

NOTE

“People Don’t Forget”: The Necessity of Legislative Guidance in Implementing a U.S. Right to Be Forgotten

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ABSTRACT

This Note argues that U.S. policymakers should use the spirit of the EU’s decision in Google Spain to implement an American right to be forgotten—consistent with the U.S. Constitution—in order to regulate the currently unregulated discretion of Google and other search engine providers in removing search results. Part I outlines the history of the right to be forgotten, the Google Spain decision, and the emergence of the right around the world. Part II describes the current debate in the United States and discusses the constitutional and philosophical underpinnings that justify a right to be forgotten. Part III applies the spirit and principles discussed in Parts I and II and proposes a substantive and procedural legislative solution to the U.S. policy silence on search engine regulation and the right to be forgotten. The proposal in Part III sets forth a multifactor balancing test to clarify delisting criteria, as well as options for an appeals process, with the goal of channeling modern developments of the right to be forgotten into a constitutionally sound regulation.

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INTRODUCTION

[I]magine the worst thing you have ever done, your most shameful secret. Imagine that cringe-inducing incident somehow has made its way online. When future first dates or employers or grandchildren search your name, that incident may be easily discoverable. In a connected world, a life can be ruined in a matter of minutes, and a person, frozen in time.¹

A political activist in Latvia who was stabbed at a rally; a Belgian convict whose conviction was quashed on appeal; a teacher from Germany convicted of a minor crime a decade ago; an Italian widow mentioned by name in an article about her husband's murder²: these are only a few examples of the nearly 700,000 requests for removal received by Google³ following a May 2014 decision by the highest court of the European Union ("EU") that established the "right to be forgotten"—a right to request removal of certain search engine results containing one's own name—for EU citizens.⁴

Has Google decided that the privacy rights of those individuals whose petitions they granted were more valuable than those of a terminated employee seeking to keep his name off the Internet?⁵ Or those of someone being berated online after being accused of abusing welfare services?⁶ What about someone accused of sexual abuse?⁷ These stories are among the hundreds of thousands of removal requests that have been rejected by Google under the EU's framework for delisting a particular search engine result.⁸ While the rejected cases may not be as viscerally sympathetic as many of the URLs Google chose to remove, the privacy rights of each of these individu-

1 MEG LETA JONES, CTRL + Z: THE RIGHT TO BE FORGOTTEN 3 (2016).

2 *Transparency Report: European Privacy Requests for Search Removals*, GOOGLE, <http://www.google.com/transparencyreport/removals/europeprivacy/> [<https://perma.cc/KMD2-4KKY>] (last updated May 28, 2017) [hereinafter *Transparency Report*].

3 *See id.*

4 Case C-131/12, *Google Spain SL v. Agencia Española de Protección de Datos*, 3 C.M.L.R. 50, paras. 91, 99 (2014).

5 *See Transparency Report*, *supra* note 2.

6 *See id.*

7 *See id.*

8 *See id.* The delisting guidance issued in *Google Spain* states that where "information appears, having regard to all the circumstances of the case, to be inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes of the processing at issue carried out by the operator of the search engine, the information and links concerned in the list of results must be erased." *Google Spain*, 3 C.M.L.R. 50, para. 94.

als were matters to be decided at Google's discretion, and were not sufficiently checked by outside regulations.⁹

In the 2014 case of *Google Spain v. Agencia Española de Protección de Datos* (“*Google Spain*”),¹⁰ the Court of Justice of the European Union (“CJEU”), the EU's highest court, interpreted a data privacy directive¹¹ to establish the right of EU citizens to request removal of search results containing their names if the data contained in the results is “inadequate, irrelevant or no longer relevant, or excessive in relation to those purposes and in the light of the time that has elapsed.”¹² In essence, this holding means that an individual's right to privacy in the EU outweighs the public interest in accessing that information; therefore, if a certain result fits these criteria, the individual about whom that result contains information can request that the search engine provider remove it.¹³ The right was first proposed in the EU's General Data Protection Regulation (“GDPR”) in 2012, and formally adopted in 2016, after *Google Spain*, as part of a data protection reform proposal by the European Commission.¹⁴ The GDPR articulates and clarifies the right to be forgotten as a “fundamental right for citizens.”¹⁵

Although neither the *Google Spain* holding nor the GDPR is binding on the United States or its citizens, the framework that the EU has adopted to address privacy rights in an ever-modernizing world can serve as a legitimate guidepost for the U.S. government in seeking to fill its policy void on a similar right to be forgotten for U.S. citizens.¹⁶ This Note argues that the United States should implement

⁹ This comment is meant in the context of American law and is intended to distinguish the EU's view on search engine discretion from that of the United States. Google's actions were taken in compliance with the relevant EU laws and only on their European—not U.S.—domains.

¹⁰ 3 C.M.L.R. 50 (2014).

¹¹ A “directive” is defined as “a legislative act that sets out a goal that all EU countries must achieve.” European Union, *Regulations, Directives and Other Acts*, EUROPA, http://europa.eu/european-union/eu-law/legal-acts_en (last updated May 28, 2017).

¹² *Google Spain*, 3 C.M.L.R. 50, para. 93.

¹³ *See id.* para. 98.

¹⁴ European Commission Press Release IP/12/46, Agreement on Commission's EU Data Protection Reform Will Boost Digital Single Market (Dec. 15, 2015), http://europa.eu/rapid/press-release_IP-15-6321_en.htm.

¹⁵ *Id.*

¹⁶ *See* JEFFREY A. EISENACH ET. AL., AM. ENTER. INST., AN AMERICAN STRATEGY FOR CYBERSPACE: ADVANCING FREEDOM, SECURITY, AND PROSPERITY 40 (2016) (proposing that the United States “[a]ggressively seek to negotiate a multilateral agreement . . . with the European Union . . . including data shield and the right to be forgotten” as part of a strategic plan for American success in cyberspace).

its own “right to be forgotten” using the EU’s recent developments as a skeletal outline, while making necessary changes, clarifications, and additions to ensure compliance with the U.S. Constitution—in particular, the First Amendment.¹⁷ Such a development in U.S. law is critical in light of the momentum online privacy rights have gained around the world, the prevalence of online data sharing between countries, the state of legal flux in which Google and other search engine providers find themselves on the issue (as well as their unregulated discretion), and the currently unaddressed rights of U.S. citizens to exercise any control over their data in the context of search engines. This Note focuses on the issue of regulating search engine providers’ discretion in the context of the right to be forgotten, and proposes legislation enumerating a multifactor balancing test by which the U.S. government should regulate such discretion.¹⁸ This test borrows the procedure of the EU’s balancing framework to capture the spirit of the right (which this Note argues is consistent with—and, in fact, fortified by—the U.S. Constitution) to ensure that citizens’ privacy rights are protected, while recognizing the public interests in free expression in a more extensive, more specific, and more “American” way.¹⁹

The proposed balancing test seeks to place constitutional limits on search engine providers’ discretion while promoting the kind of decisionmaking and accountability by search engine providers that would be in the best policy interests of the American people. If the United States were to adopt a right to be forgotten devoid of—or lacking in—any constructive regulations for search engine providers, companies like Google would have no legal or constitutional guidance from the U.S. government and no accountability to the citizens affected by its decisions. This void would also leave citizens with little or no recourse if they disagree with Google’s decisions. Thus, this Note proposes that Congress enact legislation enumerating a multifactor balancing test for search engine providers to follow in making delisting decisions and establishing an appeals process for citizens who disagree with such decisions. This legislation would balance the privacy of U.S. citizens against the public interest in free access to information, while regulating the overbroad discretion of search engine providers.

Part I of this Note traces the history of the right to be forgotten, discusses the holding and implications of *Google Spain*, and outlines the current state of the right around the world and the accompanying

¹⁷ See *infra* Part III.

¹⁸ See *infra* Section III.A.

¹⁹ See *infra* Section III.A.

debates. Part II discusses the current debate in the United States and seeks to explain the philosophical underpinnings of judicial reluctance to regulate search engine providers in the context of positive and negative constitutional liberties. Finally, Part III takes the constitutional principles discussed in Part II, the EU's framework from *Google Spain*, and the global momentum behind the right, and endeavors to reconcile them with this Note's multifactor proposal for U.S. implementation. The goal of this proposal is to channel these modern realities and developments of the right to be forgotten into a constitutionally sound regulation that reflects the amount of discretion U.S. law is comfortable affording to a corporation like Google.

I. THE RIGHT TO BE FORGOTTEN: DEVELOPMENT OF THE RIGHT IN THE EU, GOOGLE'S DECISIONMAKING PROCESS, AND THE RIGHT'S GLOBAL EMERGENCE

The historic developments of the right to be forgotten in the EU, an examination of the procedural realities of search engine provider discretion, and the emergence of the right around the world are important to trace and understand before delving into a normative argument about what place the right may have in the United States. Some critics have dubbed the EU's recent developments as potentially signifying "the biggest threat to free speech on the Internet in the coming decade"²⁰ and as "being used to justify censorship."²¹ The philosophical basis for the EU's version of the right, however, seems to be one of fundamental fairness to the individual, as opposed to ensuring the public's access to information. For example, is it fair to continue to de facto punish a criminal if the goal of rehabilitation has already been achieved? And, more generally, why should irrelevant facts or information emblazoned on the Internet for all to see remain permanently searchable, potentially harming the people whose information appears in the search results, and affecting their reputations and legacies into eternity? These questions comprise the theoretical foundation that sets the stage for the tumultuous journey of the right's implementation in Europe, the conflicts American companies encounter in trying to comply with EU law, and the emergence of global debate regarding the right to be forgotten.

²⁰ Jeffrey Rosen, *The Right to Be Forgotten*, 64 STAN. L. REV. ONLINE 88, 88 (2012), <https://review.law.stanford.edu/wp-content/uploads/sites/3/2012/02/64-SLRO-88.pdf>.

²¹ Peter Fleischer, *Foggy Thinking About the Right to Oblivion*, PRIVACY . . . ? (Mar. 9, 2011), <http://peterfleischer.blogspot.com/2011/03/foggy-thinking-about-right-to-oblivion.html>.

