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The Process of Legal Institutionalization: How Privacy Jurisprudence Turned towards the US Constitution and the American State

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During the twentieth century, privacy evolved from an ambiguous legal idea into a defined state-centric right, while privacy claims against non-state entities became more marginalized. Whereas prior studies treat this as the direct outcome of cultural shifts or landmark interventions by legal elites, I document legal institutionalization as a three-stage process of domain formation and meaning making. Using a combination of citation network analysis and qualitative research, I show that the concept of privacy first entered the legal field when journalists raised concerns about the unauthorized use and commodification of personal data; that US jurisprudence produced two competing schools of legal thought as judges and legal scholars struggled to give substance to an abstract concept and structure to an evolving domain of judicial practice; and that privacy was consecrated as a constitutional right when state courts and the US Supreme Court selectively mobilized the language of privacy to confront the expanding reach of the American state. These findings demonstrate the processual nature of legal institutionalization, draw attention to intra-legal contestation and the implicit pluralism of American jurisprudence, and highlight an emerging distinction between the legal regimes governing bureaucratic rule and market exchanges in the early twentieth century.

INTRODUCTION

User tracking and the aggregation of personal data have put privacy at the center of US political and legal debates about twenty-first-century surveillance capitalism (Pasquale 2012; Cohen 2013; Zuboff 2019). Yet despite the potential for privacy violations by market entities, the "right to privacy" has historically conditioned the ability of government officials to examine personal information and intimate spheres (Beaney 1966; Solove 2002; Sklansky 2014). This was not always the case. In the early twentieth century, the logic of privacy was invoked in legal disputes about the unauthorized use of photographs by yellow press journalists, the use of a person's name by advertising agencies and playwrights, and telephone eavesdropping by landlords. But the subsequent institutionalization of privacy as a legal right preserved few traces of this expansive early history. Instead, it was increasingly tied to constitutional amendments and used to adjudicate the limits of state power, while privacy violations by non-state actors were

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narrowly circumscribed and conceptually defanged (Prosser 1960; Zimmerman 1983; Friedman 2002; Whitman 2004; Citron 2009; Richards and Solove 2010).

How did privacy turn into a state-centric right? Socio-legal scholars of privacy advance two main arguments to explain the "domain formation" (Jenness 2007) and the "settling" of meaning (Phillips and Grattet 2000) that are commonly regarded as key elements of legal institutionalization. First, they emphasize the formative impact of prominent legal experts and thus treat legal institutionalization as the consequence of elite interventions that shape the interpretation and canonization of abstract principles (Gerety 1977; Glancy 1979; Zimmerman 1983; Kramer 1990; Bratman 2001). Studies in this tradition tend to focus on the publication of a *Harvard Law Review* essay by Samuel Warren and Louis Brandeis (1890), on Brandeis's dissenting opinion in the US Supreme Court's 1928 *Olmstead v. United States* decision,[1] and on William Prosser's handbooks on tort law as "milestones" that focused legal discourse and cemented a distinction between narrow privacy torts, on the one hand, and a state-centric, constitutionally grounded right to privacy, on the other (Richards and Solove 2010; Palmer 2011). Second, scholars treat state-centric privacy jurisprudence as a product of the postwar decades, when shifts in sexual norms, social movement activism, and growing concerns about electronic government databases contributed to the recognition of privacy as a constitutional right that shielded personal data and sexual activity against state interference (Beaney 1966; Boling 1996; Sklansky 2008; Igo 2018; Citron 2019). Like the first perspective, this approach also places considerable emphasis on important milestones of legal development—for example, the Supreme Court's explicit recognition of a right to privacy in *Griswold v. Connecticut* or the now-overturned decision in *Roe v. Wade*—although scholars who focus on the postwar decades generally see those milestones as indicators of extrajudicial pressures and macro-social realignments.[2]

Yet neither perspective captures the process through which the right to privacy was originally institutionalized as a state-centric right. The first approach misconstrues the early evolution of privacy jurisprudence, especially since studies published before the middle of the twentieth century only find a limited impact of Warren and Brandeis's essay on American jurisprudence (Harvard Law Review Association 1929; Moreland 1931). The second approach focuses on a period that is too close to the present, when the right to privacy had already become conceptually tied to the problem of state power. The debates of the 1960s and 1970s were not primarily about whether a right to privacy protected citizens against government intrusion but, rather, on the specific domains of life that were to be protected and on the legal justifications for doing so (Simitis 1987; Kasper 2005; Seo 2015).[3] More generally, the focus on landmark cases in each of these two approaches also risks obscuring developments that galvanized legal thought and judicial practice even if they were ultimately abandoned and written out of the canon of legal precedent. It thereby hinders the study of law as "an arena

1. *Olmstead v. United States*, 277 U.S. 438 (1928).

2. *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Roe v. Wade*, 410 U.S. 113 (1972).

3. Until the Supreme Court's 1965 *Griswold* decision, judges had repeatedly opted for a proceduralist interpretation of the Fourth Amendment. See *Griswold*, 381 U.S.; *Mapp v. Ohio*, 367 U.S. 643 (1961). In 1973, *Roe v. Wade* also folded abortion rights into privacy law, although the US Supreme Court's revisiting of that decision in *Planned Parenthood v. Casey* in 1992 focused instead on due process rights under the Fourteenth Amendment. *Roe*, 410 U.S.; *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

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of conflict within which alternative social visions contended, bargained, and survived" (Hartog 1985, 934–35) and avoids "a more rigorous analysis of socio-legal field dynamics" during the process of legal institutionalization (Burchardt, Yanasmayan, and Koenig 2019, 4).

In this article, I connect the historical study of jurisprudence to the social-scientific literature on institutionalization and develop an account of legal institutionalization as a multi-stage process of domain formation and meaning making. New concepts can enter the legal field from adjacent domains of public life; spawn competing schools of thought as legal professionals contest their meaning and applicability in American jurisprudence; and become settled when one such school becomes consecrated and alternative interpretations are marginalized. Because this process—from the introduction of new concepts into the legal imagination to the settling of their distinctly legal meaning—is shaped by the gradual dissemination of contested ideas and the piecemeal emergence of schools of legal thought in state and federal courts, legal institutionalization cannot be reduced to a handful of landmark decisions.

In particular, I demonstrate that the articulation of a state-centric approach to privacy stood at the end of three periods of legal institutionalization. Before the turn of the twentieth century, during a period of initial judicialization, the leading exponents of a right to privacy were not judges and legal scholars but, rather, journalists, who highlighted the intrusive potential of mass media and tabloid photography, articulated concerns about the privacy of personal communications, and helped to connect the language of privacy to the domain of the law. Between 1900 and 1920, during a period of intra-legal competition, privacy began to diffuse into American jurisprudence as judges drew on a multitude of sources and legal traditions to defend and contest privacy as a legally enforceable right but without establishing the primacy of any single approach. And after 1920, during a period of judicial consolidation, constitutional interpretations and state-centric applications of the right to privacy became dominant as legal professionals and the US Supreme Court adapted the language of privacy and selectively mobilized the power of law to confront the growing reach of the American state. Across these three periods, legal meaning became settled, privacy jurisprudence became tied to constitutional law, and state-centric applications of privacy were consecrated by the federal judiciary. The "modern legal fact" of privacy still bears the marks of the judicial and interpretive struggles from this disjointed legal history (Jenness 2007).

In developing this argument, I also offer a methodological contribution. Processes of institutionalization and the "ideological concretion" of abstract concepts like privacy are important topics across many social-scientific subfields, yet it is not always clear how they should be studied empirically (Geuss 2001, 11; Anthony, Campos-Castillo, and Horne 2017). Legal histories frequently rely on the analysis of landmark cases and law review essays without questioning which facts and whose perspectives are excluded from these sources. I show that a network analysis of legal citations can be combined with close qualitative readings of historical texts to produce processual accounts that identify consequential shifts in legal interpretation and judicial practice without glossing over the complex struggles that produced them. Unlike analyses that focus exclusively on the contributions of legal elites, this approach also makes it possible to identify disagreements and abandoned developments that are otherwise written out of legal

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history and excluded from the genealogy of legal precedent. I first identify distinct schools of legal thought through a network analysis of "right to privacy" cases between the 1880s and the 1920s. These cases did not necessarily affirm the existence of such a right, but they began to give shape and substance to an otherwise amorphous idea. I then separately examine several periods of legal institutionalization through a qualitative analysis of historical texts. This allows me to study the interpretive positions of different groups and thereby to situate the legal evolution of privacy within macro-social environments and the wider American legal field.

I highlight two implications of this work in the concluding discussion. First, American political culture and jurisprudence are now strongly oriented toward the Constitution as an "American creed" that organizes social relations and national identity on the basis of fundamental rights and through the careful balancing of private, state, and federal interests (Myrdal 1944, xlvi). But, until the 1920s, the Constitution and the question of state power played lesser roles in US jurisprudence (Rabban 1997; Rana 2015). Uncovering competing sources of legal authority can thus draw attention to the "implicit pluralism of American law" that has become obscured by the subsequent hegemony of constitutional thought (Hartog 1985, 935). Second, the 1920s and 1930s were a period of American history when "the economy" came to be seen as an independent domain that could be conceptually distinguished from the domain of the state and subjected to the self-regulating forces of the market rather than the legal regimes that circumscribed the exercise of state power (Mitchell 1990). The legal institutionalization of privacy as a state-centric concept is a part of this larger pivot, helping to lay the cultural and legal foundations for the politics of laissez-faire during the twentieth century.

LEGAL ELITES AND THE "INVENTION" OF THE RIGHT TO PRIVACY

Legal historians frequently trace the right to privacy back to a single *Harvard Law Review* essay, written in 1890 by Samuel Warren and Louis Brandeis (1890). The authors sought to protect the "inviolate personality" of the individual and "the sacred precincts of private and domestic life" against undue intrusions and thereby "meet the wants of an ever changing society" in a way that neither libel law nor property rights and copyright could (Warren and Brandeis 1890, 195, 213; Beaney 1966; Palmer 2011). Their essay has become enshrined in American legal thought as one of the most-cited law review articles of all time (Shapiro and Pearse 2012), and it is now understood as a landmark intervention that "gave birth to" US privacy jurisprudence, added "nothing less than . . . a chapter to our law," laid "the foundation of American privacy law," and marked the "inception" of the right to privacy (Glancy 1979, 1; Richards 2010, 1295–96; Palmer 2011, 70; see also Kramer 1990; Bratman 2001).

