

# THE ELUSIVE CONSTITUTIONAL RIGHT TO INFORMATIONAL PRIVACY

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*Today, at any moment, many Americans are subject to having their private information stolen or otherwise used without their consent. This Article will discuss the specifics of a constitutional right to informational privacy theory, and a civil lawsuit remedy for the unauthorized governmental use of one's private information. The Fourth Amendment is the most logical constitutional source for this privacy theory; and, a governmental entity, to justify its unauthorized use of private information, must satisfy the strict scrutiny standard by showing a compelling governmental interest that cannot be satisfied by a less intrusive alternative.*

*As a part of this discussion, this Article will review the Supreme Court's substantive due process standards and show how they have changed such that the Court is less bound to a strict historical analysis of an asserted liberty interest. To further this due process analysis, this Article will review some of the Court's Fourth Amendment cases, which show that the Fourth Amendment is the most logical constitutional source to support a constitutional right to informational privacy.*

*The Article also contains a detailed analysis of the Court's major opinions in this area of the law and argues that the Court, contrary to assertions in its most recent opinion on this subject, has previously held that there is a constitutional right to informational privacy. This Article also contains a detailed discussion of federal circuit courts of appeals' opinions, which show that most federal circuit courts give a broader interpretation to the Court's precedent than the Court does itself, and that these circuit courts are providing more leadership in holding that there is a constitutional right to informational privacy. And, this Article will conclude that the broad approach that some of the federal circuit courts have taken is the preferable approach, and that the Fourth Amendment and strict scrutiny should be used to evaluate a constitutional right to informational privacy claim.*

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## INTRODUCTION

There has been an erosion of personal privacy in this country since the terrorist's attack on 9/11,<sup>1</sup> including the creation of the National Security Agency and its surveillance activities;<sup>2</sup> enhanced scrutiny at airports and other public places;<sup>3</sup> a substantial increase in the number of cameras that record many public places;<sup>4</sup> a possible recording of all of our cell phone and email conversations;<sup>5</sup> and a pervasive belief by some that most of our electronic data—including social security numbers, credit card numbers, bank records, and medical records—are subject to being hacked.<sup>6</sup> There is even a fear that our laptops, televisions, and other electronic devices, such as Amazon Echo, and perhaps Siri, are secretly spying on us by recording our actions and submitting the data to others without our permission.<sup>7</sup> And, there is a fear of artificial intelligence where algorithms collect and manage the electronic data that we create when we surf and otherwise use the internet,<sup>8</sup> with some even believing that with fu-

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<sup>1</sup> See generally Adam Liptak, *Civil Liberties Today*, N.Y. TIMES (Sept. 7, 2011), <https://www.nytimes.com/2011/09/07/us/sept-11-reckoning/civil.html> [<https://perma.cc/QF26-7UHP>].

<sup>2</sup> See Megan Blass, Note, *The New Data Marketplace: Protecting Personal Data, Electronic Communications, and Individual Privacy in the Age of Mass Surveillance Through A Return to Property-Based Approach to the Fourth Amendment*, 42 HASTINGS CONST. L.Q. 577, 577–81 (2015) (discussing pervasive surveillance by the NSA).

<sup>3</sup> See Lisa Benton-Short, *After 9/11, Public Spaces No Longer Represent Freedom*, TIME (Sept. 9, 2016), <http://time.com/4482672/public-space-after-september-11/> [<https://perma.cc/BH5C-SUBF>]. See generally Daniel S. Harawa, *The Post-TSA Airport: A Constitution Free Zone?* 41 PEPP. L. REV. 1 (2013) (discussing airport security measures).

<sup>4</sup> Somini Sengupta, *Privacy Fears Grow as Cities Increase Surveillance*, N.Y. TIMES (Oct. 13, 2013), <https://www.nytimes.com/2013/10/14/technology/privacy-fears-as-surveillance-grows-in-cities.html> [<https://perma.cc/B9XL-SZHB>].

<sup>5</sup> See Krishnadev Calamur, *5 Things to Know About the NSA's Surveillance Activities*, NPR, (Oct. 23, 2013, 12:14 PM), <https://www.npr.org/sections/parallels/2013/10/23/240239062/five-things-to-know-about-the-nas-surveillance-activities> [<https://perma.cc/G6ET-2JNA>].

<sup>6</sup> Laura Shin, *Hackers Are Hijacking Phone Numbers and Breaking Into Email, Banks Accounts: How to Protect Yourself*, FORBES (Dec. 21, 2016, 11:48 AM), <https://www.forbes.com/sites/laurashin/2016/12/21/hackers-are-hijacking-phone-numbers-and-breaking-into-email-and-bank-accounts-how-to-protect-yourself> [<https://perma.cc/LQ3P-9Y2C>]; Brigid Sweeney, *The Frightening New Frontier for Hackers: Medical Records*, MOD. HEALTHCARE (Apr. 10, 2017), <http://www.modernhealthcare.com/article/20170410/NEWS/170419987> [<https://perma.cc/55JW-PLQC>]; Craig Timberg, *How Equifax Hackers Might Use Your Social Security Number to Pretend They're You*, WASH. POST (Sept. 8, 2017), <https://www.washingtonpost.com/news/the-switch/wp/2017/09/08/how-equifax-hackers-might-use-your-social-security-number-to-pretend-theyre-you> [<https://perma.cc/77VM-NRKH>].

<sup>7</sup> Chris Smith, *Hackers Can Spy on You Through Amazon Echo*, N.Y. POST (Aug. 2, 2017, 4:57 PM), <http://nypost.com/2017/08/02/hackers-can-spy-on-you-through-amazon-echo/> [<https://perma.cc/B63P-HBZH>]. See generally Simon Hill, *Is Your Smartphone Listening to Everything You Say? We Asked the Experts*, DIGITAL TRENDS (Jan. 15, 2017, 3:10 AM), <https://www.digitaltrends.com/mobile/is-your-smartphone-listening-to-your-conversations/> [<https://perma.cc/9KL7-XPRF>].

<sup>8</sup> See generally Erik Brynjolfsson & Andrew McAfee, *The Business of Artificial Intelligence*, HARV. BUS. REV. (July 2017), <https://hbr.org/cover-story/2017/07/the-business-of-arti>

ture developments artificial intelligence will be able to read our minds and thoughts.<sup>9</sup>

In short, much of the information that we have historically believed to be, and sought to keep, private might be seized by both private parties and governments and used for multiple purposes without our consent. Along these lines, there are four areas of possible privacy violations. One, the government's direct request or demand that one provide private information; two, the government's request to others, such as Facebook and Google, that they produce one's private information; three, the government's use of one's information for purposes other than that for which it was voluntarily given; and four, the government's private surveillance of one's daily activities.<sup>10</sup>

This Article will explore the possibility that the governmental use of data, in the four above-stated areas, may infringe upon one's constitutional right to informational privacy. Part I will examine potential privacy violations and show how government entities can misuse one's private information. Part II will review substantive due process standards and some of the Court's Fourth Amendment jurisprudence, and it will conclude that the Amendment is applicable in a civil context and should be the primary source for a constitutional right to informational privacy. Part III then examines the United States Supreme Court's precedent on informational privacy and concludes that the Court has recognized such a right to privacy, but that it should more clearly state so, and establish standards that federal circuit courts of appeals must use when evaluating claims asserting a violation of the informational right to privacy. Part IV will discuss the federal circuit courts of appeals current interpretation of the scope of the constitutional right to information privacy, and shows that, without Supreme Court guidance, some of these courts have fashioned conflicting rules and doctrines that establish a disuniformity of protection. Part V will explain that broad standards should be used to give the broadest application of a claim for a constitutional right to informational privacy. And, Part VI will conclude that a constitutional right to informational privacy claim is needed and that the Fourth Amendment and strict scrutiny should be used by courts in their evaluation of the claim.

## I. POTENTIAL PRIVACY VIOLATIONS

### A. *Government's Requests or Demands for Certain Information*

The state and federal governments demand one's private information when he or she applies for a driver's license, social security, governmental employ-

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ficial-intelligence [<https://perma.cc/D3RV-P3YD>].

<sup>9</sup> Luke Dormehl, *This A.I. Literally Reads Your Mind to Re-create Images of the Faces You See*, DIGITAL TRENDS (Feb. 26, 2018, 9:00 AM), <https://www.digitaltrends.com/cool-tech/university-of-toronto-mind-reading-ai/> [<https://perma.cc/2QTB-5C89>].

<sup>10</sup> See *infra* notes 11–22 and accompanying text.

ment, and many other services.<sup>11</sup> Mostly, we do not object to providing such information. However, one might resist disclosing some sensitive information, such as one's sexual orientation, HIV or other disease status, prior history of drug usage, genetic disposition to certain diseases, and many other types of private information. Many of these objections implicate one's constitutional right to informational privacy; and therefore, the government should have to offer a sufficiently strong justification before it can compel production of some types of private information.

*B. The Government's Obtaining One's Personal Data from Facebook, Google, and Other Social Media*

Subscribers to such social media platforms as Facebook and Google submit a substantial amount of private data to these services.<sup>12</sup> But, there is at least one federal law that might be leading federal and state governments to violate citizens' rights to privacy. That law is the Electronic Communication Privacy Act of 1986,<sup>13</sup> which includes the Stored Wire and Electronic Communications and Transactional Records Access Act.<sup>14</sup> This law allows "a governmental entity" to request a copy of stored wire or "electronic communication" from Facebook, Google and other social media providers, without any showing of probable cause, if the stored information is more than 180 days old, and the request can be made through an "administrative subpoena" or "trial subpoena."<sup>15</sup> Even if the governmental entity seeks a court order to compel production of the stored Facebook content, a court can order a disclosure of the information on a mere showing that the information is "relevant and material to an ongoing criminal investigation."<sup>16</sup> This means that the government does not have to show probable cause that the Facebook subscriber or user has committed a crime.<sup>17</sup>

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<sup>11</sup> See generally Rachel Levinson-Waldman, *What the Government Does with Americans' Data*, BRENNAN CTR. FOR JUST. (2013) (discussing government's collection and use of data, including possible misuses of data), <https://www.brennancenter.org/sites/default/files/publications/Data%20Retention%20-%20FINAL.pdf> [<https://perma.cc/H2AU-7283>].

<sup>12</sup> *Facebook & Your Privacy: Who Sees the Data You Share on the Biggest Social Network?* CONSUMER REP. (June 2012), <https://news.consumerreports.org/cro/magazine/2012/06/facebook-your-privacy/index.htm> [<https://perma.cc/DJN6-XM8E>].

<sup>13</sup> Pub. L. No. 99-508, 100 Stat. 1848 (1986) (codified at 18 U.S.C. § 2510 (2012)).

<sup>14</sup> 18 U.S.C. §§ 2701–12 (2012).

<sup>15</sup> 18 U.S.C. § 2703(a) (2012).

<sup>16</sup> 18 U.S.C. § 2703(d) (2012).

<sup>17</sup> *Id.* Several laws have been introduced in the U.S. Congress to require that the governmental entity show probable cause before it can obtain stored digital content, regardless of the age of the information, including data that has been in storage for more than 180 days. David Ruiz, *Email Privacy Act Comes Back, Hopefully to Stay*, ELECTRONIC FRONTIER FOUND. (May 29, 2018) (discussing various versions of the Email Privacy Act that Representative Kevin Yoder (R-KS) and others have introduced over the years), <https://www.eff.org/deeplinks/2018/05/email-privacy-act-comes-back-hopefully-stay> [<https://perma.cc/J8WP-3H7C>]. See Electronic Communications Privacy Act Amendments Act of 2015, S. 356, 114th Cong.

C. *Governmental Employees' Misuse of Information that Citizens Provide for Legitimate Purposes*

Each day American citizens submit private information to obtain the governmental benefits mentioned above.<sup>18</sup> And, there are state laws mandating that some private information, such as sexually transmitted diseases, be submitted to public health agencies.<sup>19</sup> The problem is that some governmental employees have used, and might use, such sensitive information for ulterior purposes, including to further their own private needs for romance and retaliation against others.<sup>20</sup> Obviously, such illegitimate usages of citizens' private information raise substantial issues that implicate one's constitutional right to informational privacy.

D. *Pervasive Governmental Surveillance*

The concern here is that governments—through pervasive and sophisticated use of ever-present traffic and security cameras, face recognition technology, cell phone location tracking systems, bank account records, and other means of monitoring each and every aspect of citizens' lives—can secretly create a map of one's entire existence.<sup>21</sup> Certain law enforcement entities have

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(2015) (including a provision that would have obviated the distinction between digital material stored for less than and for more than 180 days).

For an argument that Facebook and other major social media providers do attempt to aggressively protect subscribers' data from governmental intrusions, see Alan Z. Rozenstein, *Surveillance Intermediaries*, 70 STAN. L. REV. 99 (2018).

Presently, the federal and state governments request a substantial amount of digital information that is contained in Facebook, Google and other social medial networks. As a matter of fact, Facebook issues quarterly reports showing minimal information about the large number of requests that it receives from different government entities. See *Facebook Transparency Report*, FACEBOOK, <https://www.transparency.facebook.com/> [<https://perma.cc/CZ4T-SKXV>] (last accessed June 29, 2018); see also James Rogers, *The US Government is Asking Facebook for More and More Data on Its Users*, FOX NEWS (Dec. 20, 2017), <http://www.foxnews.com/tech/2017/12/20/us-government-is-asking-facebook-for-more-and-more-data-on-social-networks-users.html> [<https://perma.cc/G3YD-PHC3>].

<sup>18</sup> See *Facebook & Your Privacy*, *supra* note 12.

<sup>19</sup> See generally PUB. HEALTH LAW RESEARCH, TEMPLE UNIV. & CTRS. FOR DISEASE CONTROL AND PREVENTION, DIVISION OF STD PREVENTION, *State Statutes Explicitly Related to Sexually Transmitted Diseases in the United States, 2013*, CTR. FOR DISEASE CONTROL AND PREVENTION (2014) <https://www.cdc.gov/std/program/final-std-statutesall-states-5june-2014.pdf> [<https://perma.cc/2HM2-8R9D>].

<sup>20</sup> See Sadie Gurman, *AP: Across US, Police Officers Abuse Confidential Databases*, ASSOCIATED PRESS (Sept. 28, 2016), <https://www.apnews.com/699236946e3140659fff8a2362e16f43> [<https://perma.cc/LPN2-45F6>].

<sup>21</sup> Although one might know that traffic cameras are positioned at certain traffic locations, he or she might not know that governmental entities can use the information from these cameras, along with cell phone location information, bank records information, and medical records information, to create a map that discloses a great deal of information about one's movement, purchases, and propensities toward certain behavior, including criminal behavior.

used such public and private information to target certain persons who allegedly show a propensity for criminal behavior.<sup>22</sup> The crux of the problem is that a map of one's entire existence creates a more substantial invasion of privacy than any single invasion that is joined with other invasions to create the map. In other words, an isolated traffic camera picture of a person's running a red light may not be as harmful or psychologically oppressive as knowing that the government knows each and every step or computer keystroke the person took for three hundred and sixty-five days a year, for the last ten years. Such pervasive monitoring, including the eventuality that artificial intelligence might one day be able to read our minds, would leave us without any privacy in anything that we do. Thus, this Article, in part, takes the position that public monitoring, which might normally be permissible, may lead to a violation of one's constitutional right to informational privacy if such monitoring becomes too pervasive.<sup>23</sup>

All of the above-stated examples are just some of the privacy concerns that are ripe for challenges under the constitutional right to informational privacy theory, as discussed in this Article.