A. *History of the Right, Developments in the EU, and the Google Spain Framework*

The ideological underpinnings of the right to be forgotten in Europe can be traced to French law, “which recognizes *le droit à l’oubli*—or the ‘right of oblivion,’—a right that allows a convicted criminal who has served his time and been rehabilitated to object to the publication of the facts of his conviction and incarceration.”²² The value placed on rehabilitation in EU law is a likely basis for the intellectual and jurisprudential evolution of the EU toward recognizing the right to be forgotten. Even so, the modern iteration of the right in the context of search engine delisting has been rife with controversy.

The principles embodied in the modern manifestation of this right came in the form of the EU’s 1995 Data Protection Directive (“Directive”), which allowed a person to request deletion of certain data “because of the incomplete or inaccurate nature of the data.”²³ It was not until fifteen years later that the Directive’s interpretation was questioned and applied to search engine providers. In 2010, a Spanish citizen named Mario Costeja González filed a complaint with the Spanish Data Protection Agency (Agencia Española de Protección de Datos (“AEPD”)) requesting that both a Spanish newspaper and Google be required to remove links to a news story in which his name was published in conjunction with an auction notice of his repossessed home.²⁴ González claimed that the continued appearance of a link to this notice as a search result on Google was a violation of his privacy rights because it was no longer relevant.²⁵ After he prevailed in the Spanish court on his complaint against Google, the case was referred to the EU’s highest court, the CJEU.²⁶ The CJEU’s decision in *Google Spain* resulted in a broad unification of privacy laws on May 13, 2014, and the unambiguous creation of a “right to be forgotten” for EU citizens.²⁷

²² Rosen, *supra* note 20, at 88.

²³ Council Directive 95/46/EC, art. 12(b), 1995 O.J. (L 281) 31 [hereinafter Council Directive].

²⁴ Case C-131/12, *Google Spain SL v. Agencia Española de Protección de Datos*, 3 C.M.L.R. 50, para. 14–18 (2014); European Comm’n, *Fact Sheet on the “Right to be Forgotten” Ruling (C-131/12)*, EUROPA, http://ec.europa.eu/justice/data-protection/files/factsheets/factsheet_data_protection_en.pdf [hereinafter *Fact Sheet*].

²⁵ *Fact Sheet*, *supra* note 24.

²⁶ *Id.*

²⁷ *Google Spain*, 3 C.M.L.R. 50; *Fact Sheet*, *supra* note 24; see also Robert Lee Bolton III, *The Right to Be Forgotten: Forced Amnesia in a Technological Age*, 31 J. MARSHALL J. INFO. TECH. & PRIVACY L. 133, 134–36 (2015).

In the midst of these first judicial manifestations of the right to be forgotten in the EU, legislative actions gained traction as well. Then-European Commissioner for Justice, Fundamental Rights, and Citizenship, Viviane Reding, announced in January of 2012 that the European Commission would be proposing the codification of the controversial right.²⁸ The CJEU's May 2014 decision in *Google Spain* consolidated, up to that point, the general and contested manifestations of the right to be forgotten, as well as the degree of value placed on the right, from the separate countries throughout the EU.²⁹ The codification proposed in 2012 was then informally agreed upon in late 2015, and formally adopted by the European Parliament and Council in 2016 (to apply starting in May 2018), incorporating and strengthening the issues decided in the landmark case of *Google Spain*.³⁰

The court addressed three issues in *Google Spain*: (1) whether the scope of the Directive included applicability to a search engine provider (in that case, Google); (2) whether the Directive applied to Google Spain, whose data processing server is located in the United States; and (3) whether an individual has the “right to be forgotten,” i.e., to request that personal data be removed from search engine results.³¹ In addition to answering interpretive questions regarding the Directive, the court relied on the Charter of Fundamental Rights of the European Union (“Charter”), which is essentially the EU’s counterpart to the U.S. Constitution, as a broader foundation for its decision.³² In response to the questions presented, the court found that (1) search engine providers do, in fact, fall into the category of “controllers” of data for purposes of the Directive; (2) EU rules apply to branches or subsidiaries of companies with U.S.-based servers as long as that branch or subsidiary “is intended to promote and sell, in [an EU] Member State, advertising space offered by the search engine

²⁸ See Bolton, *supra* note 27, at 136; Rosen, *supra* note 20; see also *Commission Proposal for a Regulation of the European Parliament and of the Council on a General Data Protection Regulation*, COM (2012) 11 final (Jan. 25, 2012).

²⁹ See *infra* Section I.C.

³⁰ Council Regulation 2016/279, 2016 O.J. (L119) 1 (EU), <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679&from=EN>; see also Steven Lorber, *New Data Protection Regime Will Be Backed by Tough Penalties*, PEOPLE MGMT. (June 16, 2016), <http://www2.cipd.co.uk/pm/peoplemanagement/b/weblog/archive/2016/06/16/new-data-protection-regime-will-be-backed-by-tough-penalties.aspx>.

³¹ *Google Spain*, 3 C.M.L.R. 50, paras. 28, 45–46, 97; *Fact Sheet*, *supra* note 24; Council Directive, *supra* note 23.

³² Charter of Fundamental Rights of the European Union, art. 7, 2000 O.J. (C 364) 10 [hereinafter Charter of Fundamental Rights].

which serves to make the service offered by that engine profitable”;³³ and (3) EU citizens have the right to ask a search engine provider to delist information that is “inaccurate, inadequate, irrelevant, or excessive,”³⁴ and the search engine provider decides whether or not those criteria are met.

As to the first holding—that search engine providers are categorized as “controllers” for the purposes of the Directive—the Directive defines that term in Article 2(d) as “the natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data.”³⁵ According to the CJEU, it would be against the spirit of the Directive for search engine operators to be excluded from this definition simply because they do not control the content of third party websites.³⁶ The court further reasoned that the actions taken by search engine providers are distinct and “additional” to those undertaken by website publishers, and that the “decisive role” search engine providers play in “overall dissemination” and the “organisation [sic] and aggregation” of personal data, as well as the likelihood that this activity will have an impact on the “fundamental rights to privacy and the protection of personal data,” mean that search engine providers ought to be categorized as “controllers” for the purposes of the directive.³⁷

Though not absolute, the right to be forgotten as held by the court in *Google Spain* establishes that personal privacy outweighs the interest in free data flow in the EU, “as a rule.”³⁸ Google originally complied with the ruling by accepting requests and removing links from the appropriate European domains (e.g., Google.fr, Google.uk)³⁹ based on the *Google Spain* criteria, before temporarily refusing to remove the same links from its U.S. domain, Google.com.⁴⁰

³³ *Google Spain*, 3 C.M.L.R. 50, paras. 43, 45, 55, 60; *Fact Sheet*, *supra* note 24.

³⁴ *Fact Sheet*, *supra* note 24; *see Google Spain*, 3 C.M.L.R. 50, paras. 92–93.

³⁵ Council Directive, *supra* note 23, art. 2(d); *see also Google Spain*, 3 C.M.L.R. 50, para. 32.

³⁶ *Google Spain*, 3 C.M.L.R. 50, paras. 34–35 (finding the objective of the Directive is “to ensure, through a broad definition of the concept of ‘controller[.]’ effective and complete protection of data subjects”).

³⁷ *Id.* paras. 35–38, 41.

³⁸ *Google Spain*, 3 C.M.L.R. 50, para. 97; *see Fact Sheet*, *supra* note 24

³⁹ *Transparency Report*, *supra* note 2.

⁴⁰ Peter Fleischer, *Implementing a European, Not Global, Right to be Forgotten*, GOOGLE: EUR. BLOG (July 30, 2015), <http://googlepolicyeurope.blogspot.be/2015/07/implementing-european-not-global-right.html>.

In June 2015, the Commission Nationale de l'Informatique et des Libertés (“CNIL”), a French data protection organization, ordered Google to apply the approved delisting requests to all of its domains.⁴¹ Until February 2016, when Google refused to comply with the order, Peter Fleischer, Google’s Global Policy Counsel, justified this failure to comply by rejecting the CNIL’s claim of global authority on this matter.⁴² He wrote that if the CNIL were allowed to exert such power, “the Internet would only be as free as the world’s least free place.”⁴³ Google subsequently adapted its position on the matter, announcing that it would begin using geolocation signals (such as the IP address of the user) to restrict access to removed URLs “*when accessed from the country of the person requesting the removal,*” and that the change would apply retrospectively as well, to results that had already been delisted under the EU’s ruling.⁴⁴ This is not only a concern because of the potential infringement on the free expression rights of U.S. citizens and American journalists living abroad (which will not be addressed at length in this Note), but also because of the breadth of unregulated discretion evinced by Google’s shift in position.⁴⁵ Fleischer’s March 2016 post admits that Google has been “work[ing] hard to find the right balance” while implementing the European right to be forgotten.⁴⁶

However, that balance was tipped in May 2016 when Google announced it would appeal the CNIL’s decision to fine the company for

⁴¹ *CNIL Orders Google to Apply Delisting on All Domain Names of the Search Engine*, CNIL (June 12, 2015) <http://www.cnil.fr/english/news-and-events/news/article/cnil-orders-google-to-apply-delisting-on-all-domain-names-of-the-search-engine/>.

⁴² Fleischer, *supra* note 40.

⁴³ *Id.*

⁴⁴ Peter Fleischer, *Adapting Our Approach to the European Right to be Forgotten*, GOOGLE: KEYWORD (Mar. 4, 2016), <http://googlepolicyeurope.blogspot.com/2016/03/adapting-our-approach-to-european-right.html> (emphasis added).

⁴⁵ See Wendy Davis, *Google Draws Support in Showdown Over ‘Right to Be Forgotten,’* MEDIAPOST: POL’Y BLOG (Nov. 28, 2016), <http://www.mediapost.com/publications/article/289896/google-draws-support-in-showdown-over-right-to-be.html>; Ariel B. Glickman, *Reporters Committee and 28 Journalism Groups Oppose French Global Delisting Order*, REP. COMMITTEE FOR FREEDOM PRESS (Nov. 8, 2016), <http://www.rcfp.org/browse-media-law-resources/news/reporters-committee-and-28-journalism-groups-oppose-french-global-de> (“The CNIL order must be overturned to preserve and protect the principle that one country cannot deny the news media and its readers in another country legal protections that exist under their own laws and those of the international community.”); Emma Llansó, *Global Application of French ‘Right to Be Forgotten’ Law Would Pose Threat to Free Expression*, CTR. FOR DEMOCRACY & TECH. (Nov. 23, 2016), <https://cdt.org/blog/global-application-of-french-right-to-be-forgotten-law-would-pose-threat-to-free-expression/>.