The original essay had proposed that "social and domestic relations be guarded from ruthless publicity" by advertisers and the tabloid press through new legal remedies (Warren and Brandeis 1890, 214). But, by the late 1920s, Brandeis—now a US Supreme Court justice—had also begun to tie the right to privacy to the Fourth and Fifth Amendments and pushed for the application of privacy law to disputes over

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the exercise of state power. In his dissent to the Supreme Court's 1928 decision in *Olmstead*, Brandeis advocated for an expansive reading of constitutional amendments and the subsumption of the right to privacy under their enlarged umbrella. He suggested that the passage of time had "[brought] into existence new conditions and purposes" that required a reassessment of legal doctrine, and he argued that "the makers of our Constitution conferred, as against the Government, the right to be let alone."[4] The argument failed in 1928. Yet, in the eyes of many legal historians, the *Olmstead* dissent marks the advent of privacy claims against the American state in the federal judiciary (Prosser 1960; Shils 1966; Solove, Rotenberg, and Schwartz 2006; Richards and Solove 2010). As Justice Felix Frankfurter would later argue in a dissent to *Harris v. United States*, Brandeis's expansive interpretation of the Fourth Amendment reflected "an indispensable need for a democratic society" that was by the middle of the twentieth century "consistently and carefully respected" by courts and Congress.[5]

American privacy law was then further restructured through the work of William Prosser, who authored the standard hornbook on American tort law and served as the dean of the Berkeley School of Law at the University of California from 1948 to 1961. Observing that the "prodigious breadth" of privacy jurisprudence risked "swallowing up and engulfing the whole law of public defamation," Prosser (1960, 401) aimed to impose order upon an unruly legal field by confining privacy claims against private persons and non-state entities to four narrowly defined torts (Palmer 2011, 82). Starting in 1941 and continuing through a series of publications until his death in 1972, he proposed to restrict such claims to intrusions into a person's private affairs, the disclosure of personal information, the depiction of a person in a false or misleading light, and the appropriation of a person's likeness. But Prosser remained deeply skeptical of the ambitious language about "inviolate personalities" that characterized the work of Warren and Brandeis (1890). By constructing a set of relatively narrow and rigid categories—and by invoking property rights rather than personality-based language—he "stripped privacy law of any guiding concept to shape its future development" and ensured that it languished in "a doctrinal backwater" of American jurisprudence (Richards and Solove 2010, 1890, 1894; see also Kalven 1966). Even as the right to privacy became explicitly recognized by the US Supreme Court as an important element of due process and a possible guardrail against executive overreach, Prosser's work curbed its significance as a tool for managing social relationships and personal autonomy more generally.

So goes the conventional story about early American privacy jurisprudence. Underlying the focus on exalted legal scholars is a view of legal institutionalization as an elite project. Such elites can assert a "monopoly of the right to determine the law" and decisively shape the content of legal doctrine because they occupy key positions within the legal field and because this field is "relatively independent of external determinations and pressures" (Bourdieu 1986, 816–17; Dezalay and Madsen 2012). Their interventions therefore structure the evolution of jurisprudence "from the top down" by shaping common interpretations of the law and displacing local forms of legal

4. *Olmstead*, 277 U.S., 478 (Brandeis J dissenting opinion)

5. *Harris v. United* States, 331 U.S. 145 (1947) (Frankfurter J dissenting opinion). For a comprehensive list of congressional acts that regulate the search and seizure of personal papers based on the Fourth Amendment, see the appendix to *Davis v. United States*, 328 U.S. 582 (1946).

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reasoning (Mertz 1994, 1251). They also anchor communities of legal thought, which can disseminate the ideas of legal elites to a wider audience, elevate their influence, and ensure the subsequent consecration of individual thinkers as canonical figures (Merton 1979; Latour 1993). Indeed, the prominence afforded to Warren and Brandeis's (1890) intervention is at least in part an artifact of legal histories written during the second half of the twentieth century, when their work was canonized despite having had only a tenuous hold on American jurisprudence during earlier decades (Harvard Law Review Association 1929; Moreland 1931).

To be clear, legal elites are not unencumbered by professional hierarchies and free from extrajudicial influences (Shapiro 1981; Segal and Spaeth 2002; Solove, Rotenberg, and Schwartz 2006; Gajda 2007). In the case of Warren and Brandeis, who were well integrated into Boston's upper-class social scene and occasionally attracted the unwanted attention of local tabloid publications, the articulation of a right to privacy was arguably also part of a "broader legal strategy employed by late nineteenth-century elites to protect their reputations from the masses in the face of disruptive social and technological change" (Richards and Solove 2010, 1892). But precisely because the arguments of legal elites may reflect their unique social position, a preoccupation with interventions by prominent scholars risks being a poor guide "to what was happening to privacy at the turn of the twentieth century" more generally (Pember 1972; Glancy 1979; Igo 2018, 40). While Warren and Brandeis's (1890) essay marks the "usual starting point" for studies of privacy law in the United States, it is not necessarily the "correct" one (Beaney 1966, 253; Richardson 2017).

PRIVACY AND MACRO-SOCIAL CIRCUMSTANCE

A second strand of scholarship treats the law as an indicator of prevalent cultural and political values (Durkheim 1984; Horwitz 1992; Halliday and Karpik 1998; Wiecek 2001; Haney Lopez 2006) and as a resource that can be strategically deployed by social movements (McCarthy and Zald 1977; Zemans 1983; McCann 2006). It focuses less on legal elites than on the macro-social contexts and conditions of possibility into which schools of legal reasoning are embedded (Foucault 2002; Allen 2003, 192). Studies in this tradition have treated shifts in the governance of private spheres and personal data as reflections of larger socio-technological transformations of American society that elevated the private automobile as a status symbol and an essential piece of personal property (Seo 2015); increased the government's reliance on computational databases and new surveillance technologies (Shils 1966, 305; Rule et al. 1983); and spawned social movements in pursuit of sexual liberation and gender equality (Igo 2018). Caught in these shifting postwar currents, the US Supreme Court reaffirmed that personal communications fell under the privacy protections of the Fourth Amendment, applied the logic of privacy to disputes about sexual self-determination and reproductive decision making, and thereby brought privacy jurisprudence into line with demands for gender equality and "pervasive concerns in the 1960s about homosexuality and its policing" (Sklansky 2008, 875). Decisions like *Griswold v. Connecticut* in 1965[6] and *Katz v.*

6. *Griswold*, 381 U.S.

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United States in 1967[7] therefore marked the "first step in a broader recalibration of privacy in American society" and added "a new facet of constitutional meaning" after decades of relative juridical stagnation (Igo 2018, 160; Dixon 1965, 197).

This second perspective makes several important contributions to the study of American privacy law. It understands privacy norms as "[products] of social development" with culturally and contextually specific meaning (Shils 1966, 287; Moore 1984, 268; Kasper 2005; Cohen 2013; Igo 2018).[8] It also draws attention to the moralized, gendered, and racialized connotations of such norms in the United States, which inextricably fused debates about the scope and substance of privacy claims to larger discussions of the American social order and the legally sanctioned domination that sustains it (Roth 1999; Browne 2015; Citron 2019, 1905). In addition, the second perspective highlights the importance of extrajudicial actors. Because many social movements exhibit a "rights consciousness"—an understanding of formal rights as key ingredients and resources in the restructuring of social relations and power dynamics (Ewick and Silbey 1998; Marshall 2003; McCann 2006, 22)—activists may decide to pursue change through the courts and to articulate socio-political grievances in explicitly legal terms (Epp 1998; Eskridge 2002; Balkin 2005). In those instances, the evolution of legal concepts is not reducible to landmark interventions by legal elites but is significantly shaped by grassroots pressure that shifts the space of legal possibility.

Yet this second perspective cannot adequately explain the institutionalization of the right to privacy as a state-centric right for two reasons. First, the focus on the latter half of the twentieth century is too recent. State-centric conceptions of privacy were already apparent in the US Supreme Court's 1914 decision in *Weeks v. United States*, which held that the warrantless search of a person's residence was unconstitutional,[9] and in the court's 1932 insistence in *United States v. Lefkowitz et al.* "to safeguard the right of privacy" through a liberal interpretation of the Fourth Amendment.[10] A crucial phase of legal development therefore occurred well before the rise of computational data processing and the sexual revolution. The debates of the 1960s and 1970s were predominantly about the scope of privacy claims within the state-centric tradition and the legal justification of those claims, not about an initial pivot from the sphere of social relations and mass media toward the informational privacy of citizens against the American state.

The second shortcoming is conceptual and especially pertinent to the central claim of this article—namely, that the postwar perspective under-appreciates the processual nature of legal institutionalization. It asserts that new interpretations of privacy became institutionalized when they reflected an emerging societal consensus. But just because an idea resonates widely does not mean that it becomes anchored in legal

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

8. Historians have made similar arguments about earlier periods. Hannah Arendt (1958) sees the growing importance of the private sphere in the nineteenth century as a consequence of the division of labor, which increased social interdependence and leveled social difference, while Richard Sennett (1974) and Edward Shils (1966) root the growing valuation of private life in the psychological anxieties of the industrial era, the decline of religiosity, and the growth of cities (which increased residential density and the possibility of neighborly surveillance).

9. *Weeks v. United States*, 232 U.S. 383 (1914).

10. *United States v. Lefkowitz et al.*, 285 U.S. 452, 453 (1932).

