible that this original meaning could also be applied to the privacy violations committed by partisan gerrymanderers.

This body of precedent, and the original meaning of these amendments, offers support to the claim that state legislatures' use of voting and third-party data to gerrymander maps violates the zone of privacy that existed at the framing of the Fourth Amendment and the zone of privacy

<https://www.aclu.org/blog/privacy-technology/location-tracking/what-founders-would-say-about-cellphone-surveillance>.

that protects from state action under the Fourteenth Amendment. One's voting data, and whatever other third-party data mapmakers may use, contain types of information that goes far beyond the degree of privacy against the government that existed when the Fourth Amendment was adopted, a standard created in *Kyllo* which Scalia cited in his *Jones* opinion. If the right to privacy must be violated to meet the needs of redistricting efforts, it must be for a compelling state interest, which was the standard used to examine legislators' motives in *Griswold* and *Roe*. A compelling state interest is a state interest that requires "particularly careful scrutiny of the state needs asserted to justify their abridgment."¹⁵² "The test traditionally applied in the area of social and economic legislation is whether or not a law such as that challenged has a rational relation to a valid state objective."¹⁵³ In *Rucho*, the most recent partisan gerrymandering case heard by the Supreme Court, Representative David Lewis said the state interest in the North Carolina case was that "electing Republicans is better than electing Democrats. So I drew this map to help foster what I think is better for the country."¹⁵⁴ In Maryland, the other state involved in *Rucho*, Governor Martin O'Malley transparently stated that their objective in gerrymandering was "to create a map that was more favorable for Democrats over the next ten years."¹⁵⁵ Increased partisan control cannot be a valid state objective because partisanship is a matter of opinion or preference, and compelling state interests must be strictly scrutinized because they risk violating fundamental rights and thus there must be proof that the objective is necessary enough to justify the violation of these fundamental rights.¹⁵⁶ This objective could be pursued in

¹⁵²*Roe v. Wade*, 410 U.S. 113 (1973).

¹⁵³*Ibid.*

¹⁵⁴*Rucho et al. v. Common Cause*, No. 18-422, 588 U.S. ____ (2019).

¹⁵⁵*Ibid.*

¹⁵⁶"Let the End Be Legitimate: Questioning the Value of Heightened Scrutiny's Compelling- and Important-Interest Inquiries," *Harvard Law Review: Constitutional Law*, March 10, 2016,

ways that do not require such an intimate violation of individuals' data privacy; albeit, without these additional forms of data on citizens, partisan gerrymandering will effectively be reverted to its earlier, less effective forms.

However, simply banning openly stated bias may just force gerrymandering efforts to occur as backroom deals. So, apart from the stated intent of mapmakers, how will the partisan bias be detected without using the measures of vote dilution that afflicted the gerrymandering cases outlined in Chapter I? Because the rights violation occurs in the process of mapmaking, this issue is not so much one of results, but of the bias present into the mapmaking process. The issue of an undiluted map, as discussed in the gerrymandering cases, is complicated by the criterion a map should be meeting (compactness, competitiveness, protection communities of interest, etc.) and how it compromises between these features, and the debate over *what* criterion should be prioritized.¹⁵⁷ Ultimately, there must be regulations that ensure the mapmaking process is unbiased before states are given access to data that violates an individual's right to privacy against the government. Compromises will have to be struck regarding which criteria are fair, but the process for reaching those compromises can be done in a way where partisan bias is mitigated, through independent commissions or bipartisan negotiations. As the Voting Rights Act did with certain states that had a history of voting discrimination, the federal government can screen state legislatures' mapmaking processes and ensure there are safeguards against bias, especially in states that allow the party in power to dominate the mapmaking process.¹⁵⁸ I will

<https://harvardlawreview.org/2016/03/let-the-end-be-legitimate-questioning-the-value-of-heightened-scrutinys-compelling-and-important-interest-inquiries/>.

¹⁵⁷“Where Are the Lines Drawn?,” All About Redistricting, Loyola Law School, Accessed November, 1, 2021, <https://redistricting.lls.edu/redistricting-101/where-are-the-lines-drawn/>.