## II. SUBSTANTIVE DUE PROCESS "RIGHT TO BE LET ALONE" UNDER THE FOURTH AMENDMENT

The central thesis of this Article is that the liberty interest component of the Fourteenth Amendment provides support for a constitutional right to informational privacy, and that right to privacy is consistent with the Court's substantive due process precedent. This constitutional right to informational privacy is premised on Justice Brandeis's "right to be let alone" principle, and it primarily stems from the Fourth Amendment's protection against unreasonable governmental intrusion.<sup>24</sup>

The constitutional right to informational privacy is consistent with the Court's substantive due process precedent, as articulated in *Washington v. Glucksberg*,<sup>25</sup> *Lawrence v. Texas*,<sup>26</sup> and *Obergefell v. Hodges*.<sup>27</sup>

First, in *Glucksberg*, the Court restated that the Fourteenth Amendment's liberty interest protection includes the rights provided for in the Bill of Rights

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See Bill Quigley, *Thirteen Ways Government Tracks Us*, COMMON DREAMS (Apr. 9, 2012), <https://www.commondreams.org/views/2012/04/09/thirteen-ways-government-tracks-us>.

<sup>22</sup> Justin Jouvenal, *Police Are Using Software to Predict Crime. Is it a 'Holy Grail' or Biased Against Minorities*, WASH. POST (Nov. 17, 2016), [https://www.washingtonpost.com/local/public-safety/police-are-using-software-to-predict-crime-is-it-a-holy-grail-or-biased-against-minorities/2016/11/17/525a6649-0472-440a-aae1-b283aa8e5de8\\_story.html](https://www.washingtonpost.com/local/public-safety/police-are-using-software-to-predict-crime-is-it-a-holy-grail-or-biased-against-minorities/2016/11/17/525a6649-0472-440a-aae1-b283aa8e5de8_story.html) [https://perma.cc/2JU3-BTW8].

<sup>23</sup> See *infra* text accompanying note 280.

<sup>24</sup> See *infra* notes 25–85 and accompanying text.

<sup>25</sup> *Washington v. Glucksberg*, 521 U.S. 702 (1997).

<sup>26</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>27</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

Amendments.<sup>28</sup> Therefore, the Fourth Amendment right against unreasonable searches and seizures is a liberty interest protected by the Fourteenth Amendment.<sup>29</sup>

Second, *Glucksberg* affirmed a test for determining whether other rights are also protected by the liberty interest.<sup>30</sup> The Court stated:

First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, “deeply rooted in this Nation’s history and tradition . . .” and “implicit in the concept of ordered liberty,” such that “neither liberty nor justice would exist if they were sacrificed.” Second, we have required in substantive-due-process cases a “careful description” of the asserted fundamental liberty interest.<sup>31</sup>

However, *Lawrence* cautions that courts should not rely strictly on a historical analysis that is frozen in time, but should also consider changes in practices that create a new normal, as “[h]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.”<sup>32</sup>

Subsequently in *Obergefell*, the Court, building on *Glucksberg* and *Lawrence*, established that the following factors are important when one seeks constitutional protection of a new liberty interest: (1) how state law and the public have historically treated the asserted liberty interest, (2) any change or evolution in the state law and public treatment of the asserted liberty interest, (3) the important principles or policies that support the asserted liberty interests, and (4) whether the challenged state’s intrusion on the asserted liberty interest is also a violation of the Equal Protection Clause.<sup>33</sup>

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<sup>28</sup> *Glucksberg*, 521 U.S. at 720. In other words, the protections provided in the Bill of Rights amendments are made applicable to the states by the due process clause of the Fourteenth Amendment. *Id.* at 721. These rights are also deemed to be fundamental and satisfy the “traditions and ordered liberty” test that *Glucksberg* affirms as the controlling test for determining when an asserted right is included within the liberty interest protection of the Fourteenth Amendment. *Id.* at 720–21.

<sup>29</sup> *Id.* at 720; *Cruzan v. Dir., Mo. Dep’t. of Health*, 497 U.S. 261, 278 (1990) (“Decisions prior to the incorporation of the Fourth Amendment into the Fourteenth Amendment analyzed searches and seizures involving the body under the Due Process Clause and were thought to implicate substantial liberty interests.”).

<sup>30</sup> *Glucksberg*, 521 U.S. at 720–21.

<sup>31</sup> *Id.* (citations omitted). Therefore, pursuant to *Glucksberg* one could say that the substantive due process analysis is mostly a historical analysis to determine which practices have been: (1) customarily allowed; and (2) are so important that the United States would not be able to operate as the type of society that it has historically been. *Id.*

<sup>32</sup> *Lawrence v. Texas*, 539 U.S. 558, 572 (2003). Therefore, the Court in *Lawrence*—despite a distance history of state’s governments’ proscribing homosexual conduct, including some Court precedent allowing such prohibition—reviewed a more tolerant, recent half-century of increased acceptance of homosexual behavior, and concluded that the liberty interest of the Fourteenth Amendment protected homosexual conduct. *Id.* at 572–79.

<sup>33</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594–2608 (2015). Using this analysis, the *Obergefell* Court held that state laws against same-sex marriage were unconstitutional violations of the petitioners’ Fourteenth Amendment liberty interests. *Id.* Despite states’ historical outlawing of same-sex marriage and homosexual relations, the Court highlighted a changing in public and state law attitudes towards such practices, including some states’ laws that, during

Therefore, an application of this substantive due process analysis, with a blending of *Glucksberg*, *Lawrence*, and *Obergefell*, shows that a constitutional right to informational privacy does exist under the Fourteenth Amendment. And, that right should be grounded in the Fourth Amendment's right to privacy against unreasonable searches and seizures<sup>34</sup> because the right to informational privacy stems from the same general concerns about unrestrained governmental actions. The following cases inform this analysis and support the general theme that the government has no right to one's private information when there is a reasonable expectation of continued privacy in that information, unless the government offers a legally sufficient justification for its intrusion into such private matters.

#### A. *Entick v. Carrington*

The English case of *Entick v. Carrington*<sup>35</sup> is a landmark case against improper governmental intrusion. In *Entick*, the owner's home was searched under a general warrant that was not supported by any evidence that the owner had committed a crime or that his home contained evidence that he had written the libelous articles against the King and his officers that he was accused of writing.<sup>36</sup> The appellate court eventually held that the search and seizure were unlawful, apparently because they were conducted pursuant to a general warrant, without any evidence that the owner had committed the specific crime or that his home property contained evidence of the crime.<sup>37</sup>

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the last half century, have provided more protection for homosexual conduct and same-sex marriage. *Id.* And, the Court outlined four principles or values that marriage served, including personal choice and individual autonomy: (1) "because it supports a two-person union unlike any other in its importance to the committed individuals"; (2) "it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education"; (3) it is "a keystone of [our] social order"; and, (4) state laws against same-sex marriage treated the same-sex couples differently than opposite-sex couple, thereby violating the equal protection clause. *Id.* at 2589–2604. Therefore, the *Obergefell* Court held that such laws against same-sex marriages violated same-sex couples' liberty interest under the due process clause of the Fourteenth Amendment. *Id.* at 2604–05.

<sup>34</sup> The Fourth Amendment to the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

<sup>35</sup> See generally *Entick v. Carrington* (1765) 95 Eng. Rep. 807 (K.B.).

<sup>36</sup> *Id.* at 275–77. During the four-hour search, the law enforcement officers searched all of the homeowner's papers, books, desks, and drawers, including breaking locks on doors and otherwise reviewing and reading the owner's papers. The officers seized and carried away many papers and books and the plaintiff himself for an appearance before a magistrate or other judicial official. *Id.*

<sup>37</sup> *Id.* at 278–92. It seems that the gist of the court's rationale is that the English tradition was that a warrant and a search should be issued and executed only pursuant to credible evidence that a crime had been committed and that the property searched contained specific ev-

*B. Boyd v. United States*

*Boyd v. United States*<sup>38</sup> emphasized the importance of *Entick*'s influence in the adoption of the Fourth Amendment.<sup>39</sup> And it supports the notion that there is a zone of privacy that protects citizens from unjustified governmental intrusions into one's "personal security," "personal liberty," and "private property."<sup>40</sup> Importantly, *Boyd* also shows that law enforcement does not have to physically invade one's property to violate the Fourth Amendment.<sup>41</sup> Instead, a governmental request for a production of documents, that contain private information, can also violate the Fourth Amendment.<sup>42</sup> Therefore, despite recognizing that the forced production of documents was not the same type of intrusion as a government official's entering the petitioner's property and seizing the disputed invoices, the Court held that the forced production of the invoices had the same practical effect as a physical intrusion onto the petitioner's property and the seizure of the invoices.<sup>43</sup>

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idence of the crime. *Entick* has been very persuasive in England in establishing protection for one's personal privacy and the privacy of one's home against unrestrained governmental intrusion. See *United States v. Jones*, 565 U.S. 400, 405 (2012) ("*Entick v. Carrington*, 95 Eng. Rep. 807 (C.P. 1765), is a 'case we have described as a 'monument of English freedom' 'undoubtedly familiar' to 'every American statesman' at the time the Constitution was adopted, and considered to be 'the true and ultimate expression of constitutional law' " with regard to search and seizure."); Madeline A. Herdrich, Note, *California v. Greenwood: The Trashing of Privacy*, 38 AM. U. L. REV. 993, 999 n.31 (1989).

<sup>38</sup> *Boyd v. United States*, 116 U.S. 616 (1886).

<sup>39</sup> *Id.* at 626. The *Boyd* Court stated:

It was welcomed and applauded by the lovers of liberty in the colonies as well as in the mother country. It is regarded as one of the permanent monuments of the British constitution, and is quoted as such by the English authorities on that subject down to the present time.

*Id.*

<sup>40</sup> *Id.* at 630. For example, the Court in *Boyd*, in a much-cited portion of the opinion, stated:

The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach further than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offense,—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment.

*Id.*

<sup>41</sup> *Id.* at 621–22.

<sup>42</sup> *Id.* at 618–19. In *Boyd*, the petitioner was the owner of thirty-five cases of plate glass, which the governmental official seized because the owner had allegedly not paid duties on the goods. *Id.* at 617–18. The owner challenged a notice, that allowed the seizure of the good, on the ground that the notice was a violation of his Fourth Amendment rights. *Id.* at 618.

<sup>43</sup> *Id.* at 635. The Court further stated:

Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet, as before said, it contains their substance and essence, and effects their substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive

The Court concluded that the statute allowing the notices for production of the invoices and the court order pursuant to the statute were void and unconstitutional as a violation of the Fourth Amendment.<sup>44</sup>

The implication of *Boyd*, for the theme of this Article, is that it shows that the Fourth Amendment offers protection beyond the traditional situations where law enforcement officials physically intrude onto private property to search through and seize tangible personal property.<sup>45</sup> And, the Court also noted that an erosion of the Amendment's purpose can "only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed."<sup>46</sup>

Such liberal construction should mean that it is time to explicitly recognize that the Fourth Amendment should be the foundational support for a constitutional right to informational privacy, and that the right is applicable to the States through the liberty interest clause of the Fourteenth Amendment.

### C. *Weeks v. United States*

*Weeks v. United States*<sup>47</sup> is another case that supports a constitutional right to informational privacy.<sup>48</sup> In *Weeks*, the Court reversed the petitioner's conviction and held that certain papers and books that were obtained from his private property, and admitted into evidence, should have been excluded because the federal law enforcement officers did not have a warrant to search the property.<sup>49</sup> The Court made a statement that is relevant to this Article's argument that the Fourth Amendment also protects one from the government's attempt to coerce the production of private information:

While a search ordinarily implies a quest by an officer of the law, and a seizure contemplates a forcible dispossession of the owner, still, as was held in the *Boyd* Case, the substance of the offense is the compulsory production of private pa-

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form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*. We have no doubt that the legislative body is actuated by the same motives; but the vast accumulation of public business brought before it sometimes prevents it, on a first presentation, from noticing objections which become developed by time and the practical application of the objectionable law.

*Id.*

<sup>44</sup> *Id.* at 638.

<sup>45</sup> *Id.* at 621–22.

<sup>46</sup> *Id.* at 635.

<sup>47</sup> *Weeks v. United States*, 232 U.S. 383 (1914).

<sup>48</sup> *Id.* at 387.

<sup>49</sup> *Id.* at 394.

pers, *whether under a search warrant or a subpoena duces tecum*, against which the person, be he individual or corporation, is entitled to protection.<sup>50</sup>

*Weeks* also reaffirms that the Fourth Amendment is a fundamental law against governmental intrusion.<sup>51</sup> And, subsequently, in *Mapp v. Ohio*,<sup>52</sup> the Court, for the first time, applied the exclusionary rule to state law enforcement's violation of the Fourth Amendment,<sup>53</sup> holding that the Fourth Amendment establishes a "right of privacy."<sup>54</sup>

#### D. *Olmstead v. United States*

*Olmstead v. United States*<sup>55</sup> is very important to this discussion of the Fourth Amendment's history, and to whether the Amendment can serve as the basis for a constitutional right to informational privacy. The majority opinion held that no impermissible search and seizure occurred under the Fourth Amendment when federal law enforcement officers wiretapped petitioner's telephone lines because the officers did not physically invade the petitioner's property.<sup>56</sup> The Court reasoned that a violation of the Fourth Amendment does not occur without a physical trespass to "the person, the house, his papers, or his effects."<sup>57</sup>

Justice Brandeis dissented, and reasoned that no trespass onto private property is required for a violation of the Amendment.<sup>58</sup> Instead, the Fourth Amendment should be interpreted in light of current situations.<sup>59</sup> The gist of his reasoning is that the Amendment is primarily designed to protect one's individual privacy regardless of whether law enforcement trespasses onto, and searches, private property. He asserted:

The protection guaranteed by the amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. *They conferred, as against the government, the right to be let alone—the most*

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<sup>50</sup> *Id.* at 397 (emphasis added).

<sup>51</sup> *Id.* at 390.

<sup>52</sup> *Mapp v. Ohio*, 367 U.S. 643 (1961).

<sup>53</sup> *Id.* at 655.

<sup>54</sup> *Id.* at 655–56. The Court stated that: "Since the Fourth Amendment's *right of privacy* has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government." *Id.* at 655 (emphasis added).

<sup>55</sup> *Olmstead v. United States*, 277 U.S. 438 (1928).

<sup>56</sup> *Id.* at 466.

<sup>57</sup> *Id.* at 464. Such is tantamount to requiring that law enforcement officers commit a trespass onto the petitioner's property, before a violation of the Fourth Amendment can occur.

<sup>58</sup> *Id.* at 479.

<sup>59</sup> *Id.*

*comprehensive of rights and the right most valued by civilized men.* To protect, that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth.<sup>60</sup>

His statement that the Fourth Amendment protects one's "right to be let alone" is a central focus of this Article, and the statement envisions that the Amendment protects one's right to privacy against governmental intrusion, by "whatever the means," unless the government has a legally permissible justification for the intrusion.<sup>61</sup>

#### E. *Katz v. United States*

Subsequently, in *Katz v. United States*,<sup>62</sup> the Court held that the Fourth Amendment protected a defendant when law enforcement intercepted and recorded his telephone conversations in a public phone booth; this holding overruled the majority opinion in *Olmstead*.<sup>63</sup> Rejecting the idea that a violation of the Fourth Amendment required a physical intrusion into a private place, the Court stated: "[O]nce it is recognized that the Fourth Amendment protects people—and not simply 'areas'—against unreasonable searches and seizures it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure."<sup>64</sup> Instead of requiring a physical invasion into a private place, *Katz* established that the Amendment protects one when he or she has a reasonable expectation of privacy in his or her private possessions or conversations, whether the possessions or conversations are in a private or public place.<sup>65</sup> *Katz*'s reasonable expectation of privacy test is the predominant test for determining whether one's Fourth Amendment rights have been violated when law enforcement conducts a search or seizure of one's property without a search warrant.<sup>66</sup> And, as Part IV will show, that same reasonable expectation of privacy test is the test that substantially all of the federal circuit courts of appeals use to determine whether a constitutional right to informational privacy attaches to an asserted liberty interest. This use is another

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<sup>60</sup> *Id.* at 478–79 (emphasis added).