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discourse or the routines of judicial practice (Grattet, Jenness, and Curry 1998; Colyvas and Jonsson 2011). Instead, social scientists commonly understand institutionalization as a complex process marked by prolonged contestation (Douglas 1986; Lawrence, Winn, and Jennings 2001; Fligstein and McAdam 2015; Song 2020) and by periods of repetition and habituation that fall between transformative events (Sewell 1996; Barley 2008). Such processes of institutionalization integrate new interpretive schemes "into existing modes of reproduction" and thereby ensure their recognition as natural, appropriate, or legitimate (Colyvas and Jonsson 2011, 39). For example, Peter Berger and Thomas Luckmann (1966) show that meaning becomes a shared reality when it is recognized as a factual representation of the world and internalized through repeated experiences. William Felstiner, Richard Abel, and Austin Sarat (1980) use an analogous processual logic to explain why some injurious experiences become legal disputes while others do not. They propose a theory of multi-stage transformation rooted in social psychology that leads from the "naming" of an experience (that is, its recognition as noteworthy and deleterious) to "blaming" (that is, the assigning of responsibility to some third-party agent) and "claiming" (that is, demanding a legal remedy). Crucially, each of these stages can transform the content and framing of a dispute in consequential ways. The eventual outcome is the product of a longitudinal process, not a straightforward response to the initial offense. Neil Fligstein and Doug McAdam (2015) develop a similar multi-stage model to explain the institutionalization of governance norms, although their work is rooted in Bourdieusian field theory rather than social psychology. They argue that exogenous shocks can lessen the acceptance of formerly hegemonic ideas and facilitate the migration of novel concepts across professional and cultural boundaries into proximate domains of social life. Such shocks are commonly followed by a period of ambiguity during which different groups wrestle for interpretive control since there is no agreed-upon authority that can sanctify a "correct or legitimized vision of the social world" (Bourdieu 1986, 817). The eventual emergence of such authorities can then result in the consecration and institutionalization of new perspectives.

I extend this literature to develop a processual account of legal institutionalization, applying its key insights to the historical evolution of US privacy jurisprudence during the early twentieth century. Such a perspective can help to specify the contributions of different constituencies to the evolution of legal concepts, recover struggles over legal meaning and judicial decision making that are obscured by a focus on landmark cases, and thereby demonstrate the distinct legal "career" of the right to privacy in American jurisprudence (Phillips and Grattet 2000). Specifically, I treat the institutionalization of privacy as a state-centric right as a process that can be empirically separated into three phases.[11] Along the way, it became stripped of ambiguous or competing interpretations and was integrated into the routine operations of American jurisprudence. It evolved from a relatively capacious idea into a clearly defined and tightly bounded legal concept or, as Valerie Jenness (2007) puts it, a modern legal fact.

11. As ideal-typical constructs, such phases are meaningful groupings that reflect empirically observed patterns, but they are also heuristic devices that impose conceptual order on the continuum of social experience.

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DATA AND METHODS

I employ two complementary analytical strategies to retrace the institutionalization of the right to privacy in US jurisprudence. First, I construct a legal citation network to identify longitudinal patterns and emerging schools of legal thought. This allows me to understand the right to privacy as part of a genealogy of case law, and it enables me to identify commonalities in judicial interpretation through shared precedents. I begin with a dataset of 1,025 state and federal cases that discussed privacy in majority opinions, concurring opinions, or dissenting opinions between 1870 and 1930, aggregated from the Nexis Uni database of digitized historical legal records. The selection of this time frame is motivated by two considerations. First, the late nineteenth century has been recognized as a period of American history when the idea of privacy first emerged as a salient topic of public and political discourse (Shils 1966; Seipp 1978; Palmer 2011). Second, scholars have documented a growing concern with the routine exercise and legal limits of American state power during the 1920s and 1930s (Wiebe 1966; Rabban 1997; Seo 2015; Igo 2018). Focusing on the intervening decades makes it possible to dissect the evolution of privacy jurisprudence in its early stages and during a period of significant social and political change in the United States.

The initial dataset includes cases from the US Supreme Court, circuit courts, state supreme courts, and state courts of appeal about the right to privacy as well as other cases in which judges merely mentioned such a right without explicitly framing it as a topic of judicial concern and without articulating any claims about its legal status, meaning, applicability, or genealogy. I thus restricted my analysis to 146 cases that directly engaged with the right to privacy (sometimes also called the "right of privacy").[12] In this article, I use the term "legal opinions" as a shorthand for the truncated dataset of 146 cases, which represents one of the most comprehensive compilations of legal opinions about the early decades of American privacy jurisprudence. I then manually mapped out a citation network that includes all 146 cases ("egos") as well as any other case, constitutional amendment, statute, legislative act, or law review essay that was cited as precedent for the right to privacy by judges in their written opinions ("alters"). The language of egos and alters is borrowed from social network analysis, where "ego" refers to focal nodes in a network and "alters" refers to any additional nodes that are directly connected to such egos.

Implicit in this networked approach is a recognition of the importance of precedent in American jurisprudence. Such precedents "are used as tools to justify a certain result as well as serving as the determinants of a particular decision" —that is, judicial practice requires that judges position their decisions in relation to the existing body of case law (Bourdieu 1986, 832). Lower-court judges thus tend to be oriented toward the "casuistry of concrete situations" (824). Instead of approaching disputes as instantiations of general legal principles, they focus on the articulation of retrospective genealogies that connect contemporary disputes to prior judicial traditions and thereby present

12. Judges occasionally included extended quotes about privacy jurisprudence from existing opinions, instead of providing their own formulations. I include these cases in the dataset if the quoted passages directly contributed to the judges' legal reasoning. Replicating the analyses without these cases results in networks that are smaller and less dense, but the exclusion has no impact on the network's two-cluster structure or the thematic distribution of cases across the two main clusters.

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the piecemeal articulation of justice as the "principled interpretation of unanimously accepted texts" (818).

I excluded cases that were cited only for procedural reasons—for example, to establish rules of evidence, legal standing, or jurisdiction. The resulting network is a useful heuristic device that allowed me to identify aggregate patterns and to specify connections between emerging interpretations of privacy and established legal precedents. It is composed of 677 nodes—146 egos and 531 alters—and 1,099 citation ties. I then calculated two network parameters: modularity and eigenvector centrality. Modularity Q is a commonly used measure of global network clustering, defined as the ratio of the total number of ties within a cluster to the total number of ties in the entire network. I obtain modularity scores through a two-step calculation that first uses a random walk algorithm to identify clusters within a larger network and then takes the assigned cluster membership of each node to calculate Q (Csardi and Nepusz 2006). Eigenvector centrality scores are calculated separately for each node, with higher scores indicating that a node is connected to other influential nodes. Simply put, eigenvalue centrality allows researchers to identify the most important nodes in any given network (Bonacich 1972).[13] With λ as the graph's eigenvalue and $a_{i,k}$ equal to 1 if node i is connected to node k, and 0 otherwise, the eigenvector centrality C_i of node i is given by:

$$C_i = \frac{1}{\lambda} \sum_{k \in V} a_{i,k} C_k$$

In a second analytical step, I supplemented this formal network analysis with a qualitative examination of historical legal opinions, law review essays, and newspaper articles. For each node in the network, I recorded the year of adjudication and its thematic context (in the case of constitutional amendments or statutes, I used the year of ratification). For example, the decision in *Roberson v. Rochester Folding Box Co.* is coded as "1902" (the year it was adjudicated) and as "advertising" (to identify the thematic context of the dispute).[14] I developed the thematic coding scheme through an iterative process. First, I coded all 146 egos as well as 100 additional alters to obtain an initial list of thirty-four thematic categories. After merging categories that closely resembled each other—like "advertising" and "marketing"—I recoded each case and all additional alters based on a final eighteen-category coding scheme.[15] For each of the 146 egos in the network, I also recorded two additional qualitative data points. I have noted whether privacy claims in each dispute were directed against public entities (that is, government agencies or law enforcement) or against private companies (for example, advertising agencies, publishers, or private sector employers), and I also identified whence judges derived a distinct "right to privacy," if possible. Because judges did not always explicitly state its assumed origin, it was sometimes impossible to determine unambiguously whether they considered the right to privacy to be a product of common law, natural

13. The logic of eigenvector centrality also underlies Google's PageRank search algorithm.

14. *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538 (1902).

15. I replicated my analysis using the granular initial coding scheme and found no substantive differences. For example, cases coded as "advertising" have the same median year of adjudication as cases coded that I had originally coded as "marketing." This suggests that key findings were robust to the merging of similar coding categories.

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law, case law precedent, constitutional law, or derived from some other legal document. For example, in *Frewen v. Page*, a Massachusetts court found that innkeepers had to respect the "right to privacy" of their patrons and could not intrude into their rooms unannounced.[16] Yet the court's opinion gave no indication as to the origin of such a right or its legal justification. In total, I was able to identify a stated origin in seventy-eight of the 146 cases.[17]

I also used a qualitative approach to analyze essays about privacy jurisprudence from 395 issues of fifteen prominent law reviews and law journals. Included in this dataset are texts from the *American Law Register*, *American Law Register and Review*, *American Law Review*, *American Lawyer*, *Central Law Journal*, *Columbia Law Review*, *Green Bag*, *Harvard Law Review*, *Kentucky Law Journal*, *Medico-Legal Journal*, *Michigan Law Journal*, *Minnesota Law Review*, *Northwestern Law Review*, *Virginia Law Register*, *Western Reserve Law Journal*, and *Yale Law Journal*. These data, which come from the Hein Online database of legal periodicals, allowed me to examine discursive contributions from legal scholars alongside judges' opinions. The selection of legal periodicals was negotiated with the data provider, which agreed to provide a customized dataset of legal periodicals for this research. Hein Online staff compiled an initial list of available titles. I then performed an exploratory analysis of eighty-seven law review articles to identify fifteen periodicals that may have published relevant articles during the period of interest and obtained the full digitized archives. In my analysis, I identified each essay in the full dataset that mentions a "right to privacy" or "right of privacy" and performed an in-depth/qualitative reading, recording summaries of the arguments in a separate dataset. Finally, I relied on digitized newspapers from the "Chronicling America" collection of the Library of Congress—which has grown to twenty million pages of digitized historical newspaper text, compiled from archival collections across the United States—to situate legal debates about privacy within a wider social environment.[18] I identified 3,001 articles from local and national publications that discuss the "right to privacy" between 1870 and 1930, stratified the dataset by decade, and sampled one hundred articles from each decade for the same qualitative analysis.

TWO SCHOOLS OF LEGAL THOUGHT

I now present a macroscopic overview of six decades of legal evolution that leverages the central role of precedent in American jurisprudence to document the staggered emergence of two schools of legal thought about the right to privacy. Judges who

16. *Frewen v. Page*, 238 Mass. 499 (1921).