¹⁵⁸“Section 4 of the Voting Rights Act,” The United States Department of Justice, May 5, 2020, <https://www.justice.gov/crt/section-4-voting-rights-act>.

return to the issue of regulation in the final chapter to follow. While further legislation on data privacy would solidify how these rights ought to be conceptualized, if our privacy is not protected from being usurped to distort our democratic process a solution may soon be out of reach. So long as the Court fails to address the latest technology the government is using to invade citizens' privacy, aggregated and anonymized data will continue to “pull back the curtain of one of the most protected locations in America, the voting booth.”¹⁵⁹

I want to conclude this chapter by restating how the constitutional argument offered in this chapter overcomes the issues that plagued vote dilution claims. The privacy rights violation committed by states engaged in partisan gerrymandering is clearly individual in nature as it uses data on individuals to predict the population's behavior. It also finds its basis in the right to privacy, a right that has repeatedly been located in the Constitution by the Supreme Court. Finally, this constitutional right violation justifies the Judiciary's intervention in states' control over election. In the next chapter, the conclusion of my argument, I will address some rebuttals and challenges my account must face.

¹⁵⁹Chris Evans, “It’s the Autonomy, Stupid: Political Data-Mining and Voter Privacy in the Information Age,” *Minnesota Journal of Law, Science & Technology* 13, no. 2 (2012): pp. 883, <https://doi.org/https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1130&context=mjlst>.

Conclusion: Feasibility and the Future of Data Privacy Rights

In Chapter I, I presented a timeline of partisan gerrymandering cases that have taken place and outlined why they failed to be justiciable in the Supreme Court's view. In Chapter II, I presented multiple accounts of privacy rights, focusing on the tension between James Madison's account and that of Warren and Brandeis. I argue that these tensions influence property and privacy rights today, leaving anonymized data unprotected. In Chapter III, I outlined two originalist arguments regarding the original meaning of privacy in the Fourth and Fourteenth Amendments to support my argument that the original meaning of these amendments should protect data on citizens from government invasion. I then moved through Supreme Court case law that 1) established that we hold a right to privacy against state governments through the Fourteenth amendment, and 2) that under Fourth amendment jurisprudence, the government's use of technology has been found to violate citizens' reasonable expectation of privacy and to violate the amendment's original meaning. However, there are still many rebuttals and obstacles facing this account. One challenge is that currently redistricting groups can legally get access to data by citing a state interest in accessing it and these datasets are not thought to raise privacy concerns because the data is anonymized. Further, many will ask, even if this argument is accepted, how will partisan bias be identified and regulations on partisan bias be enforced? In concluding this argument, I address both these concerns before offering a final word on the existential crisis this privacy rights violation poses to our democracy, and to our society on the whole.

In a conversation I had with a consultant who works in redistricting, he explained that 1) all the data sets used in redistricting are anonymous and thus don't violate individuals' privacy

and 2) whatever information that redistricting efforts claim to need in the mapmaking process becomes legally public to serve the state interest in mapmaking. Further, he explained that in the case of states that solely use party registry and voting data, this information is often already public and so the government is not availing itself to private information. This conversation demonstrated how the tensions between Madison's account and Kerry and Morris' argument play out in the day to day process of redistricting.

When redistricting groups identify a need for some sort of data, voting data for example, the consultant explained to me that they cite a reason for needing the data, and are invariably given access because they are serving the state interest of redistricting. Then, the information often has to be made publicly available to citizens for transparency, depending on state redistricting laws. Further, he explained accessing this data does not pose privacy concerns because the data is anonymized. As I detailed throughout this account, the Madisonian property-privacy account is in clear tension with the idea that anonymized data, while still describing the party identification of individuals in a certain district, does not violate their right to privacy.