<sup>61</sup> It should be noted that the majority opinion in *Olmstead*—that the Fourth Amendment did not protect one from law enforcement's wiretapping of his or her telephone lines when no physical trespass has occurred on one's property—has been overruled by *Katz v. United States*, 389 U.S. 347 (1967), which established a new standard for interpreting whether a violation of the amendment has occurred.

<sup>62</sup> *Katz v. United States*, 389 U.S. 347 (1967).

<sup>63</sup> *Id.* at 359.

<sup>64</sup> *Id.* at 353 (alteration in original).

<sup>65</sup> *Id.*

<sup>66</sup> See generally *United States v. Jones*, 565 U.S. 400 (2012) (discussing *Katz* and the reasonable expectation of privacy test and the trespass test); *City of Ontario v. Quon*, 560 U.S. 746 (2010) (applying the reasonable expectation of privacy test).

reason why the Court should give serious consideration to using the Fourth Amendment as the source for a constitutional right to informational privacy.

But, there is some confusion in *Katz* as to whether the Fourth Amendment provides for a “general right to privacy.”<sup>67</sup> Justice Stewart’s majority opinion states:

Secondly, the Fourth Amendment cannot be translated into a general constitutional “right to privacy.” That Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all. Other provisions of the Constitution protect personal privacy from other forms of governmental invasion. But the protection of a person’s general right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual States.<sup>68</sup>

However, despite Justice Stewart’s statements against a general right to privacy, it is clear from the Court’s opinion that the petitioner in *Katz* was not asserting a general right to privacy.<sup>69</sup> Rather, he was asserting that the Fourth Amendment prohibits the warrantless interception and recording of his private telephone conversation, which is a specific assertion of a Fourth Amendment right to privacy to protect his telephone conversation.<sup>70</sup> Therefore, at best, Justice Stewart’s anti-general right to privacy statement is dicta.

In summary, it is reasonably clear that the analysis of the above-discussed cases, from *Entick* to *Katz*, shows a continual evolution of the Fourth Amendment. And, the central feature of that evolution is that one should be protected against unrestrained governmental intrusion into his private affairs. The founding fathers acknowledged the need for such protection when they were faced with the governmental use of general warrants and writs of assistance during colonial times.<sup>71</sup> They heralded the *Entick* opinion, a 1765 English trespass case, and its holding that a search, that did not specifically identify the alleged evidence of a crime and that did not allege that the property owner had committed a specific crime, was an impermissible trespass;<sup>72</sup> and, because of *Entick*’s check on unjustified governmental intrusion, the founding fathers, in part, relied on it to support the adoption of the Fourth Amendment, as protection

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<sup>67</sup> *Katz*, 389 U.S. at 350–51.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 350. (One of the questions that the petitioner presented was: “Whether physical penetration of a constitutionally protected area is necessary before a search and seizure can be said to be violative of the Fourth Amendment to the United States Constitution.”).

<sup>70</sup> *Id.* at 349–50.

<sup>71</sup> *Boyd v. United States*, 116 U.S. 616, 624–30 (1886); *see also* *Carpenter v. United States*, 138 S. Ct. 2206, 2213 (2018) (“The Founding generation crafted the Fourth Amendment as a ‘response to the reviled ‘general warrants’ and ‘writs of assistance’ of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity.”) (alterations in original) (citation omitted).

<sup>72</sup> *Boyd*, 116 U.S. at 627.

against governmental searches and seizures that are not premised on probable cause that one has committed a specific crime.<sup>73</sup>

And, *Boyd*, more than one hundred years ago, established that the Fourth Amendment protection covers the government's request for private information, by way of a demand for the information or subpoena, even when there is no physical invasion of one's home or other property.<sup>74</sup> Subsequently, *Weeks* reaffirmed *Boyd* that such unjustified governmental demand for information can violate the Fourth Amendment.<sup>75</sup> And, *Olmstead's* dissenting opinion by Justice Brandeis, which is the only relevant part of the opinion given that *Katz* overruled the majority opinion,<sup>76</sup> emphasizes that the Fourth Amendment's main purpose is to protect one's "right to be let alone"<sup>77</sup> and that "every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment."<sup>78</sup> Next, *Mapp* acknowledged that the Fourth Amendment creates a "right of privacy" against governmental intrusions into the spaces protected by the Amendment.<sup>79</sup> And *Katz* defines those protected spaces as any space in which one has a reasonable expectation of privacy, given that the Amendment "protects people—and not simply 'areas.'"<sup>80</sup>

The next extension of the Fourth Amendment jurisprudence is for the Court to affirm that the Fourth Amendment grants one a constitutional right to informational privacy against any unjustified governmental intrusion, and that the right is enforceable against state governments and their employees. The Fourth Amendment is the proper source for a constitutional right to informational privacy because it takes no great stretch of the imagination to recognize that all searches and seizures, regarding criminal activity, seek information in some form and manner. That information might be a statement that evidence was found on someone's property, or that the information was garnered from reading the content of someone's papers, records, books, or diaries. And, by way of comparison, governmental requests and demands for private information, in a noncriminal context, seek information in some form and manner. Therefore, because there is nothing in the language of the Fourth Amendment that makes it inapplicable to civil matters and proceedings,<sup>81</sup> the Amendment and its "right of privacy" protection should apply any time the government seeks private information—whether in a civil context, or a criminal context—and should prevent the intrusion unless there is sufficient legal justification for

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<sup>73</sup> *Id.* at 627–628.

<sup>74</sup> *Id.* at 638.

<sup>75</sup> *Weeks v. United States*, 232 U.S. 383, 397 (1914).

<sup>76</sup> *Katz v. United States*, 389 U.S. 347, 353 (1967).

<sup>77</sup> *Olmstead v. United States*, 277 U.S. 438, 478–79 (1928).

<sup>78</sup> *Id.*

<sup>79</sup> *Mapp v. Ohio*, 367 U.S. 643, 655–56 (1961).

<sup>80</sup> *Katz*, 389 U.S. at 353.

<sup>81</sup> See *supra* text accompanying note 34.

the invasion of one's privacy. The Court's adoption of this rationale would offer more support for a constitutional right to informational privacy. As a matter of fact, one could legitimately argue that *Whalen v. Roe*<sup>82</sup> and *Nixon v. Administrator of General Services*,<sup>83</sup> in citing Fourth Amendment cases<sup>84</sup> and in discussing the reasonable expectation of privacy standard,<sup>85</sup> have already started the journey towards a doctrine that the Fourth Amendment is the most logical source for the establishment and development of a constitutional right to informational privacy.

### III. SUPREME COURT PRECEDENT FOR A CONSTITUTIONAL RIGHT TO INFORMATIONAL PRIVACY

The Court's decision in *Whalen v. Roe* is one of its strongest opinions to recognize a constitutional right to informational privacy. In *Whalen*, certain physicians and patients challenged a New York statute that mandated the collection and storage of copies of physicians' prescriptions for schedule II drugs.<sup>86</sup> The patients were mostly concerned that the law required that their physicians file, with a designated state agency, a copy of each prescription, which contained the patients' names and addresses.<sup>87</sup> They alleged that such filings would have both a chilling effect on patients' willingness to seek medical treatment, and that such disclosure of private information might damage their reputations.<sup>88</sup>

The patients challenged the statute on the grounds that it violated their right to privacy.<sup>89</sup> The Court held that any such right to privacy would stem from the "liberty interest" prong of the Fourteenth Amendment.<sup>90</sup> Then, the Court appeared to hold that the patients did have a "liberty interest" right to the confidentiality of their medical information.<sup>91</sup> For example, in a much-cited portion of its opinion, the Court stated that "the cases sometimes characterized as protecting 'privacy' have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and

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<sup>82</sup> *Whalen v. Roe*, 429 U.S. 589 (1977).

<sup>83</sup> *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425 (1977).

<sup>84</sup> *Whalen*, 429 U.S. at 599 n.25; *Nixon*, 433 U.S. at 461–62 (distinguishing President Nixon's case from the Fourth Amendment issues in *Stanford v. Texas*, 379 U.S. 476 (1965), but applying the reasonable expectation of privacy test to his case).

<sup>85</sup> *Nixon*, 433 U.S. at 465 ("[A]ppellant has a legitimate expectation of privacy in his personal communications.").

<sup>86</sup> *Whalen*, 429 U.S. at 591–95.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 600.

<sup>89</sup> *Id.* at 599–600.

<sup>90</sup> *Id.* at 598 n.23; *Id.* at 606 ("We simply hold that this record does not establish an invasion of any right or liberty protected by the Fourteenth Amendment.").

<sup>91</sup> *Id.* at 599–600.

another is the interest in independence in making certain kinds of important decisions.”<sup>92</sup>

However, the Court held that the New York statute did not violate the patients’ liberty interest because the state’s interest in obtaining the medical information outweighed the patients’ privacy.<sup>93</sup>

At bottom, *Whalen*’s importance is that it appears to recognize that the personal liberty interest of the Fourteenth Amendment includes a constitutional right to informational privacy, which the Court labeled as the “avoiding disclosure of personal matters” interest.<sup>94</sup> As support for “the avoiding disclosure of

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<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 598–604.

<sup>94</sup> *Id.* at 599. For other discussion of the constitutional right to information privacy prong of *Whalen*, see Erwin Chemerinsky, *Rediscovering Brandeis’s Right to Privacy*, 45 BRANDEIS L. J. 643 (2007) (arguing that the Court should find that there is a constitutional right to informational privacy under the liberty clause of the Fourteenth and Fifth Amendments, Professor Chemerinsky narrowly interprets *Whalen*’s majority opinion and broadly interprets Justice Stewart’s concurring opinion, which attempts to limit the scope of the majority opinion). See also Scott Skinner-Thompson, *Outing Privacy*, 110 NW. L. REV. 159, 205–22 (2015) (discussing the Fourth Amendment and different theories of informational privacy, but asserting that a constitutional right to informational privacy should be limited to claims involving “intimate information” and “political thought,” and that strict scrutiny should be used for such claims); Richard C. Turkington, *Legacy of the Warren and Brandeis Article: The Emerging Unencumbered Constitutional Right to Informational Privacy*, 10 N. ILL. U. L. REV. 479, 492–95 (1990) (discussing the possibility of using the Fourth Amendment as a source for a constitutional right to informational privacy, but asserting that it would not cover many invasions of privacy and, therefore, advocates for a privacy right that is “independent of the fourth amendment”).

The positions taken in this Article disagree with the main positions taken in the above-cited articles. First, as shown throughout this Article, contrary to the position that Professor Chemerinsky takes in his article, *Whalen* is strong enough to conclusively establish that there is a constitutional right to informational privacy. Second, this Article strongly rebuts Justice Stewart concurring opinion in *Whalen* and his majority opinion in *Katz* by arguing that the protection of one’s right “to be let alone,” and therefore constitutional right to informational privacy, should not be left to state law protection under state torts theories, but such informational privacy right, being based on the Fourth Amendment, as this Article argues, should be grounded in the U.S. Constitution and therefore enforceable as a matter of constitutional law litigation and not just state law torts litigation. Lastly, regarding Professor Skinner-Thompson’s article, a constitutional right to informational privacy should not be confined to “intimate information” and “political thought” claims. This is shown by the fact that most of the federal circuit courts of appeals opinions, that this Article discusses, do not limit the constitutional right to informational privacy theory to such limited issues. Instead, these circuit courts used the reasonable expectation of privacy concept as the decisive factor in determining whether one’s claim is within the scope of the constitutional right to informational privacy theory. See *infra* text accompanying notes 184–209. However, this Article does argue that strict scrutiny should be used to evaluate whether a state action has impermissibly intruded on one’s constitutional right to informational privacy. But, instead of supporting the use of strict scrutiny because it is used for “intimate information” and “political thought” issues when other constitutional law claims and theories are being litigated, this Article supports the use of strict scrutiny because it provides the most protection and because it would require state actors to really evaluate proposed state laws and other state actions before enacting the laws or before performing other actions so that they can be certain that they have

personal matters” privacy interest, the Court cited certain precedent basically establishing that the constitutional right to information privacy is rooted in Justice Brandeis’s “right to be let alone” privacy principle.<sup>95</sup> In footnote 25 of the opinion, the Court cited Justice Brandeis’s dissenting opinion in *Olmstead*,<sup>96</sup> which described “‘the right to be let alone’ as the right most valued by civilized men.”<sup>97</sup> In that same opinion, Justice Brandeis furthered stated: “To protect, that right, every unjustifiable intrusion by the government upon the *privacy of the individual*, whatever the means employed, must be deemed a violation of the Fourth Amendment.”<sup>98</sup>

The “whatever the means employed” criterion would include governmental requests for the production of private information in which one has a reasonable expectation of privacy. The criterion would apply regardless of whether that request is made in a subpoena duces tecum, in a job application, or to a third party who has possession of one’s private information, such as a request to one’s physician to produce medical records, or to some other third party to produce other information in which one has a reasonable expectation of privacy in the information.

In addition to relying on Justice Brandeis’s dissent, the *Whalen* Court, in footnote 25, also cited *Griswold v. Connecticut*<sup>99</sup> for the proposition that, “the First Amendment has a penumbra where privacy is protected from governmental intrusion.”<sup>100</sup> The logical implication from *Griswold* is that one has a constitutional right to be free from unjustified governmental intrusion into the zone of privacy created by the language of certain amendments of the Bill of Rights. And, that such privacy protection extends to related matters that are necessary for the protection of the rights specifically referenced in the amendments. That

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seriously considered alternative laws and actions that would be less intrusive into one’s constitutional right to informational privacy.

In an unrelated matter, a few words are in order regarding the “independence in making certain kinds of important decision interest” prong of *Whalen*, that, as the quote to which this footnote is attached, establishes is a different area of privacy than the constitutional right to informational privacy prong that is discussed in the paragraph immediately above. The “independence in making certain kinds of important decision interest” has historically involved abortion, contraception, and other intimate decisions that people make. In *Whalen*, the Court cited *Roe v. Wade*, and several other cases, and summed the cases up as follows: “In *Paul v. Davis*, 424 U.S. 693, 713 (1976), the Court characterized these decisions as dealing with ‘matters relating to marriage, procreation, contraception, family relationships, and child rearing and education. In these areas, it has been held that there are limitations on the States’ power to substantively regulate conduct.’” *Whalen*, 429 U.S. at 599 n.26 (citation omitted). In conclusion, one should not try to limit a constitutional right to informational privacy to areas involving intimate matters or information, which is a separate area of privacy.

<sup>95</sup> *Whalen*, 429 U.S. at 599 n.25.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Olmstead v. United States*, 277 U.S. 438, 478–79 (1928) (Brandeis, J., dissenting) (emphasis added).