17. Judges may have omitted references to the origins of the right to privacy from the remaining sixty-eight cases because they were hesitant to commit to any particular school of thought, because they considered the question of ultimate origins to be insignificant to their legal reasoning, or because they assumed such origins to be self-evident. The following analysis is agnostic to these different possibilities. In a supplementary analysis, I also restricted the citation network's egos to the subset of seventy-eight cases that include a statement of origin. This truncated network is necessarily smaller than the network presented in Figure 1, yet it has the same two-cluster structure and the same distribution of state-centric and business-centric cases across clusters.

18. Details about the Chronicling America collection are available through the Library of Congress at https://chroniclingamerica.loc.gov/about/.

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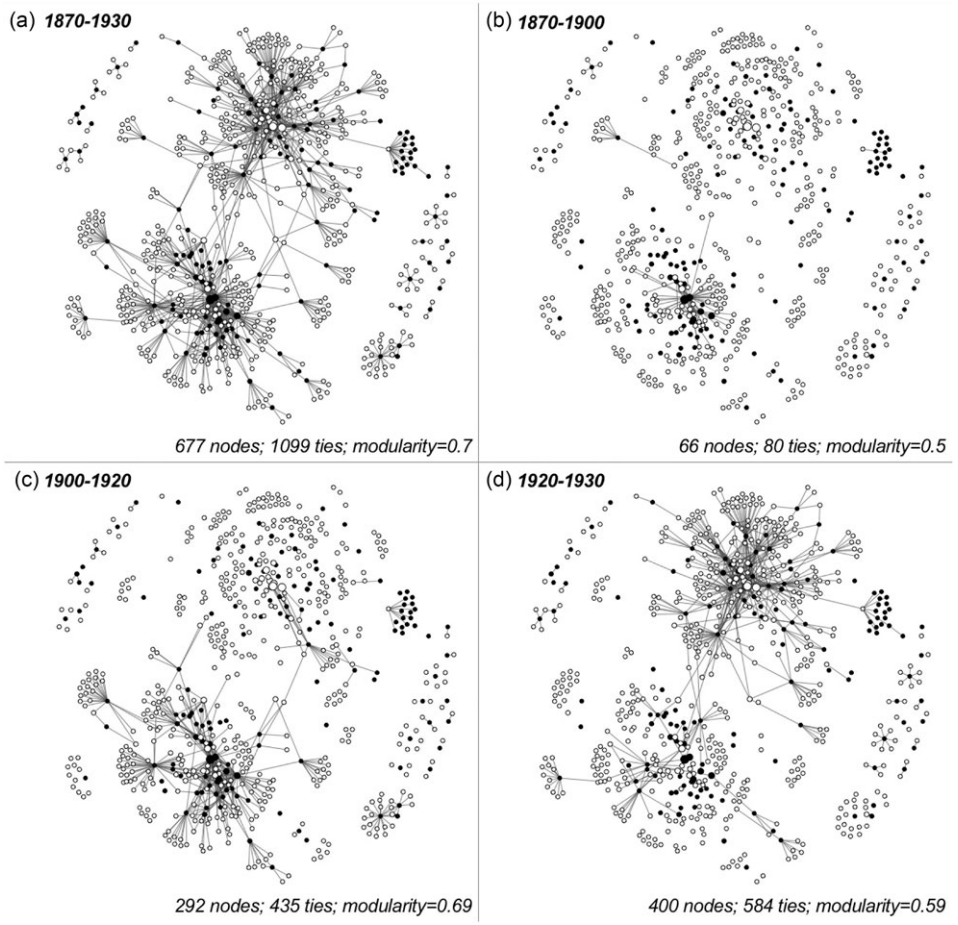

FIGURE 1.
Legal citation networks of 146 state and federal cases that discussed the right to privacy ("egos"; nodes shown with black filling) and 531 cases, statutes, laws, and publications that were cited as precedent ("alters"; nodes shown without filling). Section 1A shows the total citation network; sections 1B, 1C, and 1D show time-varying networks. Network ties represent citation links, mapped with the Fruchterman-Reingold algorithm in the iGraph R package. Credit: Nexis Uni.

affirmed or dismissed alleged privacy violations as viable legal grievances did not push into a conceptual void. Through the citation of precedent, they linked the right to privacy to an existing repertoire of legal concepts and cases and thus rendered it intelligible in the specialized language of the law. The networks in Figure 1 depicts these citation links in their entirety (section 1A) and separately for three successive periods (sections 1B, 1C, and 1D). They are marked by two primary clusters—that is, two groups of nodes with dense intra-cluster links and comparatively scarce inter-cluster links—representing different schools of legal reasoning that linked privacy into separate legal genealogies. Coexisting alongside these two clusters are multiple egos with scarce citations and no ties to the rest of the citation network; these represent cases that discussed the "right to

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privacy," especially in labor disputes or disputes over the use of medical data, without linking it to established legal precedent. The clustering observed for the entire network ($Q = 0.7$) is toward the upper bound of modularity scores for empirically observed social networks (Newman 2006). Modularity scores for specific periods are lower and suggest that legal discourse within each period was less fragmented than legal discourse across multiple periods. One exception is the period between 1900 and 1920, which has a modularity score ($Q = 0.69$) similar to the overall network and indicates that legal discourses during this interim period were more fragmented than during the phase of initial judicialization before 1900 and during the 1920s, when legal meaning had started to become settled.

The two clusters differ in several substantive dimensions. First, they reflect separate thematic foci of legal disputes. Cases in the bottom cluster of the networks shown in Figure 1 predominantly adjudicated disputes about new technologies like film photography and emerging mass media. For example, cases like *Roberson v. Rochester Folding*, *Schuyler v. Curtis*, and *Pavesich v. New England Life Insurance*—the three cases with the highest overall eigenvector centrality scores—all addressed the unauthorized use of photographs.[19] The cluster also includes Warren and Brandeis's (1890) essay, which became an occasional reference (although not the most prominent one) in disputes about photography and newspaper publishing. In contrast, cases in the top cluster primarily addressed the privacy of the home and personal information. This cluster includes cases like *United States v. Kaplan*, *State v. Owens*, and *State ex rel. King v. District Court*, which dealt with police searches for illicit liquor during the Prohibition era, as well as the US Supreme Court's 1887 decision in *Boyd v. United States*, which held that unreasonable searches and the compulsory production of personal documents were prohibited by the Fourth Amendment.[20]

Second, the two clusters identify different targets of privacy disputes. Cases in the bottom cluster focused predominantly on alleged violations by tabloid newspapers, book publishers, advertising agencies, and theater companies.[21] In total, 60 percent of cases against private entities appear in the bottom cluster, while only 19 percent appear in the top cluster (the remaining 21 percent appear in neither of the two primary clusters). In contrast, cases in the top cluster focused primarily on privacy violations by the American state, including local police forces, federal law enforcement, the Internal Revenue Service, the Bureau of Prohibition, and the Census Bureau. In total, 73 percent of state-centric privacy cases appear in this cluster, while only 16 percent appear in the bottom cluster.

Third, the two clusters capture staggered periods of legal evolution. The bottom cluster is mainly populated by privacy disputes from the 1900s and 1910s, which often cited English common law and American jurisprudence from the 1870 and 1880s as precedents. The most central nodes in this cluster are cases like *Schuyler v. Curtis*

19. *Roberson*, 171 N.Y.; *Schuyler v. Curtis*, 147 N.Y. 434 (1895); *Pavesich v. New England Life Insurance Co.*, 122 Ga. 190 (1905).

20. *United States v. Kaplan*, 286 F. 963 (S.D. Ga., 1923); *State v. Owens*, 302 Mo. 348 (1924); *State ex rel. King v. District Court*, 70 Mont. 191 (1924); *Boyd v. United States*, 116 U.S. 616 (1886).

21. The exception are several cases about the use of so-called "rogue gallery" photographs by local police agencies, which tended to cite prior cases about the illicit use of photographs by advertisers and publishers rather than cases that specifically addressed privacy violations by the police.

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and *Roberson v. Rochester Folding*.[22] Both cases were controversial within American jurisprudence—*Schuyler* because it endorsed a limited right to privacy until death and *Roberson* because it denied the existence of such a right—and both became important reference points for other judges and examples of the fragmented state of privacy jurisprudence after the turn of the twentieth century. In contrast, the top cluster includes privacy jurisprudence from the 1910s and 1920s that referenced more recent case law and constitutional amendments rather than nineteenth-century common law. The most central nodes in this cluster, measured by their eigenvector centrality scores, are cases about searches for illicit liquor by local law enforcement and the Bureau of Prohibition (like *State v. Aime*), police raids on private apartments (like *Weeks v. United States*), and searches for drugs and weapons (like *People v. Jakira*).[23] Such cases rooted privacy claims in constitutional amendments and suggest a pivot of legal reasoning from case law precedent toward constitutional legal doctrine.

Fourth, privacy disputes in the bottom cluster were overwhelmingly adjudicated in state courts, whereas disputes in the top cluster were more likely to be adjudicated at the federal level and before the US Supreme Court. In total, 6 percent of cases in the bottom cluster were federal, compared to 15 percent in the top cluster.

I also have mapped the distribution of different modes of legal reasoning over time. For each of the 146 ego nodes in the network above, I identified the thematic focus of the dispute ("issue"); the origin from which judges derived the right to privacy if explicitly mentioned ("origin"); and the entity that was alleged to have violated this right ("target"). In Figure 2, the results are arranged from top to bottom by median year of adjudication for each row, which is indicated by a dashed line. They show that privacy jurisprudence remained rare until the end of the nineteenth century. During the first two decades of the twentieth century, the right to privacy was then most commonly discussed in cases that focused on the use of photographs and the publication of personal information in newspapers and advertisements. Such cases drew on established legal doctrines and common law precedent to assess whether a distinct right to privacy existed and whether a violation of such a right had occurred. After 1920, alleged violations by government organizations became increasingly central, and searches of private residences, luggage, and cars—often conducted to enforce Prohibition laws after the passage of the Eighteenth Amendment in 1919—emerged as salient topics. These two approaches were separated by a decade of juridical development. The median date of cases that alleged privacy violations by private entities (n = 80) occurred in 1913, while the median year of cases that alleged violations by the state (n = 66) occurred in 1923. Cases about the use of personal data without consent by publishers and advertising agencies (n = 39) were concentrated in the 1910s, while cases about police interrogations (n = 18), anti-liquor raids (n = 24), and apartment searches (n = 18) occurred primarily in the 1920s.