On Madison's account any violation of property, or information on oneself, violates their right to exclude others, or their right to privacy; privacy is not linked to identity but is linked to one's liberty to exist and exercise their free choice over their property. While voting data may be in the possession of other entities, like political parties or data brokers, the data's ability to describe citizens so intimately, and its resulting ability to be used to manipulate the citizen, should allow them to have a privacy right in the information even if they do not legally own that information. As the ruling in *Carpenter* decided, cellular location data owned by a third party could still be protected by the right to privacy— though this data was not anonymous. Theorizing that this information is property in the broad, philosophical sense, as Madison did, demonstrates

the harm in the modern-day norm of separating privacy rights and property rights, linking privacy to identity and property to the right to exclude. Regardless of the anonymity of the citizen, information on that person's real-life behaviors are being used by state governments to predict their behavior and to create maps that are manipulated based on that information. Anonymity does not protect them from the effects of a distorted democratic process. Madison's account captures why anonymity does not prevent the privacy violation that occurs when state legislatures use data on citizens to partisan gerrymander. The state government is still usurping the Madisonian property that the data contains in its description of the individual's behaviors. Once this is established and recognized by Courts, the states' interest in this information will have to be justified to be a compelling state interest. As explained above, increased partisan control cannot be a valid state objective because partisanship is a matter of opinion or preference, and compelling state interests must be strictly scrutinized as necessary to justify the violation of these fundamental rights.

Even beyond Madison's tension with the idea that the government can use anonymous data to redistrict, this violates the precedent in *Jones*, where Scalia ruled that the Court must preserve the degree of privacy against the government that existed when the Fourth Amendment was adopted since it was understood to embody a pronounced concern for government trespass.¹⁶⁰ It is not clear why using anonymized information about citizens' party identification is in line with the degree of privacy that existed at the time the Fourth Amendment was adopted. At the time the Fourth Amendment was written, information was stored in physical property and the government could not use anonymous writings against individuals because they needed the individuals' identity to charge them with a crime. Today, software allows anonymous

¹⁶⁰Ibid.

information to be extremely useful in manipulating maps, while relying on the same sort of sensitive information that was once held in physical property. Anything beyond census data should not be used by mapmakers unless there is a clear demonstration that the process is serving a compelling state interest and is not serving the interests of a single party.

If anonymous data on voting registries, voting history, or other third-party data should not be used by the states if they are being used to create biased maps and to harm individual voters, how will this bias be identified and is this standard even enforceable? As touched on at the end Chapter III, the issue posed by vote dilution claims was that there was no way to answer “*how much gerrymandering is too much?*” when looking at gerrymandered maps, because all the arguments made relied on statistical standards to prove constitutional rights violations that the Court did not recognize. By identifying that citizens’ right to privacy as the right violated, my account responds to the question of “*how much gerrymandering is too much?*” with “any of it.” This right to privacy can only be violated if there is a compelling state interest. While it is very difficult to evaluate how much partisan bias in a map violates a constitutional right, identifying that the right to privacy is violated will force state legislatures to prove that they are not serving partisan interests before the mapmaking process can have access to the data that makes gerrymandering so effective today.

No map is perfect and looking for evidence of bias in the maps will run into the same issues vote dilution claims do. Gerrymandering is difficult to measure. As demonstrated in redistricting debates around the country and illustrated in case law, mapmakers sometimes have to sacrifice making the most competitive district in order to respect a community of interest,

which is a “a group of people with a common interest” that legislation might benefit.”¹⁶¹ There are many competing criteria that can be prioritized or ignored in the mapmaking process. These endlessly debatable considerations are what make partisan gerrymandering such a fraught issue. My argument is that in order to justify violating a citizen’s right to privacy, a compelling state interest must be offered and upheld. By ensuring a single party is not left to their own devices to violate citizens’ privacy while partisan gerrymandering shamelessly, a state can demonstrate that they are serving a compelling state interest and not the partisan interests of the ruling party. This can be achieved by setting up independent commissions, which are used by nine states; political commissions, which seven states use (each a bit differently) to balance political interests by evenly appointing elected officials from each party; or by ensuring the state legislature’s redistricting process cannot be primarily controlled by a single party’s majority.¹⁶² Similar to the requirement that three-fourths of state legislatures must ratify an amendment before altering the Constitution, the foundational text of our democracy, there must be stronger measures to ensure that elections, the foundational mechanism of democracy, cannot be subverted to a single party’s interests.