<sup>99</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>100</sup> *Whalen*, 429 U.S. at 599 n.25 (alteration in original).

privacy protection, wherever it exists, is tantamount to a right “to be let alone” from unwanted governmental intrusion, which arguably is the reason why the *Whalen* Court cited *Griswold* as support for the “avoiding disclosure of personal matters” interest, mostly labeled as a constitutional right to informational privacy.<sup>101</sup>

As further support for the “right to be let alone” principle, the *Whalen* Court cited *Stanley v. Georgia*.<sup>102</sup> In *Stanley*, the Court held that a Georgia statute that outlawed the possession of obscene materials was a violation of the First Amendment.<sup>103</sup> The Court relied on Justice Brandeis’s “right to be let alone” principle,<sup>104</sup> and opined that the First Amendment protects one’s *right to receive information and the right to possess and read materials in his or her home*, even if that information is obscene material.<sup>105</sup> The Court stated:

If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men’s minds.<sup>106</sup>

This conclusion is mostly a holding that one has “a right to be let alone” in the privacy of his or her own home regarding the types of books and films he or she reads and views. And, “the right to be let alone” is the reason why the Court cited *Stanley* in support of its analysis that the liberty interest includes the “avoiding disclosure of personal matters” interest, which again is the same as a constitutional right to informational privacy.<sup>107</sup> If the *Whalen* Court did not mean for *Stanley* to support a constitutional right to informational privacy, there would have been no reason for the Court to cite *Stanley*, given that *Whalen* did not involve a First Amendment claim, which is the primary claim that the parties litigated in *Stanley*, and therefore, is the primary focus of *Stanley*’s holding.

Subsequent to *Whalen*, the Court’s decision in *Nixon v. Administrator of General Services*<sup>108</sup> further establishes that there is a constitutional right to information privacy. Citing *Whalen*, the *Nixon* Court stated: “One element of privacy has been characterized as ‘the individual interest in avoiding disclosure of personal matters.’”<sup>109</sup> And, the Court held that President Nixon did not automatically give up his privacy interest in his personal materials that were intermingled with public documents and tapes: “We may agree with appellant that, at least when Government intervention is at stake, public officials, including

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<sup>101</sup> *Id.* at 599.

<sup>102</sup> *Id.*

<sup>103</sup> *Stanley v. Georgia*, 394 U.S. 557, 559 (1969).

<sup>104</sup> *Id.* at 565.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Whalen*, 429 U.S. at 599.

<sup>108</sup> *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425 (1977).

<sup>109</sup> *Id.* at 457.

the President, are not wholly without constitutionally protected privacy rights in matters of personal life unrelated to any acts done by them in their public capacity.”<sup>110</sup> This quote clearly shows that the *Nixon* Court believed that there is a constitutional right to protect private information, whether that right is called a constitutional right to informational privacy or a constitutional right of “avoiding disclosure of personal matters.”<sup>111</sup>

Despite *Nixon*’s clarity, there is dictum in the opinion that courts can rely on, and that some have relied on, to question whether the opinion supports a constitutional right to protect private information. For example, the Court stated: “We may assume with the District Court, for the purposes of this case, that this pattern of de facto Presidential control and congressional acquiescence gives rise to appellant’s legitimate expectation of privacy in such materials.”<sup>112</sup> Some might use this quote to assert that the Court merely assumed—without deciding—that the President had a constitutionally protected right to privacy in his private information. After all, the Court used the phrase “We may assume.” But, there are several reasons why these words should not be taken out of context. First, this phrase comes later in the opinion, after the Court has already unambiguously relied on *Whalen* to state: “One element of privacy has been characterized as ‘the individual interest in avoiding disclosure of personal matters.’”<sup>113</sup> Therefore, the, “We may assume” language—when put in proper con-

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<sup>110</sup> *Id.*

<sup>111</sup> *Id.* The Court stated:

In sum, appellant has a legitimate expectation of privacy in his personal communications. But the constitutionality of the Act must be viewed in the context of the limited intrusion of the screening process, of appellant’s status as a public figure, of his lack of any expectation of privacy in the overwhelming majority of the materials, of the important public interest in preservation of the materials, and of the virtual impossibility of segregating the small quantity of private materials without comprehensive screening. When this is combined with the Act’s sensitivity to appellant’s legitimate privacy interests, see § 104(a)(7), the unblemished record of the archivists for discretion, and the likelihood that the regulations to be promulgated by the Administrator will further moot appellant’s fears that his materials will be reviewed by ‘a host of persons,’ we are compelled to agree with the District Court that appellant’s privacy claim is without merit.

*Id.* at 464–65 (citations omitted).

<sup>112</sup> *Id.* at 457–58.

<sup>113</sup> *Id.* at 457. More expansively, the Court stated:

One element of privacy has been characterized as “the individual interest in avoiding disclosure of personal matters . . . .” *Whalen v. Roe*, 429 U.S. 589, 599 (1977). We may agree with appellant that, at least when Government intervention is at stake, public officials, including the President, are not wholly without constitutionally protected privacy rights in matters of personal life unrelated to any acts done by them in their public capacity. Presidents who have established Presidential libraries have usually withheld matters concerned with family or personal finances, or have deposited such materials with restrictions on their screening. We may assume with the District Court, for the purposes of this case, that this pattern of de facto Presidential control and congressional acquiescence gives rise to appellant’s legitimate expectation of privacy in such materials. This expectation is independent of the question of ownership of the materials, an issue we do not reach. But the merit of appellant’s claim of invasion of his privacy cannot be considered in the abstract; rather, the claim must be considered in light of the specific provisions of the Act, and any intrusion must be weighed against the public interest in subjecting the Presidential

text—is best understood as being a part of the *Nixon* Court’s analysis of whether some of the challenged documents at issue were private enough to be protected by the constitutional right to informational privacy, as opposed to being too public to warrant constitutional protection.<sup>114</sup> The de facto practice that the Court referenced is the one in which former presidents, at the end of their presidencies, “have usually withheld matters concerned with family or personal finances” from the public documents that are stored in presidential libraries and are deemed public documents.<sup>115</sup> The gist of the Court’s analysis is that, if the documents are of the type that former presidents have withheld because they involve only private matters, then Nixon would have a legitimate expectation of privacy that he could withhold similar documents<sup>116</sup>—with that legitimate expectation being based on the former (or de facto) practice that presidents have used to withhold such private information.<sup>117</sup>

However, whether Nixon—or some other president—believed that a de facto policy allowed him to keep possession of certain private documents is a different issue than whether these private documents are protected by a constitutional right to informational privacy. In other words, whether there is a general constitutional right to informational privacy is governed by the Court’s decision in *Whalen*, the legal precedents that the *Whalen* Court cites in footnote 25, and—as this Article argues—the Fourth Amendment; it is not governed on-

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materials of appellant’s administration to archival screening. Under this test, the privacy interest asserted by appellant is weaker than that found wanting in the recent decision of *Whalen v. Roe*, supra. Emphasizing the precautions utilized by New York State to prevent the unwarranted disclosure of private medical information retained in a state computer bank system, *Whalen* rejected a constitutional objection to New York’s program on privacy grounds. Not only does the Act challenged here mandate regulations similarly aimed at preventing undue dissemination of private materials but, unlike *Whalen*, the Government will not even retain long-term control over such private information; rather, purely private papers and recordings will be returned to appellant under § 104(a)(7) of the Act.

*Id.* at 457–59 (internal citations omitted).

<sup>114</sup> *Id.* at 457. If the documents were public, the relevant federal law would mostly make them the property of the federal government, and therefore not subject to President Nixon’s possession and control after he left the White House. *Id.* at 454.

<sup>115</sup> *Id.* at 457.

<sup>116</sup> *Id.* at 459–60.

<sup>117</sup> In other words, the *Nixon* Court first recognized a constitutional right to informational privacy, and then assumed that President Nixon’s private papers and other correspondence would be private enough to fall within the constitutional right to informational privacy. See supra note 114 and accompanying text. The Court proceeded to analyze whether the government’s limited review of the private papers and correspondence was constitutionally permissible in light of the asserted governmental interest that the limited review of the private papers was necessary to further the purpose of the federal statutory law that established that the President’s public papers, as opposed to the private papers, was governmental/public property that the President had to relinquish to the government, instead of taking them with him as private property when he left the White House. *Nixon*, 433 U.S. at 456–65. Unfortunately, both the Court—in a subsequent opinion—and lower-level federal courts, have seized upon the “assumption” language to walk back from or minimize the Court’s holding in *Nixon*. *Nat’l Aeronautics & Space Admin. v. Nelson*, 562 U.S. 134, 147–48 (2011); *Nunes v. Mass. Dep’t. of Corr.*, 766 F.3d 136, 143 (1st Cir. 2014).

ly by some de facto practice of former presidents believing they can keep certain documents as private records. Therefore, when read in context, *Nixon* is strong support that the Court affirmed the existence of a constitutionally protected right to informational privacy.

The next relevant case in the Court's jurisprudence is *Ferguson v. City of Charleston*.<sup>118</sup> Although this case is mostly one that interprets the Fourth Amendment search and seizure requirement—instead of being a strict analysis of a constitutional right to informational privacy under the Fourteenth or Fifth Amendment—the Court does make reference to *Whalen* and its impact on a right to privacy. In *Ferguson*, the Court considered a local law enforcement policy whereby pregnant patients' physicians would conduct urine tests of the patients and then report the results of those tests to law enforcement if they showed cocaine use.<sup>119</sup> The alleged purpose of the policy was to give the patients—whose tests revealed the use of cocaine—an incentive to participate in substance abuse treatment, or otherwise face criminal prosecution.<sup>120</sup> Physicians voluntarily complied with the policy without obtaining their patients' consent.<sup>121</sup> In resolving a legal challenge by some of the patients, the Court held that the nonconsensual urine tests were an impermissible search in violation of the Fourth Amendment.<sup>122</sup> The Court reached this conclusion primarily because of the substantial entanglement of the physicians with law enforcement officials who drafted, monitored and enforced the urine test policy, including initiating the prosecution of several pregnant women.<sup>123</sup>

Regarding a general constitutional right to privacy, the Court stated, "The reasonable expectation of privacy enjoyed by the typical patient undergoing diagnostic tests in a hospital is that the results of those tests will not be shared with nonmedical personnel without her consent. In none of our prior cases was there any intrusion upon that kind of expectation."<sup>124</sup> In so stating, the Court relied on *Whalen* and asserted, "we have previously recognized that an intrusion on that expectation may have adverse consequences because it may deter patients from receiving needed medical care."<sup>125</sup> In citing *Whalen*, the *Ferguson* Court, by reasonable inference, recognized *Whalen* as precedent indicating that one can have a constitutionally protected expectation of privacy in, at least, one's medical treatment and medical records.<sup>126</sup>

Therefore, given the Court's analysis in *Whalen* and *Nixon*, and its reference to *Whalen* in the *Ferguson* opinion, one can logically conclude that the

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<sup>118</sup> *Ferguson v. City of Charleston*, 532 U.S. 67 (2001).

<sup>119</sup> *Id.* at 70–73.

<sup>120</sup> *Id.* at 72.

<sup>121</sup> *Id.* at 77–78.

<sup>122</sup> *Id.* at 81–86.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 78 (citations omitted).

<sup>125</sup> *Id.* at 78 n.14 (citation omitted).

<sup>126</sup> *Id.*

Court has conclusively held that the liberty interest protection of the Fourteenth Amendment (and of the Fifth Amendment, by reasonable inference) includes a constitutional right to informational privacy.

However, the Court's decision in *National Aeronautics & Space Administration v. Nelson*<sup>127</sup> called into question the precedential effect of both *Whalen* and *Nixon*.<sup>128</sup> In *Nelson*, certain contract employees of the National Aeronautics and Space Administration (NASA) challenged a new policy that required NASA's contract employees to undergo the same background checks as required for NASA's civil service employees.<sup>129</sup> The contract employees alleged that the general questionnaire, and a specific questionnaire for certain references, violated their constitutional "right to informational privacy."<sup>130</sup> Despite the Ninth Circuit Court of Appeals holding that the general forms' questions (about former drug treatment) and the specific questionnaire's broad reference questions (about the person's character for "honesty and trustworthiness") "likely violate[d] respondents' informational-privacy rights,"<sup>131</sup> the *Nelson* Court held that both the general questionnaire and the specific reference questionnaire did not violate the Constitution.<sup>132</sup>

Instead of reaffirming the existence of a constitutional right to informational privacy, the Court gave a narrow interpretation to *Whalen* and *Nixon* by stating that it had only assumed, for the purpose of the facts at issue in those cases, that there was a constitutional right to privacy.<sup>133</sup> The Court stated:

As was our approach in *Whalen*, we will assume for present purposes that the Government's challenged inquiries implicate a privacy interest of constitutional significance. We hold, however, that, whatever the scope of this interest, it does not prevent the Government from asking reasonable questions of the sort included on SF-85 and Form 42 in an employment background investigation that is subject to the Privacy Act's safeguards against public disclosure.<sup>134</sup>

This quote adds confusion as to whether *Whalen* and *Nixon* did or did not establish that there is a constitutional right to informational privacy. Such confusion was not necessary, given the mere fact that the *Whalen* Court cited legal authority in footnote 25 to support the existence of "a right to be let alone" in certain areas of privacy.<sup>135</sup>

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<sup>127</sup> Nat'l Aeronautics & Space Admin. v. Nelson, 562 U.S. 134 (2011).

<sup>128</sup> *Id.* at 147-48 n.10.

<sup>129</sup> *Id.* at 138-39.

<sup>130</sup> *Id.* at 144.

<sup>131</sup> *Id.* at 142-43.

<sup>132</sup> *Id.* at 159.

<sup>133</sup> *Id.* at 147-48.

<sup>134</sup> *Id.* (citations omitted).

<sup>135</sup> Again, in light of the Court's analysis in *Whalen*, and its citation of authority in footnote 25, the only open issue should be whether a specific privacy claim is within the scope of a constitutionally protected liberty interest under the liberty prong of the Fourteenth Amendment and under the Fourth Amendment (as argued in this Article), and not whether there is a constitutionally protected right of informational privacy. *Id.* at n.10.

But, having assumed a constitutional right to privacy, the *Nelson* Court proceeded with a balancing analysis that pitted the contract employees' right of privacy against the governmental intrusion through the use of the background questionnaires. The Court held that the governmental interest that the questionnaires promoted outweighed the contract employees' privacy interest in not disclosing the requested private information.<sup>136</sup>

An important part of the *Nelson* decision, as it relates to the theme of this Article, is the disagreement between the majority and the concurring opinions. Justice Alito, the drafter of the opinion, was joined by Chief Justice Roberts, and Justices Kennedy, Ginsburg, Breyer and Sotomayor.<sup>137</sup> They jointly supported the Court's decision to assume, only for the purpose of the facts before it, that the Constitution provides for a right to informational privacy—asserting that this was the approach that the Court took in *Whalen*.<sup>138</sup> In footnote 10, the Court opined that the “petitioners did not ask us to hold that there is no constitutional right to informational privacy, and respondents and their *amici* thus understandably refrained from addressing that issue in detail.”<sup>139</sup> The Court also believed that it should proceed with caution because such a definitive decision, that the Constitution does provide for a right to informational privacy, would require a substantive due process analysis.<sup>140</sup>

In a scathing concurrence, Justice Scalia asserted that the Court should not have assumed that there was a constitutional right to informational privacy, and that it should have specifically held that there is no such right because the Constitution does not provide for a right to informational privacy.<sup>141</sup> And, he reasoned that the Court's process of assuming a constitutional right, and subsequently resolving the case by applying the right to the facts, would only lead to confusion in the circuit courts of appeals.<sup>142</sup> First, Justice Scalia believed that the Court should not use substantive due process as the Constitution only provides for procedural due process.<sup>143</sup> He then asserted that even if it were appro-

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<sup>136</sup> *Id.* at 151–53.