⁴⁶ Fleischer, *supra* note 44.

refusing to universally delist links on all of its domains.⁴⁷ Google's stance continued to evolve on the right to be forgotten in light of its conflict with the CNIL, with the potential for litigation causing the company to reflect on its position in a December 2016 blog post where Fleischer outlined the question to be answered by the court: "At stake: whether Europe's right to be forgotten—which allows people in EU countries to request removal of certain links from name search results—should reach beyond the borders of Europe and into countries which have different laws."⁴⁸ Google's answer to that question reiterated that it is imperative to allow different countries to balance privacy and freedom of expression based on their own standards, arguing that allowing France to impose its rule of law on all countries with access to Google domains would set precedent for other countries, even nondemocratic ones, to do the same.⁴⁹ Most recently, Fleischer and Isabelle Falque-Pierrotin, Chairman of CNIL and of the Article 29 Working Party of the European Commission, went head-to-head discussing the right at "Data Privacy Day 2017," an annual international event sponsored by the National Cyber Security Alliance to cap off their "year-round privacy awareness campaign."⁵⁰ Sharing the podium with Falque-Pierrotin leading up to Data Privacy Day, Fleischer reiterated Google's view that the EU's right to be forgotten should not be enforced on non-EU Google domains.⁵¹ The CNIL Chairman fired back: "The reasoning of the CNIL . . . says that once Google is operating in Europe . . . [it] is submitted to the European

47 *Right to Be Delisted: The CNIL Restricted Committee Imposes a €100,000 Fine on Google*, CNIL (Mar. 24, 2016), <https://www.cnil.fr/en/right-be-delisted-cnil-restricted-committee-imposes-eu100000-fine-google>; see Zoe Bedell, *Google to France: 'Forget You'—An Update on the Right to Be Forgotten*, LAWFARE (May 25, 2016, 7:39 AM), <https://www.lawfareblog.com/google-france-forget-you-%E2%80%93update-right-be-forgotten>; Kent Walker, *A Principle That Should Not Be Forgotten*, GOOGLE: KEYWORD (May 19, 2016), <http://googlepolicyeurope.blogspot.co.uk/2016/05/a-principle-that-should-not-be-forgotten.html>.

48 Peter Fleischer, *Reflecting on the Right to Be Forgotten*, GOOGLE: KEYWORD (Dec. 9, 2016), <https://blog.google/topics/google-europe/reflecting-right-be-forgotten/>.

49 See *id.* ("And any such precedent would open the door to countries around the world, including non-democratic countries, to demand the same global power.")

50 See Tammy Waitt, *Data Privacy Day: Protecting Privacy Is Critical to Business*, AM. SECURITY TODAY (Jan. 25, 2017), <https://americansecuritytoday.com/data-privacy-day-protecting-privacy-critical-business-learn/> [<https://perma.cc/6PVK-FT7A>] (noting that the event featured "TED-style talks, segments and interviews focusing on the latest privacy issues for consumers and business"); see also *Data Privacy Day: About*, STAYSAFEONLINE.ORG, <https://staysafeonline.org/data-privacy-day/about> [<https://perma.cc/AZ57-MFYF>] (last visited May 28, 2017).

51 Stephanie Bodoni, *Google Argues Privacy Right Is Wrong in Clash With French Czar*, BLOOMBERG TECH. (Jan. 25, 2017, 12:16 PM), <https://www.bloomberg.com/news/articles/2017-01-25/google-argues-right-is-wrong-in-clash-with-french-privacy-czar>.

law,” and thus the data should be treated globally; she also said that the dispute must be resolved by the courts.⁵²

While maintenance of such a balance is important, as this Note argues, implementation of a right to be forgotten in the United States requires more detailed regulation to guide that balancing process toward compliance with U.S. laws and the Constitution.

B. Google’s Decisionmaking Process and Regulation of Search Engine Providers

As the CJEU’s decision in *Google Spain* is currently being applied to all search engine providers with global reach (including their U.S. domains if the user is in a geographical location subject to CJEU jurisdiction), those search engine providers have become ad hoc adjudicative authorities tasked with deciding what information to remove.⁵³ According to Google, its staff makes “relevant determinations” for delisting on a “case-by-case basis,” with a “team of specially trained reviewers for this purpose,” though Google does not define how the team is specially trained.⁵⁴ The stated criteria used by Google reviewers to evaluate removal requests is aligned with the EU’s “Article 29 Working Party Guidelines,” and contains four steps: the reviewers must decide (1) whether the request contains the necessary information to make a decision; (2) whether the requestor has a “connection” to a European country, such as residency or citizenship; (3) whether the search results appear in a search for the requestor’s name, and, if so, on the pages requested for delisting; and (4) whether “the page requested for removal include[s] information that is inadequate, irrelevant, no longer relevant, or excessive, based on the information that the requester provides,” and whether there is “a public interest in that information remaining available in search results generated by a search for the requester’s name.”⁵⁵ Google addresses the

⁵² *See id.*

⁵³ *See* Patricia Sanchez Abril & Jaqueline D. Lipton, *The Right to Be Forgotten: Who Decides What the World Forgets?*, 103 KY. L.J. 363, 363–64 (2014–2015) (arguing that the government and interest groups should take a direct role in assisting search engine providers in making removal decisions because “it is unbecoming and socially undesirable for unchecked businesses to act as the ultimate arbiters of privacy”).

⁵⁴ *Transparency Report: Frequently Asked Questions*, GOOGLE, https://www.google.com/transparencyreport/removals/europeprivacy/faq/?hl=EN#how_does_googles_process (last visited May 28, 2017).

⁵⁵ *Id.* The final prong of Google’s analysis must be thoroughly fleshed out if this right is to be enacted in the United States; the multifactor balancing test proposed in Section III.A incorporates this prong as one of several other criteria for search engine providers to consider when deciding which search results to delist.

issues of recourse and appeal of removal decisions with undefined “escalation paths,” used by staff and attorneys to decide whether difficult cases should be reviewed for a second opinion, and provides the option for “an individual [to] request that a local data protection authority review [its] decision.”⁵⁶ While the option to request review of Google’s decision by a local data protection organization seems like a valid recourse channel, it is merely a right to request, with no legal right to review set forth by law.⁵⁷

The kind of discretion afforded to Google by the EU in the process discussed above is dangerous in the hands of private corporations; if a similarly vague procedure were to be applied to the United States, it would be unconstitutional. The amount of power that the EU places in the hands of search engine providers (albeit subject to its Directive and Charter) is an important point of distinction between the EU’s approach to the right to be forgotten and how this Note proposes such policies should be implemented in the United States.

C. *Global Emergence of the Right to Be Forgotten*

While the EU’s implementation of the right to be forgotten has been highly publicized around the world—particularly in the United States because of Google’s status as an American company—it is worth noting that many other countries are undergoing parallel debates within their justice systems and political realms, grappling with whether to establish a right to be forgotten.⁵⁸ This global discussion makes it all the more important for the United States to take the right under consideration as well.

In Argentina, for example, the right to be forgotten takes on a pop-culture bent, because many of the plaintiffs in Internet privacy suits are celebrities.⁵⁹ One high-profile case involved an Argentine pop singer who won a suit against Google and Yahoo in 2009 at the

⁵⁶ *Id.* (“As of November 1, 2015, just over 30% of requests had been escalated for a second opinion.”).

⁵⁷ *See id.* Section III.B seeks to resolve the problematic lack of internal transparency posed by Google’s ambiguous “escalation paths” with proposed appeal options.

⁵⁸ *See, e.g.,* Emma Hinchliffe, *Google Wins Its Latest Case Against the ‘Right to Be Forgotten,’* MASHABLE (Feb. 1, 2017), <http://mashable.com/2017/02/01/google-right-to-be-forgotten-japan/#vpRWf0666qqm>; Kyodo, *Tokyo High Court Overturns Man’s ‘Right to be Forgotten,’* JAPAN TIMES (July 13, 2016), <http://www.japantimes.co.jp/news/2016/07/13/national/crime-legal/to-kyo-high-court-overturns-mans-right-forgotten/#.V4ZUUJMrJAZ>; Kristof Van Quathem, *Right to Be Forgotten—French High Courts Disagree*, NAT’L L. REV. (June 4, 2016), <http://www.natlawreview.com/article/right-to-be-forgotten-french-high-courts-disagree>.

⁵⁹ *See* Edward L. Carter, *Argentina’s Right to Be Forgotten*, 27 EMORY INT’L L. REV. 23, 23 (2013).

trial court level, but lost after an appeal the following year; another Argentine case involved a famous soccer mogul.⁶⁰ In Argentina, there is no “right to be forgotten” as there is in Europe, so the cases there are based on other existing causes of action.⁶¹ As of 2013, one scholar predicted that “Argentine plaintiffs, and some judges, appear[ed] ready to strike a blow to the Internet’s penchant for memorializing things forever.”⁶² However, Argentine courts have yet to hear an actual “right to be forgotten” case.⁶³ Because “Argentine courts, like [their American] counterparts, have more often than not upheld freedom of expression over other rights,” such as privacy,⁶⁴ it is helpful to note the presence of this issue in Argentina when analyzing the right to be forgotten as it could develop in the United States.

Argentina is not the only non-EU country wrestling with the right to be forgotten. In July of 2015, for example, Russia tightened regulations on search engine providers when Russian President Vladimir Putin signed a law similar to the EU’s right to be forgotten.⁶⁵ The Russian law gives citizens a version of the right to be forgotten, “allowing them to selectively edit the history that is unearthed when internet users search for their names,” if the link “(1) reveals information that ‘violates their personal data, (2) contains unverified information, or (3) contains information that is no longer relevant.’”⁶⁶ The search engine providers have ten days to respond before potentially being subject to litigation or fines.⁶⁷

Other countries have addressed the right through their judicial branches. A district court in Japan, for example, recently decided to grant a right to be forgotten to a man requesting that Google remove three-year-old links to his arrest for child prostitution and child pornography.⁶⁸ The court cited the Japanese right to privacy, as well as

⁶⁰ *Id.* at 24.

⁶¹ *See id.* at 34.

⁶² *Id.* at 25.