Beyond safeguards in the mapmaking process, some may argue that regulating this and ensuring that bias still does not find its way into the process is impossible. However, the government been able to achieve effective regulation of insider trading, a form of bias, or an information asymmetry, in investing that could be similarly difficult to regulate. Insider trading occurs through unethical behavior in a process (choosing an investment) that could be “explained away” when pointing solely to results. The difficulty of proving what information is shared in an

¹⁶¹“Where Are the Lines Drawn?,” All About Redistricting, Loyola Law School, Accessed November, 1, 2021, <https://redistricting.lls.edu/redistricting-101/where-are-the-lines-drawn/>.

¹⁶²Ibid.

office and then is used to make personal investments is similar to proving what intentions are shared in a redistricting meeting and then used to draw a map. Both unethical investments and biased maps could be denied through using plausible deniability of what the intent or knowledge behind the investment or map was. However, the SEC has effectively persecuted insider traders since 1961. Jennifer Moore, who wrote *What is Really Unethical about Insider Trading?*, explains that “preventing insider trading requires continuous and extensive monitoring of transactions and the ability to compel disclosure, and privately imposed penalties do not seem sufficient to discourage insider trading.”¹⁶³ State legislatures will not regulate their own partisan bias. The SEC is able to regulate insider trading because it allotted resources to monitoring transactions and has created serious penalties to punish violators. The case of insider trading shows that if the law eventually recognizes this rights violation as wrong, with the impetus of judicial action, the monitoring and regulatory scheme necessary to enforce the need for unbiased use of citizens’ data is possible. Moore notes that the SEC’s penalties did not effectively discourage insider trading until the Insider Trading Sanctions Act was passed in 1984, though its efficiency continues to be criticized to this day. While the regulation may never be perfect, as the SEC shows, it is still possible to deter violators by allocating resources to monitoring the issue and demonstrating that violators will face serious consequences for their actions.

Ultimately, the details of enforcement are a problem that would come much farther down the road. First, the Court must recognize the tensions in our current privacy jurisprudence and the fundamental right to privacy that are allowing the government to invade our privacy in order to partisan gerrymander and distort our democratic voices. This use of citizen data goes against the

¹⁶³ Jennifer Moore, “What Is Really Unethical about Insider Trading?,” *Journal of Business Ethics* 9, no. 3 (1990): pp. 179, <https://doi.org/10.1007/bf00382642>.

original meaning of privacy as articulated by James Madison and the original meaning of the Fourth and Fourteenth Amendments. Anonymizing sensitive information does not overcome the original meaning of the Fourth and Fourteenth Amendments which were meant to protect citizens' sensitive information from government invasion and arbitrary use of such information. Data privacy is an issue that our society will have to grapple with as AI, machine learning, and other technological advances upend the construction of rights we know today, as it did with privacy and property rights as they were conceived by Madison.

Before concluding, I want to return to Justice Kagan's quote:

What was possible with paper and pen—or even with Windows 95—doesn't hold a candle (or an LED bulb?) to what will become possible with developments like machine learning. And someplace along this road, “we the people” become sovereign no longer.¹⁶⁴

Ultimately, as society explores and answers questions related to data and privacy in the private sphere, we must note the paramount importance of addressing this issue first in our democracy. Without functioning elections, our democracy, the only tool we have to make our voices heard in these discussions, will slip from our collective grasp. Predicting our behaviors, as data allows gerrymanderers to do with terrifying accuracy, will only weaken our ability to correct these rights violations as the democratic process will be manipulated to serve the interests of those in power. The Founders understood privacy was a fundamental right. While our conception of privacy has become muddled by new types of property and a narrowing of the right to privacy in the digital world, we must realign this right with its original meaning— a right meant to protect us from the arbitrary invasion of the government. If the original meaning of this fundamental right to privacy is lost to modernity, our sovereignty may well go with it.

¹⁶⁴Rucho et al. v. Common Cause, No. 18-422, 588 U.S. ____ (2019).

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