How the existence of a right to privacy was established or contested also evolved as judges settled on a constitutional interpretation of privacy in the 1920s instead of deriving it from natural law or property rights. Rooted in the Fourth Amendment (the right

22. *Schuyler*, 147 N.Y.; *Roberson*, 171 N.Y.

23. *State v. Aime*, 62 Utah 476 (1923); *Weeks*, 232 U.S.; *People v. Jakira*, 193 Misc. 306 (NY Gen. Sess., 1922).

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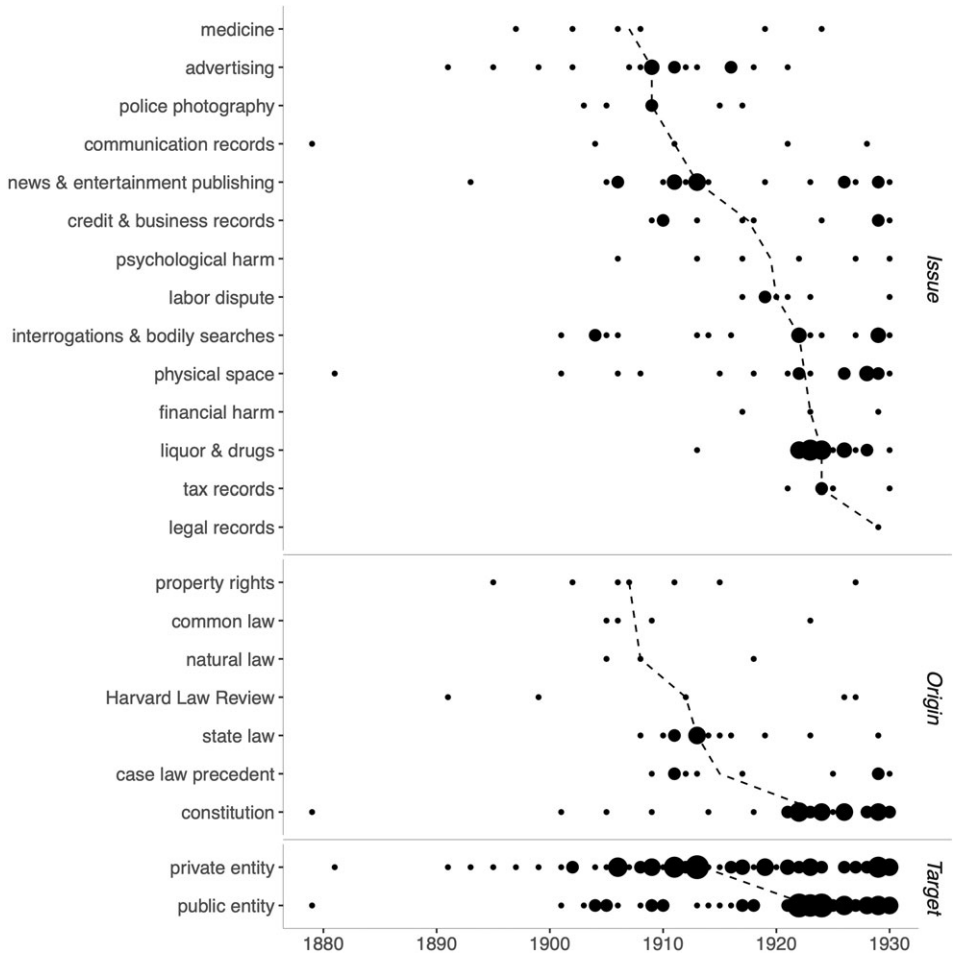

FIGURE 2.
Thematic contexts of right-to-privacy lawsuits ("issue"), legal doctrines and texts that were cited to establish an origin of the right to privacy ("origin"), and targets of right-to-privacy disputes ("target"), shown by year of adjudication. Dot sizes reflect the number of cases per year. Dashed lines indicate the median year of adjudication for each category. Credit: Nexis Uni.

of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures), the Fifth Amendment (the right against self-incrimination), and the Fourteenth Amendment (the right to due process), privacy was folded into an existing set of constitutional principles and the legal precedents that had already developed around them. The median date of such constitutional justifications (mentioned in thirty-three cases) occurred seventeen years after the median date of the property-based justifications (n = 7).[24] By 1930, constitutionalism had come to

24. Several cases in the 1910s also referenced civil rights bills passed by state legislatures and suggest that juridical developments were directly affected by the elevated significance of privacy in the political domain. I return to this point in the discussion below.

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TABLE 1.
Eigenvector centrality by period

C_i	Node	Year	Description
	Before 1900		
1.00	Schuyler v. Curtis	1895	advertising
0.52	Corliss v. E. W. Walker Co.	1893	publishing
0.43	Atkinson v. Doherty	1899	advertising
0.36	Mackenzie v. Mineral Springs Co.	1891	advertising
0.32	Marks v. Jaffa	1893	publishing
0.30	Prince Albert v. Strange	1849	English common law
0.30	Pollard v. Photographic Co.	1888	English common law
0.20	Brandreth v. Lance	1839	libel
0.20	Dixon v. Holden	1869	property claims
0.19	Warren and Brandeis/HLR	1890	law review essay
	1900-1920		
1.00	Roberson v. Rochester Folding Box Co.	1902	advertising
0.85	Pavesich v. New England Life Insurance Co.	1905	publishing
0.57	Edison v. Edison Polyform and Manuf. Co.	1907	advertising
0.51	Atkinson v. Doherty	1899	advertising
0.51	Schuyler v. Curtis	1895	advertising
0.48	Henry v. Cherry and Webb	1909	advertising
0.46	Corliss v. E. W. Walker Co.	1893	publishing
0.45	Klug v. Sheriffs	1906	property claims
0.45	Miller v. Gillespie	1917	police photography
0.42	Riddle v. MacFadden	1911	advertising
	After 1920		
1.00	State v. Aime	1923	liquor production
1.00	People v. Mayen	1922	personal papers seized
0.96	Hall v. Commonwealth	1924	liquor searches
0.89	State of Missouri v. Owens	1924	liquor searches
0.89	Weeks v. United States	1914	personal papers seized
0.89	4th Amendment		Constitutional law
0.86	Boyd v. United States	1886	personal papers seized
0.82	Gouled v. United States	1921	personal papers seized
0.77	Morse v. Commonwealth	1908	admissibility of evidence
0.74	Owens v. State of Mississippi	1923	admissibility of evidence

dominate over alternative legal doctrines, and grievances against private actors had become overshadowed by grievances against the state. Cases against private entities persisted at the state level after 1920 but disappeared almost entirely from federal jurisprudence.

Data shown in Table 1 also corroborate these findings. The table lists the top ten nodes by eigenvector centrality (egos as well as alters) for three successive periods of legal institutionalization, and it illustrates the shift from privacy disputes about the publication of photographs or details from a person's intimate life toward disputes about the exercise of state power as well as the concurrent pivot from common law precedent toward constitutional jurisprudence.

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THREE PERIODS OF LEGAL INSTITUTIONALIZATION

Legal citation networks and longitudinal analyses offer a macroscopic perspective on the uneven development of American privacy jurisprudence: First, they highlight the staggered emergence of two distinct schools of legal reasoning. Second, they document a shift toward state-centric and constitutional interpretations of privacy during the 1920s. I now dissect this development in greater detail by delineating three periods of legal institutionalization. Before 1900, during the period of initial judicialization, the language of privacy entered American jurisprudence sporadically and without significant effects on case law decisions, pushed in part by concurrent discussions about the social impact of emerging technologies. Between 1900 and 1920, during a period of intra-legal competition, judges relied on a multitude of legal doctrines and applied the right to privacy to a wide variety of legal disputes, but without agreeing on the existence of such a right, its proper scope, or its legal foundations. After 1920, during a period of judicial consolidation, the right to privacy became more deeply anchored in American jurisprudence, closely tied to constitutional law and increasingly applied to the actions of state officials.

Initial Judicialization: 1870–1900

Before the 1870s, references to privacy tended to appear in serialized non-fiction stories and novels like Charles Dickens's (1841, 294–95) *Barnaby Rudge*, in which an unannounced entry into a gentleman's bedroom became an "intrusion upon [his] privacy" that betrayed a lack of courtesy and decency and signified a careless violation of social norms. Privacy drew a conceptual circle around domestic life and helped to structure social and gender relations within the home (Flaherty 1972). It was also closely tied to notions of moral decency. Women, in particular, were commonly relegated to the so-called privacy of the home on the assumption that isolation from worldly temptations and vices would protect their innocence and allow them to act as the moral center of the family and for the family's children, although the distinction between private homes and public life was rarely as clear-cut in practice (Hansen 1997). This was a conception of privacy among peers and members of familial units that still had little to say about the relationship between individuals, governments, markets, and society writ large. However, in the waning decades of the nineteenth century, the language of privacy was increasingly adapted by journalists and applied to new technologies and mass media (Seipp 1978; Igo 2018). Connotations of domestic life and social roles did not disappear, yet they were supplemented with an informational interpretation of privacy: to be truly private implied to be secure against the unauthorized and undue exposure of one's appearance and one's written and spoken communications.