⁶³ *See id.*

⁶⁴ Marcelo Garcia, *Argentina’s Right to Be Forgotten*, BUENOS AIRES HERALD (Oct. 11, 2014), <http://www.buenosairesherald.com/article/171914/argentina%E2%80%99s-right-to-be-forgotten>.

⁶⁵ *See* Brittany Doyle, *Russia’s “Right to Be Forgotten” and China’s Right to Be Protected: New Privacy and Security Legislation*, HARV. J.L. & TECH: JOLT DIGEST (July 20, 2015), <https://web.archive.org/web/20170120170308/http://jolt.law.harvard.edu/digest/legislation/russias-right-to-be-forgotten-and-chinas-right-to-be-protected-new-privacy-and-security-legislation> [<https://perma.cc/GKV7-GCRM>].

⁶⁶ Doyle, *supra* note 65 (discussing Russian Federal law 149-FZ).

⁶⁷ *See id.* Litigation and fines are also the remedy for erroneous removal of information by the search engine provider. *See id.*

⁶⁸ *See* Kyodo, *Japanese Court Recognizes ‘Right to Be Forgotten’ in Suit Against Google*,

the public interest in rehabilitation, as justifications for the decision.⁶⁹ The right was similarly upheld in South Korea, where the state-appointed media monitoring agency said it would allow Internet users to request deletion of certain search results from search engine lists.⁷⁰ The acceptance of the right in these countries can be contrasted with the more nuanced approach taken in Iceland, where the Data Protection Authority of Iceland rejected the request of an Icelander to be forgotten, ruling that although a balance between privacy and free expression is important, the nature of the news article at issue in that particular case did not warrant removal.⁷¹

Whether through legislative or judicial action, many other countries around the world appear to be trending toward recognizing some sort of right to be forgotten for their citizens. The criteria and means of implementation these countries are using, however, clarify the need for a unique solution that complies with the U.S. Constitution and the philosophical ideals of American exceptionalism. While this Note does not argue that the policies in these non-EU countries should lend any guidance to an American right to be forgotten, these developments are evidence of global momentum toward voicing opinions and decisions about the right—a lead that the United States should follow.

II. U.S. DEBATE AND JUDICIAL RELUCTANCE TO LIMIT SEARCH ENGINE PROVIDER DISCRETION

American courts have dealt with search engine provider discretion in a very limited way, most notably in three district court cases in the early 2000s.⁷² Although these were not cases about the right to be forgotten, there is clearly a judicial reluctance to impose regulations

JAPAN TIMES (Feb. 27, 2016), http://www.japantimes.co.jp/news/2016/02/27/national/crime-legal/japanese-court-recognizes-right-to-be-forgotten-in-suit-against-google/#.WSsu_RjMxE4.

⁶⁹ *Id.* (“Criminals who were exposed to the public due to media reports of their arrest are entitled to the benefit of having their private life respected and their rehabilitation unhindered.”).

⁷⁰ See Ock Hyun-ju, *Media Watchdog to Uphold ‘Right to Be Forgotten’ in Korea*, KOREA HERALD (Feb. 21, 2016), <http://www.koreaherald.com/view.php?ud=20160221000366>.

⁷¹ Paul Fontaine, *Icelander Has No “Right to Be Forgotten,”* REYKJAVÍK GRAPEVINE (Jan. 27, 2016), <http://grapevine.is/news/2016/01/27/icelander-has-no-right-to-be-forgotten/>.

⁷² See *Kinderstart.com, LLC v. Google, Inc.*, No. C 06-2057 JF (RS), 2007 WL 831806, at *14–15 (N.D. Cal. Mar. 16, 2007) (dismissing antitrust complaint against Google that alleged its website-ranking method violated the Sherman Act); *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 630 (D. Del. 2007) (holding that Google’s right to reject ads is protected as part of its First Amendment rights); *Search King, Inc. v. Google Tech., Inc.*, No. CIV-02-1457-M, 2003 WL 21464568, at *4 (W.D. Okla. May 27, 2003) (protecting Google’s page ranking method under the First Amendment).

on Google to fetter its discretion.⁷³ The American exceptionalist value placed on free speech⁷⁴ renders these decisions somewhat unsurprising. However, the focus should not be on whether the U.S. government should be allowed to regulate the speech of search engine providers; instead, it should be whether U.S. citizens feel comfortable with the amount of discretion given to search engine providers to make decisions affecting their other fundamental right of privacy. This Part outlines the philosophical basis for the American exceptionalist perspective on constitutional rights of free speech and privacy, and uses that perspective to understand the disinclination of American jurists to limit search engine provider discretion.

A. *Philosophical Underpinnings of the American Exceptionalist View*

The U.S. commitment to its “exceptionalist tradition” of free speech, as guaranteed by the First Amendment, is a point of pride for many citizens;⁷⁵ the freedom *from* infringement on the ability to express oneself is a negative liberty that many Americans hold dear. The right of privacy, however, is a highly valued positive (or affirmative) right contained in the penumbra of the Constitution.⁷⁶ Affirmative rights and negative liberties are in conflict by design in the U.S. Constitution.⁷⁷

Judge Posner has observed that the Constitution “is a charter of negative rather than positive liberties The men who wrote the Bill of Rights were not concerned that Government might do too little for

⁷³ Cf. Greg Miller, *Why Won't Americans Let Bygones Be Bygones Online?*, ATLANTIC (June 1, 2016), <http://www.theatlantic.com/technology/archive/2016/06/right-to-be-forgotten/484961/> (“In the U.S., . . . people who’ve looked to the legal system for help getting embarrassing information about themselves taken offline have mostly gotten a cold shoulder.”).

⁷⁴ See Ronald L. Krotoszynski, Jr., *Free Speech Paternalism and Free Speech Exceptionalism: Pervasive Distrust of Government and the Contemporary First Amendment*, 76 OHIO ST. L.J. 659, 660 (2015).

⁷⁵ See *id.*

⁷⁶ See *infra* Section III.C.

⁷⁷ See David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 864–65 (1986); Ernest van den Haag, *Liberty: Negative or Positive*, 1 HARV. J.L. & PUB. POL’Y 63, 63 (1978) (arguing for the negative definition of freedom: “Inability, unless caused by deliberate acts of coercion, does not deprive one of freedom. Ability is freedom only inasmuch as it is owed to the absence of coercion.”); see also Mila Versteeg & Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 U. CHI. L. REV. 1641, 1681 (2014) (“The federal Constitution—per the Court’s interpretations—omits not only positive rights but also a requirement that the government take affirmative action to protect recognized *negative* rights.”).

the people but that it might do too much for them.”⁷⁸ He further opined that “when constitution-makers impose affirmative government obligations they tend to say so.”⁷⁹ Sociologist Ernest van den Haag argues that there are three troublesome “positive” definitions of freedom that should be replaced with the “negative” definition describing freedom as the “absence of coercion.”⁸⁰ The first “troublesome” positive definition defines freedom “as the right only to make right choices,” which van den Haag argues is problematic because, while the ability to make rational choices free of “enslaving passions” is a “prerequisite to making good use of one’s freedom,” it does not constitute freedom itself.⁸¹ Second is the positive definition of freedom “as the right to make any choices”; but absent the opportunity to make one’s choices effective, this definition does not denote true freedom.⁸² Lastly, freedom’s definition as one’s “ability to do what one chooses” is inaccurate because it would blur the line between freedom and power.⁸³ The negative definition of freedom as “absence of coercion” is therefore the ideal definition for van den Haag,⁸⁴ and his perspective can be viewed as one that is largely consistent with the values embodied in the U.S. Constitution,⁸⁵ albeit an extreme iteration.

If one accepts this negative definition, coupled with Judge Posner’s declaration that the Constitution is composed of negative, not positive liberties,⁸⁶ many may argue that American law therefore should not, “as a rule,” place positive, unenumerated privacy rights above the rights of the public to access information. This argument, however, is misplaced because of the long history that privacy rights, alongside First Amendment liberties, have in the United States.⁸⁷ It is important to understand these values underlying the U.S. Constitution if we are to understand the implications of implementing a right to be

⁷⁸ See Currie, *supra* note 77, at 864 (quoting Judge Posner’s commentary of the Constitution in *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983)).

⁷⁹ *Id.*

⁸⁰ van den Haag, *supra* note 77, at 63.

⁸¹ *Id.* at 64.

⁸² *Id.* at 64. He makes the point that choosing to be in chains would mean one is free under this definition, which is counterintuitive. See *id.* at 65.

⁸³ *Id.* Van den Haag defines power as “the ability to make choices available and to make the available choices effective.” *Id.* He argues that this definition should be broader than that of freedom, and the confounding of the two is problematic. *Id.*

⁸⁴ *Id.* at 65–66.

⁸⁵ See *supra* notes 77–79 and accompanying text.

⁸⁶ See Currie, *supra* note 77, at 864.

⁸⁷ See *infra* Section II.C.

forgotten consistent with American privacy and free speech jurisprudence, and how to equitably balance those rights.

B. *American Courts and Search Engine Provider Discretion*

Although U.S. policymakers and courts extol a largely exceptionalist view of free speech,⁸⁸ commentators disagree about the degree to which search engine providers should enjoy First Amendment protections.⁸⁹ Some scholars argue that search providers are entitled to the full expressive protections of the First Amendment,⁹⁰ while others posit that their First Amendment protections “stand on shaky ground.”⁹¹ The legal disagreement stems from the scope and nature of expression in which search engine providers are engaged; to state the question more simply, is the listing of search results “speech” under the First Amendment?⁹²

Three U.S. district courts have been reluctant to impose limiting regulations on search engine providers, holding that such companies are entitled to some First Amendment protections regarding the way they organize search results.⁹³ The first of these cases was decided in 2003 and involved a company called Search King, which charges its clients fees to locate and solicit advertising on websites that are highly “ranked” within Google’s search results.⁹⁴ Search King sued Google

⁸⁸ See Krotoszynski, *supra* note 74, at 660.