<sup>137</sup> *Id.* at 137.

<sup>138</sup> *Id.* at 147–48.

<sup>139</sup> *Id.* at 147 n.10.

<sup>140</sup> *Id.* To support its decision not to wade into the substantive due process waters, the Court cited several decisions, including *Cruzan v. Dir., Mo. Dep't. of Health*, 497 U.S. 261, 279 (1990), which assumed, for the purpose of that case, “that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition.” *Id.*

<sup>141</sup> *Id.* at 159–60 (Scalia, J., concurring).

<sup>142</sup> Justice Scalia's prediction about confusion is correct. *See infra* notes 182–267 and accompanying text. However, most federal circuit courts of appeals have ignored *Nelson*'s contention that *Whalen* does not establish that there is a constitutional right to informational privacy; and therefore, almost all of the federal circuit courts have accepted that there is a constitutional right to informational privacy and have used *Whalen* to develop their own tests and standards for analyzing that constitutional right. *See infra* notes 182–269 and accompanying text.

<sup>143</sup> *Nelson*, 562 U.S. at 161.

priate to use substantive due process under the Court's precedent, the majority opinion strayed away from the formula that the Court has used to resolve such issues.<sup>144</sup> He also believed that the Court, in assuming that a constitutional right to privacy existed for the purpose of the case before it, created more confusion by not establishing a standard specific enough that courts can use to resolve claims asserting a right to informational privacy.<sup>145</sup>

But, both the majority and concurring opinions are open to critique. First, despite the majority opinion's interpreting *Whalen* and *Nixon* as only assuming that there is a constitutional right to informational privacy, a clear reading of *Whalen* and *Nixon* shows that these decisions are based on more than a mere assumption; the *Whalen* and *Nixon* decisions should be considered a definitive statement by the Court that a constitutional right to informational privacy does exist. At no place, in either *Whalen* or *Nixon*, does the Court state that its application and analysis of the privacy issue is based on an assumption that there is a constitutional right to informational privacy. Rather, in analyzing the facts under a constitutional right to informational privacy theory, and given that the petitioning parties proceeded under such a theory—regardless of whether such was specifically presented as a technical question presented—the Court's decisions in *Whalen* and *Nixon* established the Court's acceptance that the Constitution does provide for a constitutional right to informational privacy.

#### A. *The Nelson Court's Misinterpretation of Whalen's Judicial History*

Whether *Whalen* represents a definitive decision by the Court that there exists a constitutional right to informational privacy is important because trial and appellate courts must resolve current and future claims that raise such issues, and without clarity this task becomes far more difficult. And, to the extent that the Supreme Court exercises supervisory control over both state and federal courts regarding the interpretation of the U.S. Constitution, one would think that it would be important for the Court to give clear statements about the scope of its opinions interpreting the Constitution.

Further, there is a need for national uniformity in interpreting the Constitution.<sup>146</sup> Despite that there are thirteen federal judicial circuit courts of appeals, it is not desirable for each of these circuits to have a different interpretation of the same United States Constitution, unless such is absolutely necessary.<sup>147</sup>

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<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 167.

<sup>146</sup> *Peguero v. United States*, 529 U.S. 23, 23 (1999) (“Certiorari was granted to resolve conflict in circuits.”).

<sup>147</sup> There might be a need for a disuniformity in lower-level courts' interpretation of the Constitution if the United States Supreme Court has not spoken on an issue subject to multiple interpretations, or if it has spoken on the issue but its decision (or interpretation) is not broad enough to encompass a current issue pending before the lower courts. Furthermore, the mere fact that the United States Supreme Court has certiorari authority to accept an appeal from a federal court of appeals on the grounds that there is a split amongst the federal

And, it is not absolutely necessary to have a different interpretation about the existence of a constitutional right to informational privacy because *Whalen* is a clear enough opinion that there is a constitutional right to informational privacy. As a matter of fact, even with the confusion that *Nelson* caused with its attempt to weaken *Whalen*'s precedential value, substantially all of the thirteen circuit courts of appeals have rejected *Nelson*'s interpretation that *Whalen* establishes only an assumption of a constitutional right to informational privacy.<sup>148</sup> Instead of following *Nelson*, substantially all of the federal circuit courts of appeals presently cite *Whalen* as definitively establishing a constitutional right to informational privacy.<sup>149</sup>

A closer look at *Whalen* shows that the federal circuit courts' interpretations are correct. First, the appellees in *Whalen* clearly placed the constitutional right to informational privacy issue before the court.<sup>150</sup> A single District Court judge initially held that the appellees' claim did not present a substantial constitutional claim.<sup>151</sup> However, the Second Circuit Court of Appeals held that the

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circuits is a persuasive statement that a uniform interpretation of laws is desirable to avoid conflicts in the application of such laws. Rule 10 of the Supreme Court Rules provides that the Court has discretionary authority to accept an appeal when: "[A] United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort[.]" SUP. CT. R. 10(a). Therefore, there appears to be a federal policy in favor of a uniform interpretation of laws amongst the federal courts.

At least one commentator has acknowledged the desirability of a uniform interpretation of provisions of the U.S. Constitution. *See generally* J. Clifford Wallace, *The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or a Molehill?*, 71 CAL. L. REV. 913, 923 (1983) ("Ideally the federal Constitution and the federal laws should be applied consistently and uniformly by all the lower courts, state and federal, throughout the nation. There is, in reality, but one due process clause, and theoretically the question of what 'process' is constitutionally 'due' should not vary in cases presenting the same facts, either within one circuit or between two or more circuits.").

And some federal courts have recognized that there is some pressure for them to follow the reasonable rulings of other circuit courts—to avoid conflicts between the circuits that might overburden the United States Supreme Court's responsibility of resolving conflicts amongst the circuits. *Hunter v. Regents of the Univ. of Cal.*, 971 F. Supp. 1316, 1327 (C.D. Cal. 1997) ("The Court does not have an 'abiding conviction' in the 'reasonableness' of the Third, Fourth, Fifth, and Seventh Circuits' judgments, all of which base their holdings on an interpretation of *Croson* previously rejected by this Court."); *id.* at 1326 (citing *Int'l Soc. for Krishna Consciousness v. Lee*, 925 F.2d 576, 580 (2d Cir. 1991)), *aff'd in part*, 505 U.S. 672 (1992) ("refusing to differ from a considerable weight of contrary and reasonable authority 'lest the Supreme Court's ability to resolve conflicts among the circuits be impaired by the sheer number of conflicts'"); *see also* *Brock v. Ely Grp., Inc.*, 788 F.2d 1200, 1204 (6th Cir. 1986) ("Although we are reluctant to create an inter-circuit conflict, we cannot agree with the Second Circuit's 'judicially created exception.'").

<sup>148</sup> *See infra* notes 182–269 and accompanying text.

<sup>149</sup> *See infra* notes 182–269 and accompanying text.

<sup>150</sup> *Whalen v. Roe*, 429 U.S. 589, 591 (1977).

<sup>151</sup> This is how the Second Circuit Court of Appeals described the claim:

Alleging that the compelled disclosure to the Department of Health of the identity of patients for whom Schedule II drugs have been prescribed unconstitutionally invades the patient's right to

appellees' claim for the existence of a constitutional right to privacy was a substantial issue.<sup>152</sup> The court held the right to informational privacy existed in part because the zone of privacy had been extended beyond the right to use contraception, to the right to have an abortion, and to the right to make decisions about an abortion without having to obtain a hospital committee's approval.<sup>153</sup> As such, the Second Circuit reasoned that the concept of privacy was an evolving concept, the confines of which would be defined by the current and future litigation.<sup>154</sup> Thus, the Second Circuit reversed the district court's dismissal, reinstated the lawsuit, and assigned it to a three-judge district court for resolution of the constitutional right to privacy issue.<sup>155</sup>

The three-judge district court held that the prescription reporting requirement violated the appellees' constitutional right to privacy, in part because it required the reporting of the names and addresses of patients for whom controlled substances prescriptions were written.<sup>156</sup> And, on appeal to the United States Supreme Court, the Court acknowledged that it was being presented with a constitutional right to privacy issue, stating: "The District Court enjoined enforcement of the portions of the New York State Controlled Substances Act of 1972 which require such recording on the ground that they violate appellees' constitutionally protected rights of privacy. We noted probable jurisdiction of the appeal . . . and now reverse."<sup>157</sup>

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privacy, infringes on the doctor's right to prescribe treatment solely on the basis of medical considerations, and discriminates against persons suffering from certain diseases by requiring their identification to a governmental agency as a condition to receiving medical treatment, plaintiffs sought temporary and permanent injunctive relief and asked that a three-judge court be convened, 28 U.S.C. § 2281, to consider their complaint.

Roe v. Ingraham, 480 F.2d 102, 104 (2d Cir. 1973). The Second Circuit described the district court's determination as "he found no substantial constitutional question and dismissed the complaint for lack of federal jurisdiction." *Id.* at 105.

<sup>152</sup> *Id.* at 106–08.

<sup>153</sup> *Id.*

<sup>154</sup> The Second Circuit stated:

The patients' main attack is that the requirement of filing with the Department of Health is an impermissible invasion of a constitutional right to privacy with respect to the status of their health and the medical treatment they are receiving, and the physicians contend that the danger of disclosure impairs a constitutional right to make their decisions solely on the basis of medical considerations. The concept that privacy may be a constitutional right enjoying protection against governmental intrusions other than those banned by specific provisions of the Bill of Rights, notably the First and Fourth Amendments, was first explicitly stated in *Griswold v. Connecticut*.

*Id.* at 106–07 (citations omitted).

<sup>155</sup> *Id.* at 109. Contrary to today, a three-judge district court used to be required for resolution of constitutional law issues. If a constitutional right to informational privacy issue had not been before the court, there would have been no need to assign the case to a three-judge district court panel. *See generally* David P. Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. CHI. L. REV. 1 (1964).

<sup>156</sup> *Whalen v. Roe*, 429 U.S. 589, 591 (1977).

<sup>157</sup> *Id.* at 591.

And, the Court proceeded to resolve the constitutional right to privacy issue:

*Appellees contend that the statute invades a constitutionally protected “zone of privacy.”* The cases sometimes characterized as protecting “privacy” have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions. Appellees argue that both of these interests are impaired by this statute. The mere existence in readily available form of the information about patients’ use of Schedule II drugs creates a genuine concern that the information will become publicly known and that it will adversely affect their reputations. This concern makes some patients reluctant to use, and some doctors reluctant to prescribe, such drugs even when their use is medically indicated. It follows, they argue, that the making of decisions about matters vital to the care of their health is inevitably affected by the statute. Thus, the statute threatens to impair both their interest in the nondisclosure of private information and also their interest in making important decisions independently.

We are persuaded, however, that the New York program does not, on its face, pose a sufficiently grievous threat to either interest to establish a constitutional violation.<sup>158</sup>

The most logical interpretation of the above quote is that the Court acknowledged that its prior precedents, including the ones cited in footnote 25 of its decision, established a right to constitutional privacy against “the disclosure of personal matters,”<sup>159</sup> which is the same as the claim for a constitutional right to informational privacy. And that, although having acknowledged such a constitutional right to informational privacy, the Court held that the state statute’s reporting mandate was not a sufficient enough burden to establish a violation of the constitutional right to informational privacy.

It is also significant that, despite the Court’s contention in *Nelson* that the *Whalen* decision had only assumed that there was a constitutional right to informational privacy, none of the justices involved in deciding *Whalen* articulated that such an assumption was the basis of the *Whalen* opinion. Instead, Justice Brennan clearly believed that the majority opinion had definitively established the existence of a constitutional right to informational privacy. In his concurring opinion, he states:

The New York statute under attack requires doctors to disclose to the State information about prescriptions for certain drugs with a high potential for abuse, and provides for the storage of that information in a central computer file. *The Court recognizes that an individual’s “interest in avoiding disclosure of person-*

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<sup>158</sup> *Id.* at 598–600 (emphasis added). Just because the disclosures of medical information at issue in *Whalen* was, according to the Court, not “a sufficiently grievous threat . . . to establish a constitutional violation” of the right to privacy does not mean that a right to privacy—or a liberty interest in informational privacy—did not exist; nor does it mean that *Whalen* should be narrowly interpreted to mean that it did not establish that a constitutional right to informational privacy generally exists.

<sup>159</sup> *Id.*

*al matters*” is an aspect of the right of privacy, but holds that in this case, any such interest has not been seriously enough invaded by the State to require a showing that its program was indispensable to the State’s effort to control drug abuse.<sup>160</sup>

To counter Justice Brennan’s belief that *Whalen* established a constitutional right to informational privacy, Justice Stewart’s concurring opinion attempted to minimize the scope of the *Whalen* decision by labeling Justice Brennan’s comments—about *Whalen* having established a constitutional right to informational privacy—as mere dicta, given that a mass public disclosure of the patients’ names and addresses, beyond the limited disclosure to a state agency’s employees, was not authorized or contemplated under the relevant New York statute.<sup>161</sup>

Justice Stewart relied on *Katz* to argue that there was no general right to privacy, stating: “[there exists no] ‘general constitutional ‘right to privacy.’ . . . [T]he protection of a person’s general right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual States.”<sup>162</sup> To support his conclusion that there is no “general right to privacy,” Justice Stewart proceeded to limit the cases that *Whalen* relied on in footnote 25 and 26 to the specific facts that existed in those cases, including marriage, “privacy in the home,” and “the right to use contraceptives.”<sup>163</sup> Regarding *Griswold*, he concludes, “[w]hatever the *ratio decidendi* of *Griswold*, it does not recognize a general interest in freedom from disclosure of private information.”<sup>164</sup> Then, he argues that *Stanley v. Georgia*<sup>165</sup> should be limited to its First Amendment holding. He asserts:

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<sup>160</sup> *Id.* at 606. (Brennan, J., concurring) (emphasis added) (citations omitted).

<sup>161</sup> *Id.* at 607–08 (Stewart, J., concurring). What Justice Stewart does not acknowledge is that a violation of a constitutional right to informational privacy is not implicated only by mass public disclosure of private information. Such a violation can occur when the government mandates that the information be disclosed only to the government’s employees. It seems reasonably clear that Justice Brennan’s above-stated quote is in reference to a disclosure only to the government’s employees—which were the facts at issue in *Whalen* and in response to which the *Whalen* Court’s acknowledgement of a constitutional right to privacy is geared, despite the Court leaving open the issue whether a mass public disclosure of the private information, at issue in *Whalen*, would have led to a different conclusion: that such mass distribution would have been a violation of the aggrieved parties’ privacy right, when a more limited disclosure to the government’s employees was not.

Furthermore, if *Whalen* had only assumed, for the purpose of the case before it, that there was a constitutional right to informational privacy, then there would have been no need for or justification for the spirited debate between Justices Brennan and Stewart in their concurring opinions.

<sup>162</sup> *Id.* at 607–08 (Stewart, J., concurring) (emphasis omitted). There would be negative implications from leaving the privacy issues to state law, because states, and their employees, are mostly the ones that are alleged to have violated the constitutional right to informational privacy; therefore, they might offer inadequate protection against their own challenged behavior.

<sup>163</sup> *Id.* at 608–09.

<sup>164</sup> *Id.* at 609.

<sup>165</sup> *Stanley v. Georgia*, 394 U.S. 557 (1969).