This shift occurred during a period of increasing mass media saturation and long-distance communication. The number of published newspapers tripled, and their circulation increased tenfold between 1870 and 1925 as production and distribution costs dropped; the use of photographs in printed advertisements and tabloid papers became a common phenomenon; and access to private telephone landlines multiplied after 1890 (Figure 3). In response to the proliferation of tabloid newspapers that published

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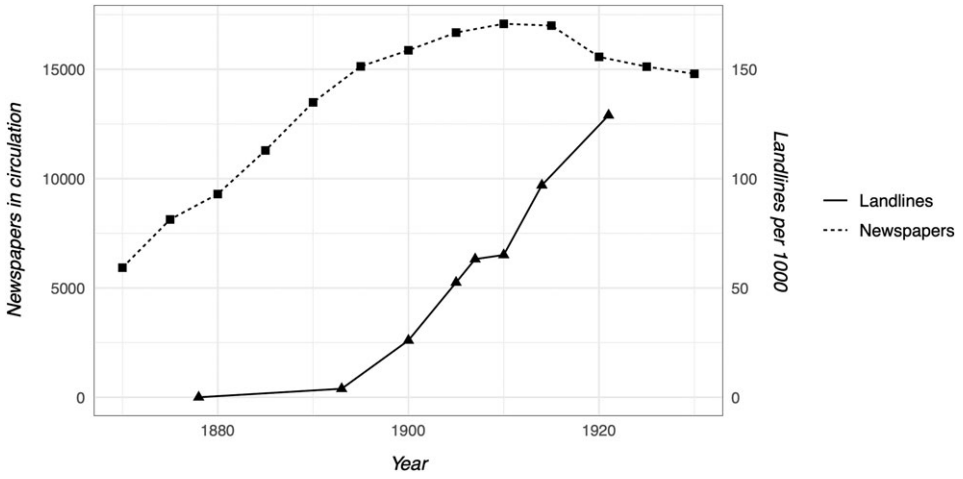

FIGURE 3.
Access to telephone landlines (per one thousand people) and number of published newspapers by year. Credit: US Bureau of the Census 1914; Dill 1928; Thompson 1947.

sensationalized and highly personalized stories about the crimes of the poor and the excesses of the rich, the *Irish Standard* (1892, 7) in Minnesota argued that "it is scarcely possible to take up a newspaper without finding in it invasions of the sacred right to privacy." This was especially true for persons who occupied public office or had otherwise established themselves as prominent citizens and who could neither "retreat within the privacy of the average citizen" (*Chicago Daily Tribune* 1884, 5) nor enjoy themselves in public "without becoming subject to the criticism of the Press" (*New York Times* 1870b, 4).

New communication technologies sparked analogous debates about the possibility of personal privacy in the modern United States. In the 1870s, amidst a series of scandals about political bribery and voter fraud, several congressmen demanded access to archived telegraph messages from the Western Union Telegraph Company to investigate political rivals and corrupt state officials (Seipp 1978). Yet the backlash was swift. As the magazine *Telegrapher* (1877, 13) concluded in 1877, "if the privacy of communicating by telegraph is to be invaded on every pretext, . . . the liberties of the people are endangered." The subsequent expansion of telephone networks only increased these concerns. "There are purchasable spies in many households," warned the *San Francisco Call* (1899, 3) in a front-page article about the use of private telephones, while the *New York Times* (1870a, 4) argued that "it is difficult to imagine how a more complete system of Government surveillance could be established" than through wiretapping long-distance communication networks. Such concerns—about the precarious nature of privacy in an increasingly interconnected society—were still conspicuously absent from American jurisprudence. Yet the sweeping social and technological changes of the late nineteenth century increased calls—in Congress as well as in the popular press—that the American legal system had to "concern itself with the privacy of the individual" to meet the challenges of the modern age (Glancy 1979, 6; Warren and Brandeis 1890).

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When judges and legal scholars used the language of privacy before 1900, it was primarily in reference to such journalistic discourses and prevalent social norms rather than in reference to judicial precedent or legal doctrine. On the one hand, adopting the language of privacy allowed judges to give legal articulation to traditional cultural attitudes and nineteenth-century moral imaginaries. When the Michigan Supreme Court affirmed a woman's "legal right to the privacy of her apartment" in 1881—the first recognition of such a right in American jurisprudence—the ruling was rooted in arguments about femininity and the moral innocence of women (Danielson 1999).[25] On the other hand, privacy gave judges a language through which they could capture emerging social anxieties far beyond the confines of domestic life, especially once those anxieties had evolved into prominent topics of public discourse. As one judge acknowledged, the rising prominence of privacy claims in American jurisprudence was a sign of the times rather than the product of deliberate legal reasoning. "The present age ... may be said to be marked with a characteristic of publicity," another legal scholar wrote in the journal *Green Bag*, "yet this very condition holds within itself the germs of a right of privacy, the returning swing for balance." This right was "unmentioned in the legal tomes" and "based upon no ancient or modern statute" (McClean 1903, 494). It had instead been pushed into the legal consciousness as Americans began to wrestle with emerging social realities and the new conditions of life around the turn of the twentieth century (*American Law Register* 1879; Harvard Law Review Association 1894).

Before the right to privacy gained a foothold in American courtrooms, extralegal debates had already elevated the salience of privacy discourses; invoked the language of privacy to address domestic relations and nascent concerns about modern life beyond the home; questioned the proper relationship between the individual and society in the modern United States; and thus spawned a set of arguments about the meaning and significance of privacy as well as an audience that was attuned to such arguments. There was not yet a developed judicial discourse about the scope or legal justification of a right to privacy—judicial discussions of privacy remained relatively rare until 1900, despite increasing journalistic attention and the publication of Warren and Brandeis's (1890) *Harvard Law Review* essay. But there was a growing constituency of scholars and judges that had become attuned to the questions raised by journalists and pundits. Jürgen Habermas (1991, 39) has posited that there is no discourse without a *Publikum*—that is, an audience that is familiar with the basic terms of a debate and invested in its outcome. The late nineteenth century had seen the emergence of such an audience within American jurisprudence that could subsequently articulate conceptions of familial and informational privacy in explicitly legal language and adapt legal schools of thought to the socio-technological questions that imposed themselves with greater urgency at the beginning of the twentieth century.

Intra-Legal Competition: 1900–20

When judges mentioned the right to privacy before the turn of the century, it was usually to dismiss it as a figment of the legal imagination or to curtail its proposed

25. *DeMay v. Roberts*, 46 Mich. 160, 161 (1881).

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application. This changed between 1900 and 1920. As one lawyer argued in 1909, the right to privacy "has of late years grown out of the unredressed residue of the law into a recognized right."[26] But this growth did not follow a singular path. Instead, the first two decades of the twentieth century saw a blossoming of competing approaches that aimed to establish a more solid legal footing for the right to privacy by grounding it in natural law, common law, evolving precedent, and state-level legislation and by applying it to the actions of advertising agencies and newspaper publishers as well as the conduct of state officials. Without a commonly recognized authority stepping in to consecrate individual legal genealogies as "correct," judges sought to seize control over the legal meaning of privacy in a series of prolonged interpretive struggles in which the common denominator was often a conflict of opinion about the scope and substance of the right to privacy.

It was not uncommon during this period for judges to frame the demand for privacy as an extension of property or libel claims. In addition to controlling material possessions, a person could also exercise control over immaterial properties like one's speech or image. Thus, one Missouri court opined in 1911 that "if it can be established that a person has a property right in his picture," those who "now deny the existence of a legal right of privacy would freely concede a remedy to restrain its invasion, for all agree that equity will forbid an interference with one's right of property."[27] Indeed, as the Wisconsin Supreme Court argued in *Klug v. Sheriffs*, "many [recent decisions] turn upon property rights or breach of trust, contract, or confidence" to carve out space for a right to privacy.[28] Linking privacy and property was not only a conceptual claim but also a strategy of legal argumentation: at a time when the judicial foothold of the right to privacy was tenuous, it allowed judges to establish grounds for legal recognition by way of analogy.

The same analogous reasoning also connected the right to privacy to libel law: alleged invasions of privacy by journalists, photographers, and advertisers were repeatedly framed by state courts as matters of libel, which provided remedies for material and reputational damage resulting from slanderous publicity. Before the language of inviolate personalities separated privacy from the legal genealogy of property rights or libel law—thereby establishing privacy violations as a distinct class of legal grievances that did not presuppose demonstrable harms or effective control—judges recognized the seizure of immaterial possessions and the infliction of psychological harm as actionable offenses and bootstrapped the rhetoric of privacy to those earlier case law traditions. As the Michigan Supreme Court put it in 1899, it was through such bootstrapping in lower courts rather than through any single intervention from above that "this law of privacy seems to have gained a foothold" in American jurisprudence.[29]

Yet case law precedent had long coexisted in American jurisprudence with an emphasis on legal doctrine. The natural law tradition was particularly prominent in the nineteenth century and became a common doctrinal reference point for privacy discussions in the early twentieth century (Pound 1924; Sternberg 1938; Brown

26. *Sanning v. City of Cincinnati*, 81 Ohio St. 142, 146 (1909).
27. *Munden v. Harris et al.*, 134 S.W. 1076, 1078 (1911).
28. *Klug v. Sheriffs*, 129 Wisc. 468, 472 (1906).
29. *Atkinson v. John E. Doherty & Co*, 121 Mich. 372, 383 (1899).

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1939; Wright 1962; Horwitz 1992). Tasked with adjudicating a dispute over the unauthorized use of a person's image in an advertisement for life insurance, the Georgia Supreme Court argued that "each individual as instinctively resents any encroachment by the public upon his rights which are of a private nature as he does the withdrawal of those of his rights which are of a public nature." A right to privacy "is therefore derived from natural law."[30] While the social and technological conditions of modern society had rendered privacy concerns more acute, the judges ruled that an affirmative reading of the right to privacy did not hinge on any recent developments. As the Kentucky Court of Appeals similarly found in *Brents v. Morgan*, "the doctrine of the right of privacy, while modern in every sense, is older than generally recognized in the opinions of the courts which we have read."[31] In 1908, judges of the Appellate Court of Indiana even drew on treatises about ancient law to highlight the long history of the right to privacy. They argued that such a right was "well recognized," "derived from natural law," and already "embraced in the Roman conception of justice."[32] By 1918, this approach had become sufficiently common to warrant the assertion, in volume 21 of the comprehensive legal guide *Ruling Case Law*, that the right to privacy "is considered as a natural and an absolute or pure right springing from the instincts of nature" (McKinney 1918, 1197).