⁸⁹ Compare Eugene Volokh & Donald M. Falk, *First Amendment Protection for Search Engine Search Results* 3 (UCLA Sch. of Law, Research Paper No. 12-22, 2012), <http://ssrn.com/abstract=2055364> (arguing that search engine providers are speakers under the First Amendment for three reasons: (1) they can convey self-prepared information, like locations and directions; (2) they report about the speech of others (websites) when presenting search results; and (3) they sort the results with the goal of making the information helpful and useful), with Oren Bracha & Frank Pasquale, *Federal Search Commission? Access, Fairness, and Accountability in the Law of Search*, 93 CORNELL L. REV. 1149, 1197 (2008) (arguing that the First Amendment does not prohibit regulation of the ability of search engine providers to manipulate and structure search results). See generally JONES, *supra* note 1, at 23 (“[W]hile the First Amendment places significant hurdles in the way of establishing a digital redemption, narrow exceptions may provide room for such a right under certain circumstances.”).

⁹⁰ Michael J. Ballanco, *Searching for the First Amendment: An Inquisitive Free Speech Approach to Search Engine Rankings*, 24 GEO. MASON U. C.R.L.J. 89, 89 (2014) (citing Volokh & Falk, *supra* note 89, at 3–4).

⁹¹ *Id.* at 89 (quoting Bracha & Pasquale, *supra* note 89, at 1189).

⁹² See *id.*

⁹³ See *Kinderstart.com, LLC v. Google, Inc.*, No. C 06-2057 JF (RS), 2007 WL 831806, at *14–15 (N.D. Cal. Mar. 16, 2007); *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 630 (D. Del. 2007); *Search King, Inc. v. Google Tech., Inc.*, No. CIV-02-1457-M, 2003 WL 21464568, at *4 (W.D. Okla. May 27, 2003); see also Bracha & Pasquale, *supra* note 89, at 1189; Ballanco, *supra* note 90, at 89 (citing *Kinderstart.com*, 2007 WL 831806, at *14–15; *Langdon*, 474 F. Supp. 2d at 630; *Search King, Inc.*, 2003 WL 21464568, at *4).

⁹⁴ *Search King, Inc.*, 2003 WL 21464568, at *3–4.

for allegedly “purposefully and maliciously” reducing certain rankings, thereby devaluating its business.⁹⁵ Broadly, the case was about “the interrelationship between Internet search engines and Internet advertising, and their collective connection to the First Amendment.”⁹⁶ More narrowly, the court addressed two specific issues: (1) whether page ranking in search results was protected speech; and (2) if so, whether the “speaker” was shielded from liability under state tort law because of this protection.⁹⁷ The court agreed with Google’s argument that, although the algorithm that determined the rankings was objective, the resulting rankings were themselves subjective.⁹⁸ This led the court to conclude that the rankings “relate[d] to matters of public concern” by way of the Internet and were therefore constitutionally protected speech that could not constitute tortious interference under state law.⁹⁹

Two related cases arose in 2007, one of which rejected the allegation that Google’s website-ranking constituted an antitrust violation,¹⁰⁰ and the other which granted a search engine provider’s motion to dismiss a complaint on First Amendment grounds.¹⁰¹ In the latter case, the court agreed with the search engine providers’ argument that compelling placement of ads in prominent places on Google’s, Yahoo’s, and Microsoft’s search engines—the relief sought by the plaintiff in the case—would impermissibly require them to “speak in a manner deemed appropriate by Plaintiff and would prevent [search engine providers] from speaking in ways that Plaintiff dislikes.”¹⁰²

While these cases demonstrate the judicial inclination to protect *ranking* search results as subjective “speech” under the First Amendment, the question of whether these decisions can be analogously applied to decisions regarding *removal* of search results has yet to be answered, highlighting the need for a uniform federal law to govern search providers.

⁹⁵ *Id.* at *4.

⁹⁶ *Id.* at *1.

⁹⁷ *Id.* at *1–2.

⁹⁸ *Id.* at *3.

⁹⁹ *Id.* at *4, 12 (citing *Jefferson Cty. Sch. Dist. No. R-1 v. Moody’s Inv’t’s Servs., Inc.*, 175 F.3d 848 (10th Cir. 1999)).

¹⁰⁰ *Kinderstart.com, LLC v. Google, Inc.*, No. C 06-2057 JF (RS), 2007 WL 831806, at *18 (N.D. Cal. Mar. 16, 2007).

¹⁰¹ *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 629–30 (D. Del. 2007).

¹⁰² *Id.* at 629.

C. *Search Engines, the First Amendment, and the Right to Be Forgotten*

Because search engine disputes cross doctrinal lines, the competing policy issues they present make compromises between “privacy and access, transparency and efficiency, and being found and remaining hidden” all the more important to address in order to resolve such disputes.¹⁰³ Similarly, interventions by government regulators and adjudicators have generally been issue-specific, with a trend toward more issues being considered in the context of search engine disputes.¹⁰⁴ Three main values that have been argued to intersect the wide range of issue areas and policy debates that surround search engine disputes are informational autonomy, diversity, and information quality.¹⁰⁵ All three of these basic values are particularly relevant to evaluating the right to be forgotten through the First Amendment lens.

“Informational autonomy” includes three elements: (1) “an individual must have the freedom to make choices among alternative sets of information, ideas, and opinions”; (2) “everyone has the right to express her own beliefs and opinions”; and (3) “every user can participate in the creation of information, knowledge, and entertainment.”¹⁰⁶ “Diversity” is the idea that society places value on wide availability of information in the marketplace of ideas—an emphasis in First Amendment scholarship.¹⁰⁷ Not only is a variety of information important, but the quality of that information is important as well.¹⁰⁸ “Information quality” refers to access to high-quality information, gauged not only by functional and cognitive dimensions, but also by aesthetic and ethical requirements of “different stakeholders,” from users to administrators.¹⁰⁹

¹⁰³ Viva R. Moffat, *Regulating Search*, 22 HARV. J.L. & TECH. 475, 477, 510 (2009). At least one scholar, however, has argued against the assumption that such unification is necessary or appropriate to achieve “regulatory efficiency.” See JONES, *supra* note 1, at 18 (“[P]laced in different cultures, technologies hold different meaning, provide different use, and carry different norms and expectations shaped by . . . the legal culture in which the computer sits. . . . Hurried harmonization risks placing efficiency over problem solving and giving the false impression of consistency where significant variety remains.”).

¹⁰⁴ Urs Gasser, *Regulating Search Engines: Taking Stock & Looking Ahead*, 8 YALE J.L. & TECH. 201, 220 (2006).

¹⁰⁵ *Id.* at 234.

¹⁰⁶ *Id.* at 227–28.

¹⁰⁷ *Id.* at 228–29.

¹⁰⁸ *Id.* at 230.

¹⁰⁹ *Id.*

These three dimensions that purportedly transcend policy debates in the different issue areas surrounding search engine conflicts also implicate broader First Amendment themes. Of particular relevance to the right to be forgotten analysis is the value of informational quality. If information available online is “inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes of the processing at issue carried out by the operator of the search engine,”¹¹⁰ all stakeholders with an interest in high-quality information must make a sacrifice. Because this value is consistent with both the European approach and the First Amendment, as discussed above, the ideal behind this language should be incorporated into U.S. legislation and serve as a starting point for delisting guidance for search engine providers.

The role of search engine providers in privacy matters can be expansive without infringing on constitutional values or societal norms. To accomplish this balance, this large role must be accompanied by governmental guidance and accountability. Part III endeavors to solve this problem by proposing legislation enumerating specific delisting criteria, with the goal of molding the right to be forgotten into a constitutionally sound benefit to American society.

III. A PROPOSAL: CRITERIA FOR SEARCH ENGINE PROVIDERS IN IMPLEMENTING A U.S. RIGHT TO BE FORGOTTEN

Global momentum around the right to be forgotten is continuously growing, with some countries enacting similar laws to the EU and others at least starting to debate it.¹¹¹ It is being implemented in different ways all around the world, and considering the global nature of the Internet, it is important that the United States say its piece on how it is to regulate search engine providers.¹¹² Having established the importance of the United States voicing its values on this issue and the constitutional justifications behind implementation of a right to be forgotten, this Part proposes a solution for regulation and enforcement of search engine provider discretion, which, in turn, will create a right to be forgotten for U.S. citizens.

¹¹⁰ Case C-131/12, *Google Spain SL v. Agencia Española de Protección de Datos*, 3 C.M.L.R. 50, para. 94 (2014).

¹¹¹ See *supra* Section I.C.

¹¹² See *supra* Part I.

A. *Regulating Search Engine Delisting Criteria: A Tailored Balancing Test*

Google Spain establishes a worthy, albeit broad, starting point for the criteria needed to guide a search engine provider in its quest to make delisting decisions fairly: “[I]nadequate, irrelevant or no longer relevant, or excessive in relation to those purposes in the light of the time that has elapsed.”¹¹³ This Note proposes that Congress enact legislation establishing the requirement that search engine providers engage in a judicial-type balancing test, weighing the values of individual privacy against the value of the data in question to the public.¹¹⁴ This approach differs from that set forth in *Google Spain* because, in that case, there is merely a nominal reference to balancing of interests, while the decision goes on to say that privacy trumps free expression “as a rule.”¹¹⁵ In contrast, the test this Note proposes requires this balancing to be based on specific factors, several of which analyze the importance of privacy and several of which focus on preserving First Amendment free expression principles. The main factors that should be considered in the search engine provider’s balancing decision (and which should be enumerated in the legislation) are gleaned from different areas of legal scholarship, First Amendment and privacy jurisprudence, and by analogy from other areas of law.

The first factor search engine providers should take into consideration is whether the requestor is a public or private individual—a factor that is taken from the First Amendment defamation framework¹¹⁶ and is valuable because private individuals can reasonably assume a greater protection of their privacy from public interference than public individuals. The second factor is whether the requestor was the

¹¹³ *Google Spain*, 3 C.M.L.R. 50, para. 93.

¹¹⁴ Similar tests have been proposed, but the multifactor test and the importance of balancing inherent in the test proposed here, in addition to the appeals aspect discussed below, make it novel to the scholarship. For example, Lisa Owings suggests a test with three separate criteria, upon any of which a search engine provider could base its decision to delist: (1) “if the information is the publication of a private fact that is offensive to a reasonable person and not newsworthy, it should never be published unless the individual chooses to do so”; (2) “if individuals posted the information about themselves or as an expression of their opinion, they should have the right to remove it”; and (3) “if the information is not relevant to the circumstances under which it has been posted or is outdated, and if there is not a compelling reason for it to remain publicly available, then it should be removed.” Lisa Owings, *The Right to Be Forgotten*, 9 AKRON INTELL. PROP. J. 45, 47, 67–80 (2015).