The other case referred to held that an individual cannot constitutionally be prosecuted for possession of obscene materials in his home. Although *Stanley* makes some reference to privacy rights, the holding there was simply that the First Amendment—as made applicable to the States by the Fourteenth—protects a person’s right to read what he chooses in circumstances where that choice poses no threat to the sensibilities or welfare of others.<sup>166</sup>

However, it is clear that Justice Stewart’s reasoning is mostly his attempt to apply a strict textual interpretation of the Constitution and of *Whalen*, to limit the Court’s privacy jurisprudence, and to limit the scope of the cases cited in footnote 25 and 26. In other words, that *Stanley* established that the First Amendment protects one’s possession of obscene materials in his or her home is not the outer limit of the Court’s reasoning in that opinion. Justice Stewart does not give enough importance to some of the Court’s statements in *Stanley*—statements that are important for a full understanding of the opinion. For example, the majority opinion in *Stanley* states:

It is now well established that the Constitution protects the right to receive information and ideas. “This freedom (of speech and press) necessarily protects the right to receive.” This right to receive information and ideas, regardless of their social worth is fundamental to our free society. *Moreover, in the context of this case—a prosecution for mere possession of printed or filmed matter in the privacy of a person’s own home—that right takes on an added dimension. For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one’s privacy.*<sup>167</sup>

The *Stanley* Court proceeded to rely on *Olmstead* and the founder’s intent, stating, “They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man.”<sup>168</sup>

Thus, a fair reading of *Stanley* is that, although the Court specifically held that the relevant obscene material was protected by the First Amendment, the Court also reaffirmed or re-articulated legal principles, doctrines, and Court precedent that it believed were controlling and relevant to a full understanding of its holding. These are principles, doctrines, and precedent that are relevant to—and that should be used in—determining whether there is a constitutional right to informational privacy. The most relevant of those principles is the

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<sup>166</sup> *Whalen*, 429 U.S. at 609 (Stewart, J., concurring) (citations omitted).

<sup>167</sup> *Stanley*, 394 U.S. at 564 (alterations in original) (emphasis added) (citations omitted). Additionally, *Stanley* appears to recognize a general fundamental right to be free from impermissible governmental intrusion, stating that, “*For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one’s privacy.*” *Id.* This statement gives further support that there should be a constitutionally protected liberty interest against unjustified governmental intrusions, including a constitutional right to information privacy.

<sup>168</sup> *Id.* (internal quotation marks omitted) (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

“right to be let alone” from governmental intrusion when the government has not shown a proper justification.

Given the above-stated quotes from *Stanley*, Justice Stewart’s quotation from *Katz*<sup>169</sup> should be given a very limited interpretation and application when determining whether there exists a constitutional right to informational privacy. That limited interpretation should make a distinction between a governmental intrusion and a private person’s intrusion into one’s zone of privacy.

In that respect, one can agree with Justice Stewart that state law should, as with determining private property rights, be given deference in the rules that it establishes to protect one of its citizen’s privacy against an invasion by another of its citizen.<sup>170</sup> But, no deference should be given to either state law or state law authority, over the subject matter of privacy, when the legal issue involves a conflict between state action or regulation and a private citizen’s claim that such action or regulation violates his or her constitutional privacy rights. The fundamental difference is that a state might be trusted to, and given the authority to, protect its citizens against each other—as is mostly done when a state exercises its police powers to protect its citizens from each other—but should not be trusted to protect its citizens from the state’s own actions or conduct.

In this latter context, there should be some final authority whereby an aggrieved private citizen can obtain protection from the state’s overreaching or improper behavior. The Constitution offers that protection, through the Bill of Rights Amendments, which include prohibitions against state governments’ and the federal government’s improper intrusions.

Furthermore, to fully understand Justice Stewart’s interpretation of *Katz*, as he articulated it in the *Whalen* opinion, one would have to put the quotation from *Katz* and the accompanying interpretation in context. The quotation from *Katz* is contained in the part of that opinion where the Court was deciding whether it would accept the petitioner’s formulation of the questions to be decided by the Court.<sup>171</sup> Contrary to petitioner’s request, the Court declined to base its opinion on a rule that the interpretation and application of the Fourth Amendment should be premised on whether a governmental intrusion was in a “constitutionally protected area.”<sup>172</sup> Justice Stewart states:

Secondly, the Fourth Amendment cannot be translated into a general constitutional “right to privacy.” That Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often

<sup>169</sup> *Katz v. United States*, 389 U.S. 347, 350 (1967).

<sup>170</sup> Such deference to state privacy law appears to be the current norm as states normally have the authority to determine which of the standard four privacy causes of action they will give their citizens to protect them from another citizen’s invasion of some recognized privacy rights—including state laws regarding “public disclosure of ‘private’ facts,” “intrusion upon seclusion,” “placing [one] in a false light,” and “appropriation of [one’s] name and likeness.” VICTOR E. SCHWARTZ ET AL., *PROSSER, WADE, AND SCHWARTZ’S TORTS CASES AND MATERIALS* 1001–52 (13th ed. 2015).

<sup>171</sup> *Katz*, 389 U.S. at 349–50.

<sup>172</sup> *Id.* at 350.

have nothing to do with privacy at all. Other provisions of the Constitution protect personal privacy from other forms of governmental invasion. But the protection of a person's *general* right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual States.<sup>173</sup>

When this quote from *Katz*—an opinion that Justice Stewart wrote—is considered in conjunction with his concurring opinion<sup>174</sup> in *Whalen*, the most logical interpretation of his statements in *Katz* is that there are different provisions of the Constitution that protect one's privacy from different types of governmental intrusion, and that the Fourth Amendment's protection applies only to the types of governmental intrusions that involve impermissible searches and seizures. Other constitutional provisions guard against other types of governmental intrusions (including the First Amendment and the Third Amendment) which are specifically referenced in footnote 5 of *Katz*.<sup>175</sup> It is significant that in this footnote, Justice Stewart states: "*Virtually every governmental action interferes with personal privacy to some degree. The question in each case is whether that interference violates a command of the United States Constitution.*"<sup>176</sup> And, if one were to accept this statement, then he or she could conclude that, when no protection is offered by a particular constitutional provision, a state may provide privacy protections to its citizens, as many states currently provide through the four state law privacy theories that give citizens a civil tort claim against other citizens for violating their right of privacy.<sup>177</sup> However, when one considers a constitutional right to informational privacy, there is a provision or "command of the United States Constitution."<sup>178</sup> It is the Fourth Amendment's prohibition against any impermissible governmental intrusion into one's private information.<sup>179</sup>

The best way to reconcile the relevancy of the Fourth Amendment to a substantive due process analysis of the liberty interest provision of the Fourteenth and Fifth Amendments is for the Court to—through a *Glucksberg*, *Lawrence*, and *Obergefell* analysis—recognize that from the beginning of this country the Fourth Amendment has protected United States citizens from governmental searches and seizures of private information, including compelled production and use of that private information.<sup>180</sup> The Fourth Amendment and

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<sup>173</sup> *Id.* at 350–51.

<sup>174</sup> *Whalen v. Roe*, 429 U.S. 589, 607–09 (1977) (Stewart, J., concurring).

<sup>175</sup> *Katz*, 389 U.S. at 350 n.5.

<sup>176</sup> *Id.*

<sup>177</sup> See *supra* text accompanying note 170.

<sup>178</sup> *Katz*, 389 U.S. at 350 n.5. See also *supra* notes 25–85 and accompanying text.

<sup>179</sup> Therefore, at best, Justice Stewart's concurring opinion in *Whalen* should be considered as an effort by him to limit a broader permissible interpretation of *Katz*, and at worst it is irrelevant dicta, because the quoted part of *Katz*—that there is no general right to be let alone—clearly applies only to areas of the law where there is no constitutional provision that offer such protection.

<sup>180</sup> See *supra* notes 25–85 and accompanying text.

the liberty interest of the Fourteenth and Fifth Amendments, either separately or together, should be considered the major sources of a constitutional right to informational privacy. These amendments should be used by courts to help explain and enforce the constitutional right to informational privacy and its central policy that the right is based on the “right to be let alone.”

Although one might quibble about the scope of the Fourth Amendment, and of the Fourteenth and Fifth Amendments, one should not be confused about the implications that might flow from a court’s decision holding that a litigant’s claim falls within the protection of one of these amendments. The implication is that the litigant has a “right to be let alone” unless the government has sufficiently articulated a reasonable countervailing interest (normally involving a police power protection) that justifies the governmental intrusion.<sup>181</sup>

It seems that the federal circuit courts of appeals are more willing than the U.S. Supreme Court to protect one’s right “to be let alone,” and to acknowledge that that right is rooted in the Constitution—although many of these courts have not yet articulated whether the Fourth Amendment, in addition to the liberty interest of the Fourteenth Amendment, is also a constitutional source that supports a right to informational privacy.

#### IV. FEDERAL CIRCUIT COURTS OF APPEALS’ DECISIONS

In his concurring opinion in *Nelson*, Justice Scalia lamented the majority’s assumption of a constitutional right to informational privacy because he believed that it would lead to ambiguity in the federal circuits’ application of that right.<sup>182</sup> He argued that this ambiguity would result because the *Nelson* Court did not articulate standards that were specific enough to govern the federal circuits’ efforts to resolve lawsuits alleging informational privacy claims.<sup>183</sup> And to some extent his prediction has materialized. There is a division among the federal circuits regarding the specific standards used to evaluate informational privacy claims, with some circuit courts having more expansive standards for resolving the claims, and others having more narrow standards. But significantly, substantially all of the federal circuit courts of appeals have rejected the *Nelson* Court’s interpretation of the Court’s own opinion in *Whalen*, which is quite remarkable.

##### A. Federal Courts that Broadly Interpret the Right to Informational Privacy

###### 1. Third Circuit

In a post-*Nelson* case, the Third Circuit employed standards that, to some extent, are more in line with the approach that this Article articulates. In *Malle-*

<sup>181</sup> *Olmstead v. United States*, 277 U.S. 438, 478–79 (1928).

<sup>182</sup> *Nat’l Aeronautics & Space Admin. v. Nelson*, 562 U.S. 134, 166–69 (2011).

<sup>183</sup> *Id.* at 168.

*us v. George*,<sup>184</sup> the Third Circuit held that a local school board member, who volunteered information to the school board about a teacher's alleged improper conduct with a student, did not allege a sufficient claim that was protected by a constitutional right to informational privacy because the school board member had volunteered the information.<sup>185</sup> However, the Third Circuit did recognize the availability of an informational privacy claim in an appropriate case, and that such a claim could be based on the "right to be let alone"<sup>186</sup>:

This first type of privacy right is the right recognized in Justice Brandeis's dissent in *Olmstead v. United States*, "the right to be let alone." "[T]he right not to have intimate facts concerning one's life disclosed without one's consent" is "a venerable [right] whose constitutional significance we have recognized in the past." "In determining whether information is entitled to privacy protection, we have looked at whether it is within an individual's reasonable expectations of confidentiality. The more intimate or personal the information, the more justified is the expectation that it will not be subject to public scrutiny." We have deemed the following types of information to be protected: a private employee's medical information when sought by the government, medical, financial and behavioral information relevant to a police investigator's ability to work in dangerous and stressful situations, a public employee's medical prescription record, a minor student's pregnancy status, sexual orientation, and an inmate's HIV-positive status. This information consists of three categories: sexual information, medical information, and some financial information. While this is not an exhaustive list, it is clear that the privacy right is limited to facts and an individual's interest in not disclosing those facts about himself or herself. It is the right to refrain from sharing intimate facts about oneself.<sup>187</sup>

The court's decision, being based on *Olmstead*, shows how expansively the Third Circuit has interpreted the existence and scope of a constitutional right to informational privacy to include "sexual information," "medical information," and, "some financial information."<sup>188</sup> The *Malleus* opinion shows two things that are important to a constitutional right to informational privacy. First, unlike the Court in *Nelson*, the Third Circuit in *Malleus* recognized that *Whalen* clearly established a constitutional right to informational privacy.<sup>189</sup> Second, the

<sup>184</sup> *Malleus v. George*, 641 F.3d 560 (3d Cir. 2011).

<sup>185</sup> *Id.* at 565–66. The Seventh Circuit has asserted that it did not adopt the position that one who volunteers the disclosure of private information could not raise a valid constitutional informational privacy claim if the information is further disclosed to the public. *Chasensky v. Walker*, 740 F.3d 1088, 1096 (7th Cir. 2014).

<sup>186</sup> *Malleus*, 641 F.3d at 564–65.

<sup>187</sup> *Id.* (alteration in original) (citations omitted).

<sup>188</sup> *Id.* at 565.

<sup>189</sup> *Id.* at 564. Citing *Whalen* as precedent, the Third Circuit stated:

Traditionally, the Fourteenth Amendment has protected two types of privacy rights. First, it protects "the individual interest in avoiding disclosure of personal matters." This category protects against disclosure of certain personal information, including: information containing specific "details of one's personal life," information "which the individual is ordinarily entitled to retain within the private enclave where he may lead a private life," and information containing "intimate facts of a personal nature."

court did not try to limit the scope of a privacy claim to one that asserts an underlying fundamental right to privacy, or to one that falls within the scope of *Griswold*'s intimate sexual or familial relationship privacy interest, as some circuits have done.<sup>190</sup> Instead, the Third Circuit cited some of its own precedent, including those where the court had found certain private financial information to be within the protection of a constitutional right to informational privacy, despite the fact that the claim neither involved a fundamental right nor an intimate sexual relationship.<sup>191</sup> In the Third Circuit, the decisive determinant of whether a claim raises a Fourteenth Amendment constitutional right to informational privacy issue is whether the private information, into which the government intrudes, "is within an individual's reasonable expectations of confidentiality. The more intimate or personal the information, the more justified is the expectation that it will not be subject to public scrutiny."<sup>192</sup>

## 2. Seventh Circuit

In another post-*Nelson* case, the Seventh Circuit also broadly interpreted *Whalen*, despite the Supreme Court's allegation in *Nelson* that *Whalen* only assumed that there was a constitutional right to informational privacy.<sup>193</sup> In *Chasensky v. Walker*,<sup>194</sup> the Seventh Circuit stated:

Indeed, it is true that "[t]he courts of appeals, including this court, have interpreted *Whalen* to recognize a constitutional right to the privacy of medical, sexual, financial, and perhaps other categories of highly personal information—information that most people are reluctant to disclose to strangers—and have held that the right is defeasible only upon proof of a strong public interest in access to or dissemination of the information."<sup>195</sup>

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*Id.* (alteration in original) (citation omitted).

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 565.

<sup>192</sup> *Id.* at 564 (alteration in original) (citation omitted).

<sup>193</sup> *Chasensky v. Walker*, 740 F.3d 1088, 1096 (7th Cir. 2014).

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 1096 (alteration in original) (citation omitted). In *Chasensky*, the Seventh Circuit cited one of its earlier opinions, *Wolfe v. Schaefer*, 619 F.3d 782 (7th Cir. 2010), wherein it observed that the Supreme Court's opinions on the presence or absence of a constitutional right to informational privacy have not been entirely clear. The *Wolfe* court stated:

The Court has never held that the disclosure of private information denies due process. But in *Whalen* it did suggest that there might be a due process right to the nondisclosure of certain private information, though it upheld the law challenged in that case: a law that required a copy of every prescription for certain drugs that have both lawful and unlawful uses (methadone, for example) to be filed with state health authorities. A contemporaneous decision[] was more explicit about the existence of a constitutional right of privacy in personal papers, but again the plaintiff lost.