In other rulings, the right to privacy was folded into common law rather than natural law. Summarizing *Pavesich v. New England*, the Supreme Court of Rhode Island noted the judges' assertion that "the principle of the right of privacy was well developed in the Roman law, and from there was carried into the common law, where it appears in various places."[33] And while the majority opinion in *Roberson v. Rochester*—one of the most widely cited precedents during the 1910s—denied the existence of a legally distinct right to privacy, one judge pushed for a more expansive interpretation of the common law tradition. Castigating his colleagues for a failure to move beyond the tight constraints of precedent, he argued that "it would be a reproach to equitable jurisprudence, if equity were powerless to extend the application of the principles of common law, or of natural justice, in remedying a wrong, which, in the progress of civilization, has been made possible as the result of new social, or commercial conditions."[34] Even without any established case law precedent, the twin traditions of natural law and common law provided parallel templates that were selectively invoked by judges to anchor the right to privacy more firmly in American jurisprudence and ground it more explicitly in established legal doctrine.

Growing intra- and extrajudicial support for the right to privacy also sparked legislative action. After the New York Supreme Court had declined to recognize the right in *Roberson v. Rochester*, which concerned the unauthorized use of a woman's image in advertising materials for a flour company, public outrage and sustained critical newspaper coverage compelled state legislators to pass New York's first Civil Rights Law in 1903.[35] Sections 50 and 51 established an explicit right to privacy that forbade the

30. *Pavesich*, 122 Ga. 190, 192 (1905)
31. *Brents v. Morgan*, 221 Ky. 765, 772 (Ky. Ct. App., 1927).
32. *Pritchett v. Board*, 42 Ind. App. 3, 13 (1908).
33. *Henry v. Cherry Webb*, 30 R.I. 13, 40 (1909). Samuel Hofstadter and George Horwitz (1964) make a similar argument, tracing privacy claims back to Jewish legal traditions.
34. *Roberson v. Rochester*, 171 N.Y. 538, 545 (1902) (Gray J dissenting opinion).
35. Civil Rights Law, 1903, §§50, 51, amended Laws of 1921, c. 501.

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use of "the name, portrait or picture of any living person for advertising without prior consent." In New York, unlike in other US states, recognition by political representatives in the state assembly preceded an explicitly judicial recognition by judges. Indeed, as one legal scholar argued during the lead-up to the passage of the 1903 law, "the legislature is now the only resort for citizens whose modesty and privacy may at any time be intruded upon or who may awake any morning to discover that their physical attractiveness or mental superiority has brought their face before the great world of buyers as an advertising medium" (*American Law Register* 1902, 669). But the passage of the New York law also opened up an alternative legal genealogy for the future. For the first time, courts could refer not just to general legal principles or case law precedent but treat the right to privacy as "solely the creation of statute" with "no existence independent of the statute."[36]

While it became less common for courts to reject the right to privacy outright after the criticism that followed the *Roberson v. Rochester* decision in 1902 and the passage of the New York law in 1903,[37] judges still drew on competing legal genealogies to justify and circumscribe such a right. They also continued to discuss it across a wide range of legal disputes. More than two-thirds of privacy cases between 1900 and 1920 dealt with alleged violations by non-state actors as judges adjudicated disputes over the use of photographs in advertising, the unauthorized publication of personal information in newspapers and in reviews of theater plays, eavesdropping into telephone and telegraph communications, the sharing of medical and business records, access to inheritance and divorce documents, burial practices, and access by landlords to private apartments. But amidst these cases were occasional disputes over the power of the state, in which the government generally prevailed. In Washington State, prison authorities had begun to circulate photographs of recently released inmates to local police departments to facilitate the arrest of potential recidivists. When an inmate sued and alleged that such "rogue gallery" photographs violated his right to privacy, the state's Supreme Court sided with the government.[38] In Michigan, courts likewise held that state agencies had considerable authority to determine which types of personal information the government needed to collect to protect law and order.[39] And, in Massachusetts, the Supreme Court ruled that business owners could be compelled to report employee wages to the state's labor administration since wage information should not be considered a private matter.[40]

While some courts questioned an excessive deference to the executive,[41] the successful application of privacy claims to the problem of state power remained a relatively rare phenomenon. Yet the emergence of such cases signals that judicial interpretations of privacy had begun to deform under the weight of two decades of intra-legal contestation. Moving beyond the "restricted beginnings" of privacy as a logic of domestic life and toward "a general right of protection from others," American jurists had adapted the language of privacy in the 1900s to adjudicate a growing number of claims against

36. *Wyatt v. Hall's Portrait Studio*, 71 Misc. 199, 201 (N.Y. Sup. Ct., 1911).
37. For an exception, see *Owen v. Partridge*, 40 Misc. 425 (N.Y. Sup. Ct., 1903).
38. *Hodgeman v. Olsen*, 86 Wash. 615 (1915).
39. *Miller v. Gillespie*, 196 Mich. 423 (1917).
40. *Holcombe v. Creamer*, 231 Mass. 99 (1918).
41. See, for example, *Mendenhall v. District Court*, 29 Mont. 363 (1904).

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advertisers and publishers (especially when such claims concerned the unauthorized use of one's likeness or the publication of embarrassing personal information) (Richardson 2017, 10). By the 1910s, courts had also begun to articulate a second, less prominent, school of legal reasoning that centered on disputes over the informational rights of citizens against an expanding and increasingly inquisitive American state (Koopman 2019). Despite sharing a common ancestry, these two approaches presented different visions of the institutions against whose inquests the rights-bearing individual had to be protected. Yet, even in 1920, it was uncertain which of these approaches would prevail. As shown in Figures 1 and 2, most cases still focused on the adjudication of disputes about advertising and publishing, relying on a combination of case law precedent, statutes, and legal doctrine to ascertain the basis for a legal right to privacy and to specify its proper scope.

Judicial Consolidation: After 1920

By the 1920s, technologies that had sparked initial debates about the privacy of personal communications were well established (Dill 1928; Mueller 1993; Field 2006). One in eight Americans already had a personal telephone landline, and there would soon be one in almost every household. Newspaper circulation continued to increase, but the media landscape of the United States became more settled (Dill 1928; Thompson 1947). Yet society had begun to change in other ways. The bureaucratic apparatus of the United States had grown considerably (Wiebe 1966; Skowronek 1982; Carpenter 2002; Balogh 2009), and Congress had begun to debate the legality of warrantless searches of personal luggage, cars, and apartments after the passage of the Espionage Act in 1917 and the prohibition of intoxicating liquors through the Eighteenth Amendment in 1919.[42] Partially as a response to the government's growing capacity to survey and surveil and partially in reaction to the expansion of executive authority during the First World War that had put anti-war activists into the crosshairs of US law enforcement, Progressive Era reformers began to reconsider their "prewar faith in a benevolent state" (Rabban 1997, 4). As the *Chicago Daily Tribune* (1925) opined in 1925, the most significant threats to privacy now stemmed from the overreach of zealous officials and the access they had to large-scale databases. If a police officer "sees you in an automobile," the paper argued,

> "all he needs is the license number to find out if you are the owner. He can learn, too, if you have given a mortgage on it. He can search the records and see what real estate you own and how much the mortgages on it are. He can find out how much real estate and personal taxes you pay and what you claim your personal property is worth. He can ascertain where and when you were born, what schools you attended, to whom and by whom you were married, when and why you were divorced, the time, place and cause of your death, the name of the doctor who attended you, the undertaker who buried you and the cemetery that received you. He can learn if there are any suits or judgments

42. Espionage Act, October 6, 1917, 40 Stat. 422. See, for example, *Omaha Daily Bee* 1921.

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> for or against you. He can learn what licenses you have taken out and what they cost you. And now he can find out how much income tax you pay." (8)

Legal and legislative signs of growing concerns with the American government as a potential threat to personal privacy first appeared in several Western state constitutions, which were drafted or amended by constitutional conventions during the late nineteenth and early twentieth centuries (Johnson and Beetham 2007). Washington and Arizona became the first states to write privacy protections into their respective constitutions, emphasizing that the "private affairs" of citizens were to be secure against government interference "without authority of law."[43] Such protections did not simply expand upon legislation like New York's 1903 Civil Rights Law but specifically shifted the focus of privacy claims from any "firm or corporation" toward government officials and from the use of "the name, portrait or picture of any living person" without prior consent to the collection of personal data without prior court authorization. In a society that was "searching for order" during the early decades of the twentieth century—and which still admitted several new states to the Union, each writing and ratifying its own constitution—privacy became increasingly tied up in cultural and political debates about the proper relationship between the American state and its citizenry (Wiebe 1966; Igo 2018).

The American legal field had also evolved since the turn of the century. The strong doctrinal emphasis on natural law and common law was replaced in the 1920s by a greater reliance on constitutional arguments (Horwitz 1992; Wiecek 2001; Rana 2015). In the wake of the First World War and during the Prohibition era, questions about the limits of state power and the legal remedies against state overreach rose to the forefront of legal debates, and scholars began to consider constitutional guardrails that would prevent undue interference of public officials in the so-called "private spheres" of personal life (Rabban 1997; Geuss 2001; White 2002; Novak 2008, 769). While judges had previously struggled to coalesce around a distinct right to privacy on the ground of the lack of precedents, the constitutional revolution within American jurisprudence and the increasing focus on intrusions by government officials into private lives gave judges a new language and logic through which the "right to be let alone" could be approached (Terry 1915).[44]

Amidst such changes, privacy jurisprudence began to shift away from cases against private sector organizations like advertisers, and from disputes over the use of photographs and the publication of intimate personal details, toward cases against government agencies and disputes over the collection of financial records and the searching of homes, cars, or luggage. While fewer than one-third of court cases about the right to privacy had addressed potential violations by the state in the period between 1900 and 1920, two-thirds of cases between 1920 and 1930 dealt with the use and abuse of state power. Such disputes were primarily framed by constitutional arguments rather than natural law or case law precedent in federal courts as well as lower state courts. Searches that

43. See Arizona State Constitution, 1910, Art. 2, para. 8. Several other states have since added an explicit recognition of a right to privacy to their respective constitutions, including Alaska (1972), California (1972), Florida (1978), Hawaii (1978), Illinois (1970), Louisiana (1974), Montana (1972), New Hampshire (2018), and South Carolina (1971).