¹¹⁵ *Google Spain*, 3 C.M.L.R. 50, para. 97.

¹¹⁶ This distinction also arises in defamation cases, which this Note distinguishes in Section III.D.2. See also Michael L. Rustad & Sanna Kulevska, *Reconceptualizing the Right to Be Forgotten to Enable Transatlantic Data Flow*, 28 HARV. J.L. & TECH. 349, 398–406 (2015).

original source of the information or whether it originated from a third party website or journalistic source.¹¹⁷ This criterion comes from existing legal scholarship on the right to be forgotten¹¹⁸ and would ensure that more extensive protection is afforded to information that is independently reported or published, as opposed to placed into public discourse by the person seeking to subsequently remove it, which places them in a position of having a diminished expectation of privacy. Third, search engine providers should consider whether there is any viable claim of liability or unlawfulness based on the data,¹¹⁹ which would likely allow its removal for those claims alone and would therefore weigh heavily in favor of privacy as opposed to free expression; this factor is also derived from the defamation test.¹²⁰

The fourth factor is a seemingly “soft” factor, which asks whether the requestor will likely suffer unfair prejudice from the data’s continued listing in search results. It is important to include a broader factor like this—which would allow search engine providers to define and determine whether “unfair prejudice” exists—in order to (a) not unduly burden the “speech” of search engine providers, and (b) preserve the privacy of U.S. citizens in situations where the value of the speech to the public is outweighed by the prejudice caused to the individual. A possible example of such prejudice is a person who was arrested—but never charged—for a crime like child pornography. The existence of this type of search result could arguably ruin that person’s chances at everything from a first date to a job interview. This is the sort of unfair prejudice that this factor takes into consideration, while balancing it with the information’s value to the public.

Finally, search engine providers should inquire into whether the information has serious literary, artistic, political, or scientific value,¹²¹ a test derived from the First Amendment test for obscenity. If the information has such value, the search engine provider should then ask whether the information is easily accessible by means other than a search engine, or if removal would constructively eliminate the valua-

117 See generally Rustad & Kuleveska, *supra* note 116, at 387–98 (discussing different degrees of deletion depending on the relationship of the data between the subject of the data, the requestor, and the originator); Owings, *supra* note 114, at 73–76.

118 See Rustad & Kuleveska, *supra* note 116, at 387–98.

119 See generally *id.*

120 See *infra* Section III.D.2.

121 This is colloquially known as the “SLAPS Test,” from *Miller v. California*, 413 U.S. 15 (1973), where the Court applied this test as one prong of its three-prong test for determining obscenity. *Id.* at 24.

ble data from the public's access.¹²² If the information is available elsewhere but removal from search results would make it nearly impossible to find (e.g., sifting through documents at a court house in a state across the country), then this factor weighs in favor of the public's access to that information over the requestor's entitlement to privacy.

Depending on the weight of these factors, the regulation would guide the search engine provider to decide in favor of the interest that outweighs the other, articulating the reasons for that decision in a publicly accessible forum. This notice requirement would ensure compliance with the test and accountability to the public. Further, if the company fails to adequately consider the factors and make the appropriate decision to grant or deny a delisting request, the decision will be subject to appeal.¹²³ These factors combine principles used in First Amendment and privacy scholarship and jurisprudence,¹²⁴ using them as a means of tempering and clarifying the *Google Spain* balancing test¹²⁵—which weighs heavily in favor of privacy—to focus more on the high degree of value Americans place on free expression.¹²⁶

B. *An Avenue of Recourse: Appealing a Delisting Decision*

In addition to the balancing test and criteria, the regulation should include an appeals process by which aggrieved individuals disagreeing with a search engine provider's determination of their request can seek a remedy. This aspect of the regulation would supplement the stricter decisionmaking criteria proposed above and ensure a more transparent and accountable delisting procedure. This appeal could mirror the administrative appeals process, or it could be judicial in nature with the regulation including a private cause of action section. These options are addressed below.

¹²² This prong is based on the “marketplace of ideas” approach that forms the basis for much First Amendment free speech and free expression jurisprudence. See Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821, 823–24 (2008) (citing *Abrams v. United States*, 250 U.S. 616, 624–31 (1919) (Holmes, J., dissenting) as the birthplace of the “marketplace of ideas” approach, but citing *Lamont v. Postmaster Gen.*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring) and *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 199 (1973) (Brennan, J., dissenting), to show that the phrase “marketplace of ideas” can actually be attributed to Justice Brennan, not Justice Holmes).

¹²³ See *infra* Section III.B.

¹²⁴ See *supra* notes 116–22 and accompanying text.

¹²⁵ *Google Spain*, 3 C.M.L.R. 50, para. 93 (finding data incompatible with the Directive where it is “inadequate, irrelevant or no longer relevant, or excessive in relation to those purposes in the light of the time that has elapsed”).

¹²⁶ See generally Krotoszynski, *supra* note 74.

1. *Internal Appeals to Google: Analogical Guidance from the Administrative Procedure Act*

The proposed legislation above would further mandate that Google set up an internal appeals process. Though Google is a corporation and not a government agency, the process could take guidance from the internal adjudicatory processes of federal agencies under the Administrative Procedure Act (“APA”).¹²⁷ The APA, in relevant part for purposes of this proposed legislation, provides for both formal adjudication—“on the record after opportunity for an agency hearing”—and informal adjudication, in which agencies set out their own procedures.¹²⁸

This Note suggests the implementation of formal adjudicative proceedings by search engine providers, analogous to those prescribed by the APA, in order for individuals seeking to delist—or to appeal a delisting decision—to have a formal hearing on the record with the possibility of judicial review of the final decision of the search engine provider. Under this framework, if Google denies a request from a U.S. citizen contesting a search result detailing, for example, a previous arrest, and that person felt the request had been wrongly denied, the requestor would have recourse under Google’s internal appeals process. In practice, this implementation of an appeals process would require that requestors be protected by, at the very least, Google’s own procedures, and, at most, an opportunity for a hearing on the record. Because Google already has its own procedures for those who desire to contest a delisting decision,¹²⁹ a more formalized internal appeals process imposed by statute is favorable.

2. *Judicial Appeals*

A judicial appeal could result from an adverse delisting decision under the proposed legislation in one of two ways. First, if a search engine provider’s internal appeals yield an unsatisfactory result in delisting decisions, a judicial approach could be sought once Google

¹²⁷ 5 U.S.C. § 554 (2016). The APA governs rulemaking and adjudicatory proceedings for administrative agencies in the executive branch of the U.S. government. See Jeffrey S. Lubbers, *APA-Adjudication: Is the Quest for Uniformity Faltering?*, 10 ADMIN. L.J. AM. U. 65, 65, 67 (1996) (stating that the APA was enacted based on complaints of lack of uniformity among agency “judges” and, accordingly, a perception of lack of fairness in the proceedings over which they presided).

¹²⁸ 5 U.S.C. § 554. See generally Lubbers, *supra* note 127; Martin Shapiro, *APA: Past, Present, Future*, 72 VA. L. REV. 447 (1986).

¹²⁹ See *supra* Section I.B.

makes its final decision.¹³⁰ Alternatively, the legislation could provide for a private cause of action—an invasion of privacy tort, for example—thereby granting the judicial opportunity that normally governs that cause of action.¹³¹ Some commentators argue that specific common law actions are the best way to address the abstract tensions between information flow and personal privacy, while others argue that a judicial solution would help to centralize search engine conflicts into one unified area, letting courts view the common issues embodied in those disputes.¹³² These arguments for a judicial solution have teeth in the context of this appeals proposal, and the potential benefits of common law actions would be achieved either through a judicial response to an adverse decision by Google or by the private cause of action enumerated in the statute.

C. *Justifying the Implementation of a U.S. Law: What the United States Can Borrow from the EU and the Importance of Privacy*

This Section seeks to show how the substantive values of U.S. law embodied in this proposal couple with the procedural framework offered by the EU's approach, while also distinguishing certain aspects of the *Google Spain* framework. The substance of this proposal takes principles of U.S. law and applies a similar procedural balancing framework as the one established in *Google Spain*, but the substantive application of the test in that case—using it to make a firm declaration that privacy trumps free speech in the EU's rights hierarchy—would be inconsistent with U.S. law. It is important to clarify that any adjustment to existing law or established jurisprudence is not necessarily a permanent erosion or augmentation of the rights or freedoms at issue, but, instead, a sometimes-transitory reflection of the principles that citizens deem valuable at a certain point in history. Therefore, adopting a means of balancing values and sentiments surrounding constitutional rights—similar to that used in *Google Spain* but with a certain floor that neither side could fall below—would be a valuable starting

¹³⁰ See Moffat, *supra* note 103, at 478, 487, 513 (arguing for a common law solution to search engine regulation and that agency regulation is unwarranted).

¹³¹ See, e.g., Abril & Lipton, *supra* note 53, at 368; R. George Wright, *The Right to Be Forgotten: Issuing a Voluntary Recall*, 7 DREXEL L. REV. 401, 424–25 (2014–2015). Though not in the appeals context, these two articles argue for the benefits of a private cause of action to establish something similar to a broader right to be forgotten.

¹³² Compare Wright, *supra* note 131, at 424–25 (arguing for common law and statutory remedies), with Moffat, *supra* note 103, at 478 (arguing for a federal judicial approach).

point and guiding principle for the United States to evaluate and regulate search engine providers' removal criteria now and in the future.

Substantively, the priority of privacy rights and data protection over free access to information (as articulated by the CJEU's decisions) is inconsistent with U.S. law.¹³³ American courts have viewed the right to privacy, though unenumerated in the Constitution, as a fundamental right living in its penumbra.¹³⁴ As early as 1891, the Supreme Court held:

No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. As well said by Judge Cooley, "The right to one's person may be said to be a right of complete immunity: to be let alone."¹³⁵

Almost three-quarters of a century later, *Griswold v. Connecticut*¹³⁶ arguably set out the "clearest articulation to date" of the basis for privacy as a fundamental right in the U.S. Constitution.¹³⁷ In that case, the Court responded to a Connecticut statute making the use of contraception a criminal offense.¹³⁸ It invalidated the statute on the notion of "privacy surrounding the marriage relationship," citing jurisprudential justifications that ran the gamut from Fourth Amendment criminal procedure cases to scholarly articles on the subject.¹³⁹

¹³³ See generally Krotoszynski, *supra* note 74 (discussing American exceptionalism and the First Amendment).