The courts of appeals, including this court, have interpreted *Whalen* to recognize a constitutional right to the privacy of medical, sexual, financial, and perhaps other categories of highly personal information—information that most people are reluctant to disclose to strangers—and have held that the right is defeasible only upon proof of a strong public interest in access to or dissemination of the information. The Supreme Court, in contrast, has seemed more interested in limiting

The court proceeded to hold that the information revealing that the petitioner had previously filed for bankruptcy was not protected by a constitutional right to informational privacy because the information was publicly available.<sup>196</sup>

### 3. *Second Circuit*

The Second Circuit opinions are consistent with the Third and Seventh Circuits' opinions. In *Doe v. New York*,<sup>197</sup> the court asserted: "In *Whalen v. Roe*, the Supreme Court recognized that there exists in the United States Constitution a right to privacy protecting 'the individual interest in avoiding disclosure of personal matters.'"<sup>198</sup> Although *Doe v. New York* was decided before *Nelson*, the Second Circuit, in *Palkimas v. Bella*,<sup>199</sup> a post-*Nelson* opinion, reaffirmed that it still interprets *Whalen* as establishing: "There is [ ] a recognized constitutional right to privacy in personal information . . . characterized as a right to 'confidentiality.'"<sup>200</sup>

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the right of informational privacy than in its recognition and enforcement. It has held that reputation is not part of the liberty that the due process clauses protect, even though concern with reputation is one of the principal reasons people don't want personal information about themselves broadcast to strangers. It has held that the First Amendment forbids a state to punish broadcasting the name of a murdered rape victim if her name is in judicial records open to public inspection. Even the publicizing of highly personal information that is not in a record open to public inspection is privileged if there is a public interest in access to the information.

The rejection in *Paul v. Davis* of a liberty or property interest in reputation casts doubt on the propriety of basing a federal constitutional right to informational privacy on a state's decision to recognize such privacy as a species of liberty or property. *Paul* illustrates the modern Supreme Court's expansive view of freedom of speech and of the press, a view that casts doubt on any effort to limit the public disclosure of personal information, however private. But the Court has not yet completely extinguished state-law protections, whether common law or statutory, against publication of intimate details of people's private lives in which other people might be interested. True, not extinguishing a private right is not the same thing as elevating it to a constitutional right. Yet there is an air of paradox in giving constitutional protection in the name of privacy to conduct that stretches the ordinary understanding of the concept of privacy, yet denying it to intensely private information, which is at the concept's core. Maybe the Supreme Court will clarify the issue in *Nelson v. NASA*, in which, as we noted, it recently granted certiorari.

*Wolfe*, 619 F.3d at 784–86 (emphasis in original) (citations omitted).

<sup>196</sup> *Chasensky*, 740 F.3d at 1096–97.

<sup>197</sup> *Doe v. New York*, 15 F.3d 264 (2d Cir. 1994).

<sup>198</sup> *Id.* at 267.

<sup>199</sup> *Palkimas v. Bella*, 510 F. App'x 64 (2d Cir. 2013).

<sup>200</sup> *Id.* at 66. Although *Palkimas* is an unpublished decision, some federal district courts in the Second Circuit have relied on it as precedent and adopted its use of an intermediate level of scrutiny when balancing one's right of informational privacy against an asserted governmental interest. See *Miron v. Stratford*, 976 F. Supp. 2d 120, 139 (D. Conn. 2013) (citing *Palkimas* for support that a balancing test should be applied to a constitutional right to informational privacy); *O'Connor v. Pierson*, 426 F.3d 187, 202–03 (2d Cir. 2005) (using intermediate scrutiny in the Second Circuit Court of Appeals).

#### 4. Fourth Circuit

The Fourth Circuit is another circuit that broadly holds that the liberty interest of the Fourteenth Amendment includes a constitutional right to informational privacy, premised on “the right to be let alone.” That court, in *Walls v. Petersburg*,<sup>201</sup> relies on *Whalen, Olmstead*, and a reasonable expectation of privacy as the authorities supporting the constitutional right to informational privacy:

As the first step in determining whether the information sought is entitled to privacy protection, courts have looked at whether it is within an individual’s reasonable expectations of confidentiality. The more intimate or personal the information, the more justified is the expectation that it will not be subject to public scrutiny. *The right to keep one’s beliefs and thoughts and emotions and sensations secure, and, as against the government, private was described by Justice Brandeis as “the right to be let alone—the most comprehensive of rights and the right most valued by civilized man.” Personal, private information in which an individual has a reasonable expectation of confidentiality is protected by one’s constitutional right to privacy.*<sup>202</sup>

Further, the Fourth Circuit applies “strict scrutiny” to state laws violating the right to informational privacy.<sup>203</sup>

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<sup>201</sup> *Walls v. Petersburg*, 895 F.2d 188 (4th Cir. 1990).

<sup>202</sup> *Id.* at 192 (emphasis added) (citations omitted).

<sup>203</sup> *Id.* at 192. The *Walls* court stated:

The right to privacy, however, is not absolute. If the information is protected by a person’s right to privacy, then the defendant has the burden to prove that a compelling governmental interest in disclosure outweighs the individual’s privacy interest. As the Supreme Court has recognized, “compelling” is the key word. When the decision or the information sought is “fundamental,” regulation “may be justified only by compelling state interests, and must be narrowly drawn to express only those interests.”

*Id.* (citations omitted).

Whether a “balancing approach” or “strict scrutiny” should be used is an important consideration. The Fourth Circuit appears to apply strict scrutiny even when the underlying issues do not involve a “fundamental right.” *Walls*, 895 F.2d at 192. The mere fact that the plaintiff is challenging the public disclosure of confidential private information is enough to warrant strict scrutiny. *Id.* On the other hand, some federal circuits use a “balancing approach.” *Coons v. Lew*, 762 F.3d 891, 900 (9th Cir. 2014). The Second Circuit uses an intermediate level of scrutiny by determining whether “a substantial governmental interest outweighs the burdened privacy right.” *O’Connor v. Pierson*, 426 F.3d 187, 202–03 (2d Cir. 2005). *See also Skinner-Thompson*, *supra* note 94, at 195–201 (discussing some of the different types of balancing tests that different federal courts use). The difference in the approaches has important implications on whether a court will or will not find that a state law is a violation of the constitutional right to informational privacy.

For example, if the Court had used strict scrutiny in *Whalen*, it is likely (or at least possible) that it would have found that the reporting of the names and addresses of the patients in *Whalen* was a violation of their right to informational privacy given that there was no showing that the state law was narrowly tailored with no less restrictive alternatives to protect its interest. Perhaps there were less restrictive alternatives, such as reporting the relevant medical information without the patients’ names and addresses being disclosed.

### 5. Tenth Circuit

The Tenth Circuit, in *Douglas v. Dobbs*,<sup>204</sup> held that there is a constitutional right to informational privacy, in part relying on *Whalen*: “Our jurisprudence has made clear that ‘[t]here is a constitutional right to privacy in preventing disclosure by the government of personal matters.’ In so deciding, we have interpreted the Supreme Court’s decision in *Whalen v. Roe* as creating a right to privacy in certain personal information.”<sup>205</sup> And the court proceeded to extend that right to privacy to a person’s pharmacy records at a local pharmacy, asserting that “it seems clear that privacy in prescription records falls within a protected ‘zone of privacy’ and is thus protected as a personal right either ‘fundamental’ or ‘implicit in the concept of ordered liberty.’”<sup>206</sup>

### 6. Fifth Circuit

The Fifth Circuit, in *Wyatt v. Fletcher*,<sup>207</sup> also recognized that:

Later, in *Whalen v. Roe*, the Supreme Court identified two separate interests that fall under the constitutional right to privacy. The one of relevance to us is the “individual interest in avoiding disclosure of personal matters” by the gov-

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<sup>204</sup> *Douglas v. Dobbs*, 419 F.3d 1097 (10th Cir. 2005).

<sup>205</sup> *Id.* at 1101 (citations omitted).

<sup>206</sup> *Id.* at 1102. However, the court held that the defendants in *Douglas* were entitled to have the section 1983 claim against them dismissed under qualified immunity because the plaintiff did not establish that it was clearly established that a prosecutor, who approved a motion and order that were subsequently presented by a police officer to a magistrate judge for a warrant, violates the right to privacy. *Id.* at 1103.

In *Pyle v. Woods*, the Tenth Circuit cited *Douglas* without calling into question its interpretation of *Whalen* in *Douglas*. See *Pyle v. Woods*, 874 F.3d 1257, 1263 (10th Cir. 2017). This implies that the Tenth Circuit has not allowed *Nelson* to cloud its interpretation of *Whalen*. In *Pyle*, just as in *Douglas*, the court held that the complaining party had a constitutional right to informational privacy, but that the defendant was entitled to dismissal of the section 1983 claim because it was not clearly established that a law enforcement officer violated the Fourth Amendment when he conducted a warrantless search of pharmacy records that were contained in a state database. *Id.* at 1264.

<sup>207</sup> *Wyatt v. Fletcher*, 718 F.3d 496 (5th Cir. 2013). Although the Fifth Circuit in *Wyatt* acknowledged that *Whalen* recognized a constitutional right to informational privacy, it found that certain school officials should be granted qualified immunity to a section 1983 claim because there was no “clearly established” law that a school official’s disclosure of a student’s homosexual orientation to the student’s parents was a violation of the student’s constitutional right to informational privacy. *Id.* at 508. The court’s decision was based on the fact that the student was a minor. *Id.* at 508–09. This decision implies that school officials have more authority to disclose private information to parents of minor children than disclosing information about adult children—given that the court distinguished its opinion from an opinion of another circuit, on the grounds that the other circuit might have ruled differently if the aggrieved person had been a minor instead of an adult. *Id.* (citing *Sterling v. Borough of Minersville*, 232 F.3d 190 (3d Cir. 2000)) (finding that a police officer’s disclosure of an 18-year-old adult’s sexual orientation to the adult’s grandfather was a violation of the latter’s constitutional right of informational privacy).

ernment. This confidentiality interest has been defined as “the right to be free from the government disclosing private facts about its citizens.”<sup>208</sup>

However, the court did note that the Court has not frequently spoken on this issue.<sup>209</sup>

### 7. Eleventh Circuit

The Eleventh Circuit, being formerly a part of the Fifth Circuit, appears to follow the same broad approach by relying on Fifth Circuit precedent. For example, in an unreported post-*Nelson* opinion, *Burns v. Warden*,<sup>210</sup> the Eleventh Circuit—without deciding whether a constitutional right to privacy exists—stated: “In *Whalen v. Roe*, the Supreme Court recognized a constitutional interest ‘in avoiding disclosure of personal matters.’ In 1978, the former Fifth Circuit agreed that a ‘constitutional right to privacy’ was ‘incorporated in the due process protected’ by the Fourteenth Amendment.”<sup>211</sup>

In an earlier opinion, *Hester v. Milledgeville*,<sup>212</sup> the Eleventh Circuit, again relying on Fifth Circuit precedent, more definitely held that there is a constitutional right to informational privacy.<sup>213</sup>

## B. Federal Courts that Narrowly Interpret the Right to Informational Privacy

### 1. First Circuit

The First Circuit is one federal circuit that limits its acceptance of, and the scope of, a constitutional right to informational privacy, primarily relying on the ambiguity the Court created in *Nelson* when it only assumed a right to informational privacy. In *Nunes v. Mass. Dep’t of Corr.*,<sup>214</sup> the court held that a prison system change in how prisoners with the HIV virus receive their HIV medication did not violate any constitutional right to informational privacy that the prisoners might possess,<sup>215</sup> despite that the manner in which the prisoners would receive their HIV medication might disclose their HIV status, which the prisoners contended should be protected by the constitutional right to informational privacy.<sup>216</sup> The court, citing *Whalen*, stated: “The Supreme Court has implied that the Constitution might protect in some circumstances ‘the individ-

<sup>208</sup> *Id.* at 505 (citations omitted).

<sup>209</sup> *Id.*

<sup>210</sup> *Burns v. Warden*, 482 F. App’x 414 (11th Cir. 2012).

<sup>211</sup> *Id.* at 417.

<sup>212</sup> *Hester v. Milledgeville*, 777 F.2d 1492 (11th Cir. 1985).

<sup>213</sup> *Id.* at 1497. The court stated: “The ‘individual interest in avoiding disclosure of personal matters’ is protected by the ‘confidentiality strand’ of the constitutional right to privacy.” *Id.* (citation omitted) (citing *Plante v. Gonzalez*, 575 F.2d 1119, 1132 (5th Cir. 1978), *cert. denied*, 439 U.S. 1129 (1979)).

<sup>214</sup> *Nunes v. Mass. Dep’t of Corr.*, 766 F.3d 136 (1st Cir. 2014).

<sup>215</sup> *Id.* at 143–44.

<sup>216</sup> *Id.*

ual interest in avoiding disclosure of personal matters' from government infringement."<sup>217</sup> However, the court also referenced *Nelson* as "assuming, but declining to confirm, 'that the Constitution protects a privacy right of the sort mentioned in *Whalen*.'"<sup>218</sup>

The First Circuit further limited the constitutional right to informational privacy by refusing to apply "strict scrutiny" to such claims, because it interpreted *Nelson* as requiring that governmental intrusions have only a rational basis.<sup>219</sup>

## 2. Ninth Circuit

In *Coons v. Lew*,<sup>220</sup> the Ninth Circuit interprets *Whalen* as establishing a constitutional right to informational privacy.<sup>221</sup> However, the court noted that the right is not absolute, and it used a five-factor analysis for determining when a constitutional violation occurs:

In order "to determine whether the governmental interest in obtaining information outweighs the individual's privacy interest," we weigh the following factors: "(1) the type of information requested, (2) the potential for harm in any subsequent non-consensual disclosure, (3) the adequacy of safeguards to prevent unauthorized disclosure, (4) the degree of the need for access, and (5) whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access."<sup>222</sup>

## 3. Eight Circuit

The Eight Circuit held that *Whalen* established a constitutional right to informational privacy, which it notes has mostly been classified as a right to "confidentiality."<sup>223</sup> However, in *Cooksey v. Boyer*,<sup>224</sup> the court appears to define the scope of the right to informational privacy more narrowly than other federal circuits, as it seems to limit the protection only to informational privacy claims that allege governmental intrusion where "the information disclosed must be either a shocking degradation or an egregious humiliation."<sup>225</sup> The

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<sup>217</sup> *Id.* at 143 (quoting *Whalen v. Roe*, 429 U.S. 589, 599 (1977)).

<sup>218</sup> *Id.* (quoting *Nat'l Aeronautics & Space Admin. v. Nelson*, 562 U.S. 134 (2011)).

<sup>219</sup> *Id.* at 144. The First Circuit noted that in *Nelson*, the Court did not require that the questions in the questionnaire be necessary, or more narrowly constructed. Therefore, the government did not have to establish that there was no less restrictive alternative to the new method of distributing HIV drugs—one that would not disclose the prisoner's HIV status. *Id.*

<sup>220</sup> *Coons v. Lew*, 762 F.3d 891 (9th Cir. 2014).

<sup>221</sup> *Id.* at 900.

<sup>222</sup> *Id.* The court proceeded to find that no violation occurred in *Coons* because the individual mandate did not force petitioner to disclose any private information. *Id.* at 900–01.

<sup>223</sup> *Cooksey v. Boyer*, 289 F.3d 513, 515 (8th Cir. 2002).