44. See also *Brents v. Morgan*, 299 S.W. 967 (1927).

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resulted from the enforcement of Prohibition era liquor laws were found to be an "invasion of the rights of privacy," a potential "invasion of the right of privacy which the constitutional provision against unreasonable search … protects," and an "offense against the constitution" that ran, as the opinion in *Boyd v. United States* had put it, "contrary to the principles of a free government."[45] As the Mississippi Court of Appeals argued in 1926, "enforcement of the law against the liquor evil is highly desirable, but in doing so we must not … permit unlawful searches of private premises, and thereby destroy the sacred constitutional right of privacy of the home."[46]

As during the 1910s, this growing focus on the state did not necessarily imply tighter restrictions on the power of the executive. Some judges warned that search warrants were executed in a manner that disregarded a defendant's right to privacy,[47] observed a "startling increase in illegal searches and seizures,"[48] and issued a reminder of "the constitutional provision against unreasonable search and exemption of an accused from being a witness against himself."[49] But, in many other instances, state-centric jurisprudence facilitated rather than curtailed the assertive exercise of state power. Judges suggested that officials were not "attempting an entrance which will in any way affect the right of privacy" when they enforced the disclosure of tax and business records, and they argued that the probable cause requirements, narrowly written warrants, and the state's duty to ensure the protection of law and order provided sufficient justification for assertive interventions by government officials.[50] In these cases, state-centric privacy jurisprudence and the expanding power of the federal state were like opposing sides of a coin as judges tied privacy jurisprudence to constitutional protections while simultaneously rebalancing private rights against executive authority.

But the limited scope of privacy claims against government agencies should not detract from the significance of the underlying juridical shift: when Louis Brandeis penned his 1928 dissent to the US Supreme Court's *Olmstead* decision, state-centric approaches to privacy had already crowded out claims against non-state entities, and constitutional arguments had already begun to dominate intra-legal discussions of privacy as a fundamental legal right.[51] This rise of state-centric interpretations was not due to any single precedent established by the Supreme Court, as may be expected if legal institutionalization was a predominantly top-down process wherein federal justices imposed a selective interpretation of privacy claims on lower courts. The primary reference points throughout the 1920s (as measured by their eigenvector centrality scores) were state court decisions and the constitutional tradition itself rather than any single landmark decision by federal judges.

When the US Supreme Court explicitly considered the question of privacy *vis-à-vis* the American state, as in Brandeis's 1928 *Olmstead* dissent or in the court's 1932

45. *People v. Mayen*, 188 Cal. 237, 251 (1922); *Jessner v. State*, 202 Wis. 184, 189 (1930); *People v. Wren*, 59 Cal. App. 116, 119 (Cal. Ct. App., 1922); *Boyd v. United States* 116 U.S. 616, 632; see also *Jakira*, 193 Misc.; *People v. Bishop*, 225 Ill. App. 610 (1922); *State v. Gardner*, 249 P. 574 (Mont., 1926).
46. *Gardner v. State*, 141 Miss. 192, 195 (1925).
47. See, for example, *State ex rel. King*, 70 Mont.
48. *Knight v. State*, 171 Ark. 882, 893 (1926).
49. *Jessner v. State*, 202 Wis. 184, 189 (1930).
50. *Warner v. Gregory*, 203 Wis. 65, 69 (1930); see also *Goodman v. State*, 158 Miss. 269 (1930).
51. *Olmstead*, 277 U.S.

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Lefkowitz et al. ruling that invoked the Fourth Amendment as a means of safeguarding the right to privacy, the constitutional and state-centric tradition had already begun to displace earlier and more varied perspectives on privacy in American jurisprudence.[52] Indeed, US Supreme Court justices during this time tended to lean heavily on rulings from state courts, which had already contributed to the constitutionalization of privacy jurisprudence in the absence of clear federal precedent. The Supreme Court helped to reaffirm a state-centric and constitutional interpretation of privacy, but it did not inaugurate this shift in American legal reasoning.[53] By 1930, however, the constitutional tradition had not only crowded out earlier schools of legal reasoning but had also been consecrated by federal courts. The legal meaning of the right to privacy had become more settled, and alternative genealogies had started to recede from judicial discourse and the American legal imagination.

DISCUSSION

The judicial embrace of privacy as a state-centric constitutional right came at the end of three periods of legal institutionalization. The language of privacy was first introduced into US jurisprudence when judges and legal scholars drew on parallel cultural and public discourses about domestic privacy, adapting them to the emerging technological realities of the late nineteenth century and applying the logic of privacy to disputes beyond the confines of the family home. Second, US judges then engaged in a prolonged series of interpretive struggles that drew on competing legal traditions to defend or challenge the existence of a distinct right to privacy, to develop its legal genealogy, and to define its proper scope. During this second phase of legal institutionalization, competing schools of thought developed in state courts but without any single approach achieving discursive dominance. Third, state-centric and constitutional interpretations of privacy became dominant in the 1920s amidst shifts in the political and legal landscape of the United States and were ultimately consecrated by the federal judiciary and the US Supreme Court.

Such a processual account of legal institutionalization challenges prevailing narratives about the legal evolution of the right to privacy in two ways. First, it focuses on the gradual emergence of schools of legal reasoning, some of which were ultimately abandoned in US jurisprudence and marginalized in subsequent legal histories of privacy. Such histories remain relatively silent on intra-judicial contestation, focusing instead on landmark interventions by prominent scholars during the first half of the twentieth century or on cultural shifts during the 1960s. In a general sense, they under-appreciate the significance of interpretive struggles within the legal field and of legal institutionalization as the settling of such struggles through the imposition of conceptual order and interpretive authority. More specifically, they misconstrue the importance of landmark decisions and contributions, which are best understood as moments of consecration rather than moments of inception (Benjamin 1989; Abbott 2005; Gordon 2017): They imposed conceptual order by inscribing

52. *Olmstead*, 277 U.S.; *Lefkowitz et al.*, 285 U.S.
53. See, for example, *Harris v. United States*, 331 U.S.; *Lefkowitz et al.*, 285 U.S.; *Griswold*, 381 U.S.

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retrospective coherence into disjointed juridical traditions and by writing competing schools of thought out of legal genealogies.

Second, the processual account of legal institutionalization highlights the early twentieth century as a period of transformative change that laid the foundations for expansive readings of privacy rights during the postwar decades. Studies that focus predominantly on the 1960s and 1970s are too recent to capture interpretive struggles during this earlier period, although they can still shed light on the subsumption of reproductive rights and sexual intercourse under the umbrella of privacy and the entanglement of privacy claims with questions of gender, sexual orientation, and social class (Igo 2018, 157). Postwar privacy jurisprudence also begs a question that has thus far received little scholarly attention, placing the study of US jurisprudence into a comparative international framework and connecting postwar legal developments to prewar institutionalization. While several European countries began to pass comprehensive privacy laws in the 1970s that aimed in part to curb the informational power of corporations—such as the French Loi Informatique et Libertés and the German Bundesdatenschutzgesetz—American legislators and judges remained comparably silent about the commodification of personal data.[54] Was this simply indicative of larger trends in corporate governance during the neoliberal era or a direct consequence of the increasingly dominant state-centric tradition and the concurrent marginalization of privacy torts, thereby illustrating the path dependencies that connect the early legal institutionalization of the right to privacy to subsequent periods?

One limitation of this study is that it does not exhaustively explain why interpretive struggles produced particular outcomes. This is in line with common uses of network analysis across the social sciences, which have tended to result in richly descriptive rather than explanatory analyses (Scott 2011, 24). But could the right to privacy have been rooted in property rights if the US Supreme Court had asserted its interpretive monopoly at an earlier stage? And would privacy jurisprudence during the 1920s have followed a different course without the experience of the First World War, which sparked an expansion of government surveillance efforts and helped to turn American progressives into staunch defenders of constitutional rights (Rabban 1997, 299)? Taking the idea of path dependence seriously may suggest as much, since the sequence of events matters for the production of social outcomes (Sewell 1996; Mahoney 2000). Each phase of institutionalization is conditioned—though not exhaustively determined—by prior developments. To paraphrase Karl Marx and Friedrich Engels (1976, 72) and Felstiner, Abel, and Sarat (1980, 633), courts make their own law, but they do not make it just as they please. Future studies can seek to address this idea directly. One potentially fruitful approach is to focus on what Ivan Ermakoff (2015) has called the "structure of contingency", and to identify junctures within the process of legal institutionalization that elicited shifts in power dynamics, reoriented discursive frameworks, and thereby changed the space of legal possibility.

The findings of this study also connect to two adjacent strands of socio-legal and socio-historical scholarship that can inform future work in this area. First, the processual account of legal institutionalization sheds light on the varied foundations upon which

54. Loi Informatique et Libertés, Loi no. 78-17, January 6, 1978; Bundesdatenschutzgesetz, BGBl, Teil I no. 44 S. 2097.

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American jurisprudence has historically been based but which are partially obscured by a narrow focus on landmark decisions and by the increasing valuation of the US Constitution as a creedal document (Hartog 1985; Rana 2015). The right to privacy was initially anchored in common law and natural law, yet such references became scarce amidst the constitutional pivot of the 1920s. Seen through this lens, the legal institutionalization of the right to privacy is part of "a long historical process of constitutional elevation that began during World War I" and reshaped the legal and political landscape of the United States during the first half of the twentieth century (Rana 2015, 380). Second, the increasing entanglement of privacy with the problem of state power—what Clifford Geertz (1973) has referred to as the embedding of emerging beliefs in existing webs of meaning—highlights the "second-order effects" that can result from the settling of legal meaning (Anthony, Campos-Castillo, and Horne 2017, 262): the legal codification of the right to privacy selectively enabled and foreclosed new techniques of political and economic governance. As it became divorced from property law, closely tethered to constitutional law, and applied to disputes about the expansion of state power, questions about the informational autonomy and integrity of market participants receded into the background. It is not surprising that this happened during a period of US legal and political history when markets were increasingly understood through the logic of reciprocal economic exchange rather than the logic of rights (Mitchell 1990), with damages and redistributive payments as primary remedies for market perturbations. The growing dominance of state-centric privacy jurisprudence (which drew on arguments about individual rights and inviolate personalities rather than financial or reputational damages) thus appears as one element of the growing distinction between "the state" and "the economy" during the early twentieth century, helping to reinforce the demarcation of a transactional market from the domain of coercive power.

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