¹³⁴ *Griswold v. Connecticut*, 381 U.S. 479, 483–84 (1965); R. H. Clark, *Constitutional Sources of the Penumbra Right to Privacy*, 19 VILL. L. REV. 833, 833 (1974); Burr Henly, "Penumbra": *The Roots of the Legal Metaphor*, 15 HASTINGS CONST. L.Q. 81, 92 (1987).

¹³⁵ *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891) (quoting THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS 29 (2d. ed 1888)).

¹³⁶ 381 U.S. 479 (1965).

¹³⁷ Robert G. Dixon, Jr., *The Griswold Penumbra: Constitutional Charter for an Expanded Law of Privacy?*, 64 MICH. L. REV. 197, 197 (1965).

¹³⁸ *Griswold*, 381 U.S. at 480.

¹³⁹ *Id.* at 485–86. The Court stated that the "right to privacy, [is] no less important than any other right carefully and particularly reserved to the people." *Id.* at 485 (quoting *Mapp v. Ohio*, 367 U.S. 643, 656 (1961) (criminal procedure case)). The Court also acknowledges the controversies over the unenumerated "penumbral rights of 'privacy and repose.'" See *id.* (citing *Breard v. Alexandria*, 341 U.S. 622, 626, 644 (1951); *Pub. Utils. Comm'n v. Pollak*, 343 U.S. 451 (1952); *Monroe v. Pape*, 365 U.S. 167 (1961); *Lanza v. New York*, 370 U.S. 139 (1962); *Frank v. Maryland*, 359 U.S. 360 (1959); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)). See generally William M. Beaney, *The Constitutional Right to Privacy in the Supreme Court*, 1962 SUP. CT. REV. 212 (seeking to define existence and scope of constitutionally protected right to privacy); Erwin N. Griswold, *The Right to Be Let Alone*, 55 NW. U. L. REV. 216, 217 (1960) ("The right to be let

Privacy concerns have also become increasingly relevant in light of the Internet,¹⁴⁰ and many individuals believe (perhaps correctly) that anything posted on the Internet will remain there permanently.¹⁴¹ The Internet's permanent memory can make individuals feel exposed and trapped, and must therefore be addressed by U.S. law—ideally through the proposed balancing test here—without infringing on the general public's access to information. The declaration of a bright-line rule in *Google Spain* that individual privacy rights trump the free flow of information (not to be confused with the balancing framework itself) is inconsistent with the U.S. Constitution, as discussed above, and it must therefore be distinguished when establishing an American right to be forgotten.

Professor Richard Peltz-Steele argues that free speech assurances are eroding in U.S. constitutional law and that the United States is drifting closer to the European framework of balancing privacy with free access and free speech.¹⁴² While this might be accurate, characterizing the emergence of a balancing approach in U.S. constitutional law as erosion misses the mark. Shifts in U.S. law are necessary to avoid staleness and obsolescence in light of new technologies and changing worldviews. These shifts require the ebb and flow of certain rights and liberties to parallel and reflect the values citizens place on those principles while the spirit of the U.S. Constitution remains fixed. Professor Peltz-Steele also argues that the Supreme Court's holdings in *New York Times Co. v. Sullivan*¹⁴³—that the First Amendment protects even false statements made against public officials absent “actual malice”¹⁴⁴—and *Smith v. Daily Mail Publishing Co.*¹⁴⁵—that state restric-

alone' is the underlying theme of the Bill of Rights. It has continued to be the fertile soil for the cultivation of individual freedom.”).

¹⁴⁰ See Karen Eltis, *Breaking Through the “Tower of Babel”: A “Right To Be Forgotten” and How Trans-Systemic Thinking Can Help Re-Conceptualize Privacy Harm in the Age of Analytics*, 22 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 69, 70–71 (2011); Richard J. Peltz-Steele, *The New American Privacy*, 44 *GEO. J. INT'L L.* 365, 384 (2013).

¹⁴¹ See Eltis, *supra* note 140, at 73; Kelly Johnson, *The Permanency of the Internet*, SHEKNOWS, <http://www.sheknows.com/community/entertainment/permanency-internet> [<https://perma.cc/MXQ8-Y98E>] (last visited May 29, 2017); Angelina Perez, *Campaign to Teach Students Lesson of Internet Permanency*, NEWSCHANNEL10, <http://www.newschannel10.com/story/14197907/campaign-to-teach-students-lesson-of-internet-permanency> (last visited May 28, 2017); cf. EGC Group Lashley, *The Permanency of Online Media*, INSIGHTS: THE EGC BLOG (July 23, 2012, 12:04 PM), <http://www.egcgroup.com/blog/permanency-online-media> (arguing that Internet permanency is an asset that the company can harness for its clients).

¹⁴² See Peltz-Steele, *supra* note 140, at 409–10.

¹⁴³ 376 U.S. 254 (1964).

¹⁴⁴ *Id.* at 283.

¹⁴⁵ 443 U.S. 97 (1979).

tion of publication of certain information violates the Constitution unless the restriction serves a substantial state interest—reflected attractive rules during the civil rights era, but now serve to impede free speech guarantees in light of concerns about “reputation, security, and privacy” on the Internet.¹⁴⁶ While this argument of American intellectual evolution may be legitimate, the global landscape has changed since the 2014 *Google Spain* decision, which all but ensured that the scales would weigh in favor of individual privacy rights, absent certain fact-specific circumstances.¹⁴⁷

A unified conception and consistent application of privacy in policy and practice are key prerequisites for codifying an American right to be forgotten.¹⁴⁸ The definition of privacy as an affirmative right,¹⁴⁹ however, is one of the major points of conflict between the U.S. Constitution and the European view of privacy. Because privacy exists in the penumbra of the Constitution,¹⁵⁰ if the United States were to codify a right to be forgotten, the “right” would be best defined as a negative liberty—a freedom *from* invasion into aspects of one’s life. Further, while it may be naïve to assume that one’s information will not be used or misused if put on the Internet,¹⁵¹ there should be no affirmative obligation to keep that information secret as part of an individual’s reasonable expectation of privacy.¹⁵² This reasonable expectation is the test set forth in Fourth Amendment jurisprudence, a line of cases that sets no requirement or obligation to hide information for fear of it being misused.¹⁵³ These policy and legal considerations are important in assessing the values and the perspective on

146 *Id.* at 104–05; see Peltz-Steele, *supra* note 140, at 383–84.

147 Case C-131/12, *Google Spain SL v. Agencia Española de Protección de Datos*, 3 C.M.L.R. 50, para. 81 (2014) (“[T]hat balance may however depend, in specific cases, on the nature of the information in question and its sensitivity for the data subject’s private life and on the interest of the public in having that information, an interest which may vary, in particular, according to the role played by the data subject in public life.”).

148 See Eltis, *supra* note 140, at 75.

149 *Id.* at 95.

150 See *supra* note 134 and accompanying text.

151 See Eltis, *supra* note 140, at 95.

152 Despite the lack of appeal of an affirmative obligation to keep information secret at risk of it being misused (for the argument of this Note, at least), a tort-based argument could be made that an individual assumes the risk of misuse when posting data on the Internet. This would avoid the problem of an affirmative obligation, but still address this part of Eltis’s definition. See *id.*

153 See, e.g., *Katz v. United States*, 389 U.S. 347, 351–53 (1967) (holding that physical intrusion into an area is not necessary to violate the Fourth Amendment because the Fourth Amendment “protects people, not places”).

those values that should govern in implementing a right to be forgotten in the United States through the legislation proposed in this Note.

Privacy is important to—and derived from—the U.S. Constitution. While this is so, it is not subject to the same hierarchical ordering of rights established in *Google Spain*.¹⁵⁴ If an American right is fundamental, it is fundamental, without being subject to degrees as such.¹⁵⁵ This is why the balancing test proposed by this Note uses the CJEU’s idea of a balancing test as merely a framework, while suggesting that a U.S. application of the law be substantively more specific, by using the multifactor test in Section III.A, and procedurally more robust, by using the appeals process in Section III.B. While the United States and its Constitution are exceptional in many ways, it is also important to exercise humility, looking to global ideas and guiding principles for frameworks that America can use to mold into law that complies with existing constitutional precedent.

D. U.S. Constitutional Compliance of the Proposed Delisting Balancing Test

If the U.S. government were to enact the legislation proposed here, the same principles of American exceptionalism that underlie that framework could lead to challenges to its constitutional compliance on First Amendment grounds. Such a challenge would likely take the form of claiming the legislation is a content-based regulation, and therefore subject to strict scrutiny. The relevant aspects of this Note’s proposed legislation would pass strict scrutiny if challenged, as laid out below. In addition to addressing the legislation’s compliance with strict scrutiny, this Section also demonstrates the benefits of the proposal in contrast with the defamation framework, which has been suggested by other scholarship.¹⁵⁶ As shown below, however, the application of those principles in toto is not appropriate here.

1. The Proposed Legislation Can Withstand Strict Scrutiny

The First Amendment to the U.S. Constitution, in relevant part, states that “Congress shall make no law . . . abridging the freedom of

¹⁵⁴ See Krotoszynski, *supra* note 74, at 689–90; see also Case C-131/12, *Google Spain SL v. Agencia Española de Protección de Datos*, 3 C.M.L.R. 50 (2014); *supra* Section I.A.

¹⁵⁵ This argument is debatable, but is derived from the absence of express prioritization of certain fundamental rights over others in the U.S. Constitution. See U.S. CONST. amends. I–X. *But see, e.g.*, Krotoszynski, *supra* note 74, at 660–61 (arguing that Americans take an absolutist approach to First Amendment rights).

¹⁵⁶ Rustad & Kulevska, *supra* note 116, at 416–17.

speech, or of the press.”¹⁵⁷ The Supreme Court’s First Amendment jurisprudence has found that strict scrutiny applies to any government enforcement of a content-based restriction on speech;¹⁵⁸ such restrictions are constitutional only if the regulation serves a compelling interest of the government and the regulation is narrowly tailored to achieve that end.¹⁵⁹ It could be argued that a regulation governing Google’s discretion over the search results it removes is such a content-based regulation, especially if it only applies when a person’s name appears in the data at issue. This argument that search result regulations are content-based accepts the idea that Google is a “speaker” whose expression—the manipulation of search results—is entitled to First Amendment protections. This idea, however, is still largely unsettled in both academia and the American judiciary.¹⁶⁰ If the government were to enact the legislation proposed here, and it were to be deemed content-based, it must pass strict scrutiny so as not to conflict with the First Amendment.

The first prong of strict scrutiny—that the regulation needs to serve a compelling state interest—is met twofold by the regulation proposed in this Note. The interests of the government in (1) ensuring privacy for its citizens, and (2) regulating corporate discretion on an important constitutional issue would each, alone, likely constitute a compelling government interest; and together make a solid case for such a regulation meeting the first prong of strict scrutiny. Eugene Volokh discusses the four general principles the Court has set forth with regard to compelling interests: First, privileging particular subclasses of protected speech is never a compelling state interest,¹⁶¹ which is not a hurdle to passing strict scrutiny here because search engine “expression” has never been ruled on by the Supreme Court as

¹⁵⁷ U.S. CONST. amend. I.

¹⁵⁸ See *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 48–49 (1986) (explaining the underlying principle of subjecting content-based regulations to strict scrutiny: “[G]overnment may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views.” (quoting *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 96 (1972))).

¹⁵⁹ See, e.g., *Korematsu v. United States*, 323 U.S. 214, 216, 218–19 (1944) (applying strict scrutiny test to uphold the constitutionality of an executive order ordering Japanese-Americans into internment camps during World War II); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (setting the stage for different tiers of judicial scrutiny); see also Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1268–69, 1273–74 (2007); Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2418–24 (1996).

¹⁶⁰ See *supra* Section II.B.

¹⁶¹ Volokh, *supra* note 159, at 2419 (citing *Carey v. Brown*, 447 U.S. 455, 467 (1980); *Consol. Edison Co. v. Pub. Serv. Comm’n*, 447 U.S. 530, 537–38 (1980)).

a First Amendment protection. Second, the state does not have a compelling interest in avoiding offense and restricting bad ideas alone.¹⁶² Some may argue that this prong could be relevant to a U.S. right to be forgotten in that it could give someone the right to request removal of material that might be embarrassing or offensive to his reputation. The variety of factors weighed here, however, in addition to the relevance and timeliness requirement, go beyond the “offense and bad ideas *alone*” issue by taking a collection of issues as compelling to the state’s interest.¹⁶³ Third, a law’s underinclusiveness¹⁶⁴ can be fatal to establishing a compelling state interest, but, as discussed below in establishing the satisfaction of the narrow tailoring prong, this Note’s proposal reaches all speech implicated by the interest.¹⁶⁵ Fourth is the idea that the government cannot assert a compelling state interest as to one individual wrong.¹⁶⁶ This is not the case here, however, as established by the rejection of the proposal’s underinclusiveness.

Having dismissed these four categorical exceptions to a state’s valid assertion of compelling state interest, the Supreme Court’s history of viewing privacy as a fundamental right for U.S. citizens stands as a compelling interest.¹⁶⁷ Absent the exception in one of the four categories outlined above, privacy is an established compelling interest, and is served by the framework proposed here.¹⁶⁸ Though the interest in regulating search engine provider discretion is not a well-established compelling government interest, this potential interest is sufficiently secondary and intertwined with the notions of privacy that the test is met without directly addressing the interest itself.

Satisfaction of the second prong of strict scrutiny—that the regulation needs to be narrowly tailored to serve that interest—depends upon the means employed to enact the right to be forgotten. A narrow tailoring analysis will often ask the questions: “Does the law further the interest; is the law limited to speech that implicates the interest; does the law cover all such speech; are there less restrictive alternatives that will serve the interest equally well?”¹⁶⁹ These four criteria are addressed in turn below.

¹⁶² Volokh, *supra* note 159, at 2419–20.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 2420 (underinclusiveness in this context is defined as a law’s “failure to reach all speech that implicates the interest”).

¹⁶⁵ See *infra* notes 171–72 and accompanying text.

¹⁶⁶ See Volokh, *supra* note 159, at 2420.

¹⁶⁷ See *supra* Section III.C.

¹⁶⁸ See *supra* Sections III.A–B.

¹⁶⁹ Volokh, *supra* note 159, at 2424.

This proposed law furthers several compelling state interests, thus satisfying the second prong of strict scrutiny. The proposed legislation would require a search engine provider to consider specific factors—based on precedent and relevant policy issues—in balancing a particular requester’s privacy interest with the public’s interest in accessing the information.¹⁷⁰ The government’s compelling interests in promulgating this regulation are (1) protecting the privacy rights of U.S. citizens, and (2) ensuring that search engine providers are not afforded too much discretion. Allowing citizens to request that a particular search result be removed (even if subject to a balancing test) affords them protection of their privacy rights as well as control over access to information about them, furthering the government’s first interest. The regulation also sets out guidelines that the search engine provider is required to consider when making delisting decisions, thus regulating and limiting search engine providers’ discretion and furthering the second government interest.

The law is similarly limited to speech—or, in this case, removal of search results by the search engine provider—that implicates the interests, with prongs (1) and (4) protecting the requester’s privacy right and prongs (2), (3), (5) and (6) serving as limiting factors for the situations in which the privacy right is implicated.¹⁷¹ The legislative test would further cover all similarly situated speech (or removals) that fit the removal criteria of “inadequate, irrelevant or no longer relevant, or excessive in relation to those purposes in the light of the time that has elapsed,”¹⁷² which is to be judged by the multifactor test laid out in Section III.A. This solution would continue to afford search engine providers ample discretion, mandating them only to weigh factors that would prevent them from implicating free speech and free expression while ensuring privacy for U.S. citizens.

The legislation proposed in this Note is a broad and unrestrictive means of “regulating speech” by search engine providers and, barring the elimination of the requirement to balance these factors when considering the removal criteria in the regulation, there do not appear to be any less restrictive means of accomplishing the government’s compelling interests.¹⁷³

¹⁷⁰ See *supra* Section III.A.

¹⁷¹ See *supra* Section III.A.

¹⁷² Case C-131/12, *Google Spain SL v. Agencia Española de Protección de Datos*, 3 C.M.L.R. 50, para. 93 (2014).

¹⁷³ See generally Fallon, *supra* note 159; Volokh, *supra* note 159.

Thus, the proposed balancing test allows search engine providers to retain much of their discretion, while remaining within constitutional bounds under express guidance and accountability to the government. Based on the above compelling-interest and narrow-tailoring analyses, the proposed regulation would likely pass both prongs of strict scrutiny if challenged and found to be content-based. If the proposed legislation was deemed anything other than content-based, it would be subject to a lower level of scrutiny.¹⁷⁴ Because the regulation would satisfy even strict scrutiny, it would necessarily pass any other level of scrutiny under free speech jurisprudence.

2. *Counterargument: Rejecting the Defamation Framework*

Existing scholarship has suggested alternative means, compared with the proposed legislation here, of implementing a U.S. right to be forgotten. One recent article, for example, proposed analogous application of the public-private distinction from First Amendment defamation cases to the right to be forgotten.¹⁷⁵ Rustad and Kulevska's application includes limiting the right only to posts by the complainant (as well as reposts of the original data), and excluding data posted by third parties as well as imposing limits on the removal rights of public officials and public figures—both of which are included in the proposal set out in Section III.A.¹⁷⁶ By implementing the right legislatively, and considering the above-mentioned limitations, their article argues that transatlantic data privacy laws can be reconciled.¹⁷⁷

The solution proposed by this Note accepts the idea that limiting regulations should be adopted as *one part* of the legislation establishing a U.S. right to be forgotten. The simple balancing test suggested by this Note would apply more broadly than the framework suggested by Rustad and Kulevska, and thus resolve the overarching concerns between public and private persons and lawful and unlawful expression (as well as possible strict scrutiny concerns in the First Amendment context).

The defamation framework is not the best approach to adopt by analogy to the right to be forgotten. Not only is defamation unlawful, but it is also a categorical exception to the First Amendment.¹⁷⁸ Since

¹⁷⁴ G. Edward White, *Historicizing Judicial Scrutiny*, 57 S.C. L. REV. 1, 80–81 (2005).

¹⁷⁵ Rustad & Kulevska, *supra* note 116, at 416–17.

¹⁷⁶ *Id.* at 416; *see supra* Section III.A.

¹⁷⁷ Rustad & Kulevska, *supra* note 116, at 417.

¹⁷⁸ RESTATEMENT (SECOND) OF TORTS §§ 558–59, 578, 581 (AM. LAW INST. 1981); HENRY COHEN, CONG. RESEARCH SERV., 95-815, FREEDOM OF SPEECH AND PRESS: EXCEPTIONS TO THE FIRST AMENDMENT 12 (2009).

this and other similar types of speech are generally unprotected, they are not subject to the conflict that exists between the First Amendment and privacy in the right to be forgotten context.¹⁷⁹ The European right to be forgotten applies regardless of the legality of the speech, and therefore application by analogy of a rule governing unlawful speech is not the ideal rule to govern the lawful (but undesirable) speech often at issue with the right to be forgotten.¹⁸⁰ This concern is addressed, however, in prong (3) of the balancing test, which requires search engine providers to consider whether or not liability or illegality could exist in the relevant data.¹⁸¹ While the defamation framework could be a workable means of enacting a right to be forgotten in the United States, the proposal in this Note is more specific, more comprehensive, and allows more extensive privacy rights for individuals while also being able to withstand the First Amendment's strict scrutiny analysis if challenged.

CONCLUSION

This Note has proposed a nuanced formulation of a U.S. right to be forgotten that balances American privacy jurisprudence with First Amendment jurisprudence by way of a multifactor balancing test and appeals processes. It has sought to reflect a constitutionally sound path to regulating search engine providers' discretion in the United States, while incorporating the spirit of the right as enacted in other countries, with specific guidance from the CJEU's decision in *Google Spain*. The United States should implement its own right to be forgotten in compliance with its values and constitutional principles; this Note's proposed legislation attempts to take the first steps toward implementing such a right.

¹⁷⁹ See COHEN, *supra* note 178, at 1.

¹⁸⁰ See Case C-131/12, *Google Spain SL v. Agencia Española de Protección de Datos*, 3 C.M.L.R. 50, paras. 98–99 (2014).

¹⁸¹ See *supra* Section III.A.