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* at 516. The Eighth Circuit also cited Supreme Court precedent that it believed established that privacy claims should be limited to areas involving fundamental rights and rights

court recognized that its approach is narrower and has a more limited scope of protection than some circuits that only require that the disclosed information intrude upon the aggrieved party's reasonable expectation of privacy.<sup>226</sup> The court also acknowledged that its standards "set a high bar and implicitly hold that many disclosures, regardless of their nature, will not reach the level of a constitutional violation."<sup>227</sup>

#### 4. Sixth Circuit

The Sixth Circuit has finally recognized that *Whalen* establishes a constitutional right to informational privacy.<sup>228</sup> However, it has imposed one of the most exacting standards for applying that right to a disclosure of private information; and therefore, it requires substantially more discussion than that which this Article gives to other circuits. In a post-*Nelson* case, *Kenny v. Bartman*,<sup>229</sup> the Sixth Circuit stated:

The Supreme Court has recognized a constitutional right to privacy that includes an "individual interest in avoiding disclosure of personal matters." However, we have held that the right to informational privacy extends only to matters that implicate a fundamental liberty interest. A two-part test applies to claims that allege a violation of the right to informational privacy: "(1) the interest at stake must implicate either a fundamental right or one implicit in the concept of ordered liberty; and (2) the government's interest in disseminating the information must be balanced against the individual's interest in keeping the information private." Indeed, "we have recognized a constitutionally-protected informational-privacy interest in only two circumstances: (1) where the release of personal

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that are considered a part of "ordered liberty" *Id.* (citing *Paul v. Davis*, 424 U.S. 693, 713 (1976)).

<sup>226</sup> *Id.* In noting that some circuits do not limit informational privacy coverage to those disclosures that are a "shocking degradation or an egregious humiliation," the Eighth Circuit cited *Sheets v. Salt Lake*, 45 F.3d 1383, 1388 (10th Cir. 1995) as "finding potential constitutional violation in disclosure of diary contents even where the 'information is not extremely sensitive in nature [nor] particularly controversial or embarrassing.'" *Id.* (alteration in original).

<sup>227</sup> *Id.* at 516. In applying the standard to the facts in *Cooksey*, the court stated:

Applying these standards to the case at bar, we agree with the district court that no constitutional violation occurred. The legitimate interest in ensuring Cooksey's fitness for duty could certainly have been handled more professionally. However, the information disclosed and the circumstances of disclosure are neither shockingly degrading or egregiously humiliating. Cooksey was a high ranking law enforcement officer in a politically charged, small town. The only information disclosed was the fact that he was being treated by a psychologist for stress. Because the field of law enforcement is generally recognized as inherently stressful, it follows that the decision to seek treatment for that stress cannot be characterized as egregiously humiliating. Further, in this case, the Board's reinstatement of Cooksey as chief of police is strong evidence against Cooksey's assertion that he was stigmatized by the disclosure.

*Id.*

<sup>228</sup> *Kenny v. Bartman*, No. 16-2152, 2017 WL 3613601, at \*6 (6th Cir. May 19, 2017).

<sup>229</sup> *Id.* at \*1.

information may lead to bodily harm, and (2) where the released information relates to matters ‘of a sexual, personal, and humiliating nature.’”<sup>230</sup>

To support its “fundamental rights” and “ordered liberty” limitation, the court in *Bartman* relied on a prior Sixth Circuit case, *J.P. v. DeSanti*,<sup>231</sup> which is based on the Court’s decision in *Paul v. Davis*<sup>232</sup> and *Roe v. Wade*.<sup>233</sup> *Roe* is cited for the proposition that “[t]hese decisions make it clear that only personal rights that can be deemed ‘fundamental’ or ‘implicit in the concept of ordered liberty’” are protected.<sup>234</sup> And, *Paul*, simply cites the same language from *Roe*.<sup>235</sup> However, *Roe* and its language, regarding “fundamental rights” and “ordered liberty,” are best restricted to *Whalen*’s “individual autonomy” prong because the *Roe* Court used that language in determining whether a woman has a constitutional right to an abortion;<sup>236</sup> this “individual autonomy” language is contained in a separate area of constitutional privacy, outside the scope of the “avoiding disclosure of personal matters” prong.<sup>237</sup> Immediately before using the “fundamental right” and “ordered liberty” language, the *Roe* Court analyzed some of its prior decisions where it found an individual right to privacy, and those cases mostly involved such constitutional amendments as the First, Fourth, Fifth, Ninth, and the liberty clause of the Fourteenth Amendment.<sup>238</sup> The Court then asserted that, whether based on the liberty interest of the Fourteenth Amendment or the Ninth Amendment, a woman’s right to an abortion is

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<sup>230</sup> *Id.* (citations omitted).

<sup>231</sup> *J.P. v. DeSanti*, 653 F.2d 1080, 1088 (6th Cir. 1981).

<sup>232</sup> *Paul v. Davis*, 424 U.S. 693 (1976).

<sup>233</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>234</sup> *Id.* at 152.

<sup>235</sup> *Paul*, 424 U.S. at 713.

<sup>236</sup> *Roe*, 410 U.S. at 152–53. Several federal circuit court of appeals’ opinions have used the label “individual autonomy” when referring to the part of *Whalen* that discusses “the interest in independence in making certain kinds of important decisions,” which is one of the privacy prongs that *Whalen* recognizes. *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1061 (6th Cir. 1998) (asserting that “In *Whalen v. Roe*, the Supreme Court declared that the constitutional right to privacy grounded in the Fourteenth Amendment respects not only individual autonomy in intimate matters, but also the individual’s interest in avoiding divulgence of highly personal information.”) (citing *Whalen*, 429 U.S. at 599–600). *See also* *New York State Ophthalmological Soc’y V. Bowen*, 854 F.2d 1379, 1390 (D.C. Cir. 1988) (using both the phrase “decision-making” and “individual autonomy” to refer to the prong of *Whalen* that involves privacy in making intimate decisions.); *Flood v. Phillips*, 90 F. App’x 108, 116 (6th Cir. 2004) (“The Supreme Court has recognized that Petitioner enjoys privacy rights of ‘selective disclosure’ and individual autonomy.”) (citing *Whalen*, 429 U.S. at 599–600, n.26). The other privacy prong of *Whalen* is the “interest in avoiding disclosure of personal matters,” which is the basis of the constitutional right to informational privacy that is the subject of this Article. *Whalen*, 429 U.S. at 599–600, n.26. When this Article uses “decision-making” and “individual autonomy” to refer to *Whalen*’s privacy “interest in independence in making certain kinds of important decisions,” the above-cited opinions can be considered some of the sources of these phrases which appear to be approaching the status of being terms of art.

<sup>237</sup> *Whalen*, 429 U.S. 589, 599–600 n.25–26 (1977).

<sup>238</sup> *Roe*, 410 U.S. at 152.

included in the right of privacy.<sup>239</sup> And, *Paul*'s citation to *Roe* for the “fundamental right” and “ordered liberty” concept is best interpreted as the Court’s struggle to define the scope of an individual right to privacy in the early development of the Court’s jurisprudence in this area.

For example, in *Paul*, the Court held that there was not a violation of a right of privacy when the government included petitioner’s mug shot and name in a publication that was circulated to merchants warning them of potential shoplifters.<sup>240</sup> In reaching that conclusion, the Court cited *Roe* for the proposition that “[i]n *Roe* the Court pointed out that the personal rights found in this guarantee of personal privacy must be limited to those which are ‘fundamental’ or ‘implicit in the concept of ordered liberty.’”<sup>241</sup>

However, the *Roe* Court also said something else that is relevant: “They also make it clear that the right has some extension to activities relating to marriage, procreation, contraception, family relationships, and child rearing and education.”<sup>242</sup>

A plausible interpretation of *Roe* is that one has a constitutional right to privacy in decisions involving procreation, contraception, family relationships, child rearing, and education; and therefore, governmental intrusions in these areas must be balanced against the person’s constitutional right to make such decisions.<sup>243</sup> In other words, the statements in *Roe* (referencing or mandating that only “fundamental rights” or rights implicit in “ordered liberty” are entitled to constitutional privacy protections) define only *Whalen*’s “decision-making” or “individual autonomy” privacy prong, and not the “avoiding disclosure of personal matters” prong. This conclusion is borne out by *Whalen*’s Footnote 26 citation to *Roe* and other intimate relationship cases, such as *Griswold*, to support the existence of the decision-making privacy prong.<sup>244</sup> The *Whalen* Court cites a totally different set of cases in Footnote 25 to support the constitutional right to informational privacy,<sup>245</sup> with such cases being premised primarily on the “right to be let alone” instead of cases stating that the right must be a “fundamental right” or one that is implicit in “ordered liberty.”<sup>246</sup>

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<sup>239</sup> *Id.* at 153.

<sup>240</sup> *Paul*, 424 U.S. at 713.

<sup>241</sup> *Id.* (citing *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

<sup>242</sup> *Roe*, 410 U.S. at 152–53 (citations omitted). Such is tantamount to the “individual autonomy” prong the Court used in *Whalen* to describe one of the two sources of one’s right to privacy.

<sup>243</sup> *Id.*

<sup>244</sup> *Whalen v. Roe*, 429 U.S. 589, 600 n.26 (1977).

<sup>245</sup> *Id.* at 599 n.25.

<sup>246</sup> *Id.* It seems that the Sixth Circuit objectives in imposing a “fundamental right” or “ordered liberty” right requirement on a constitutional right to informational privacy is to limit the number of, and type of, lawsuits that one can bring to assert a constitutional right to privacy. *J.P. v. DeSanti*, 653 F.2d 1080, 1090 (1981) (“The Framers rejected a provision in the Constitution under which the Supreme Court would have reviewed all legislation for its constitutionality. They cannot have intended that the federal courts become involved in an inquiry nearly as broad—balancing almost every act of government, both state and federal,

Further, the Sixth Circuit, in *DeSanti*, relied on Justice Stewart's concurring opinion in *Whalen* and *Nixon*.<sup>247</sup> But, as described above, Justice Stewart's comments against Justice Brennan's assertion—that a subsequent public disclosure of the collected prescriptions “would clearly implicate constitutionally protected privacy rights”<sup>248</sup>—seem to be based on his belief that there must be a specifically identified provision of the Constitution that is alleged as the source of any articulated right to privacy.<sup>249</sup> This is the clear import of the asterisk footnote citation to the Supreme Court cases that Justice Stewart referenced in his *Whalen* concurrence.<sup>250</sup>

Thus, in his concurring opinion, it appears that Justice Stewart was primarily concerned about the distinction between a “general right to privacy” versus a “specific right to privacy,” which appears to be the Sixth Circuit's concern in *DeSanti*.<sup>251</sup> The best read of his concurring opinion is that, just like in the opinions cited in his asterisk footnote in *Whalen*, if one can pinpoint an amendment of the Constitution that contains a specific right to privacy, then the Court will evaluate whether a particular governmental intrusion violated that right.

However, the most important part of Justice Stewart's concurring opinion may be his reference in his asterisk footnote, stating that the Fifth Amendment “[to] some extent” may be supportive of “the right of each individual ‘to a private enclave where he may lead a private life.’”<sup>252</sup> For that proposition, he cites *Tehan v. Shott*.<sup>253</sup> In *Shott*, the Court decided to not give retrospective application to its holding that the Fifth Amendment right against self-incrimination includes improper comments, by a judge or prosecutor, regarding the accused having exercised his right to not speak.<sup>254</sup> In reaching its decisions, the Court reemphasized the value of one's right against self-incrimination:

And finally, insofar as strict application of the federal privilege against self-incrimination reflects the Constitution's concern for the essential values represented by “our respect for the inviolability of the human personality and of the right of each individual ‘to a private enclave where he may lead a private life,’ ”

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against its intrusion on a concept so vague, undefinable, and all-encompassing as individual privacy.”).

<sup>247</sup> *Id.* at 1088–89.

<sup>248</sup> *Whalen*, 429 U.S. at 608 (Stewart, J., concurring).

<sup>249</sup> *Id.* at 607 (making this argument in his asterisk footnote in his concurring opinion). There is no indication that Justice Stewart was primarily asserting that fundamental rights and rights implicit in ordered liberty are the only rights that are within the scope of the privacy that the Constitution protects. *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> *DeSanti*, 653 F.3d at 1088 (“However, the fact that the Constitution protects several specific aspects of individual privacy does not mean that it protects all aspects of individual privacy.”).

<sup>252</sup> *Whalen*, 429 U.S. at 607 (citation omitted).

<sup>253</sup> *Tehan v. Shott*, 382 U.S. 406 (1966); *See Whalen*, 429 U.S. at 608 (Stewart, J., concurring).

<sup>254</sup> *Shott*, 382 U.S. at 419.

any impingement upon those values resulting from a State's application of a variant from the federal standard cannot now be remedied.<sup>255</sup>

In further discussing the value of the privilege against self-incrimination, the Court, in footnote 12, referred to the privilege as an "important advance in the development of our liberty"; "reflect[ing] many of our fundamental values and most noble aspirations"; "our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation."<sup>256</sup> And that "our sense of fair play . . . dictates 'a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him.'"<sup>257</sup> In making this statement, the Court, in *Shott*, cited the Second Circuit Court of Appeals' decision in *United States v. Grunewald*<sup>258</sup> where the Second Circuit stated:

The foes of the privilege—beginning with Bentham—have mistakenly viewed it solely from a procedural angle; so considered, it seems to them an unjustifiable obstacle to the judicial ascertainment of the truth. *They ignore the fact that the privilege—like the constitutional barrier to unreasonable searches, or the client's privilege against disclosure of his confidential disclosures to his lawyer—has, inter alia, an important "substantive" value, as a safeguard of the individual's "substantive" right of privacy, a right to a private enclave where he may lead a private life. That right is the hallmark of our democracy.* The totalitarian regimes scornfully reject that right. They regard privacy as an offense against the state. Their goal is utter depersonalization. They seek to convert all that is private into the totally public, to wipe out all unique "private worlds," leaving a "public world" only, a la Orwell's terrifying book, "1984." They boast of the resultant greater efficiency in obtaining all the evidence in criminal prosecutions. We should know by now that their vaunted efficiency too often yields unjust, cruel decisions, based upon unreliable evidence procured at the sacrifice of privacy. We should beware of moving in the direction of totalitarian methods, as we will do if we eviscerate any of the great constitutional privileges.<sup>259</sup>

To support its contention that the Fourth Amendment and the Fifth Amendment are premised on a privacy right against governmental intrusion—which is essentially a right, "to be let alone"—the Second Circuit in *Grunewald* cited a Fifth Circuit Court of Appeals case, *Brock v. United States*.<sup>260</sup> There, the Fifth Circuit, in discussing the principles and policies that the founder's intend-

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<sup>255</sup> *Id.* at 415–16.

<sup>256</sup> *Id.* at 414 n.12.

<sup>257</sup> *Id.*

<sup>258</sup> *United States v. Grunewald*, 233 F.2d 556, 581–82 (2d Cir. 1956); In *Grunewald*, the Supreme Court held that the district court improperly instructed the jury that it could consider the fact that the petitioner, who testified at his trial, had asserted his privilege against self-incrimination when called to testify regarding the same questions at a grand jury proceeding. *Grunewald v. United States*, 353 U.S. 391, 424 (1957).

<sup>259</sup> *Grunewald*, 233 F.2d at 581–82 (emphasis added).

<sup>260</sup> *Brock v. United States*, 223 F.2d 681 (5th Cir. 1955). In *Brock*, the issue was whether a federal agent violated the defendant's Fourth Amendment rights when he seized a still and looked into a window of his home to obtain evidence of illegal activity without having a warrant to do so. *Id.* at 682–83.

ed to promote by enacting the Bill of Rights—including the Fourth and Fifth Amendments—noted that a fundamental policy was to “give the courts of this country the authority, in James Madison’s immortal phrase, ‘to oblige the government to control itself.’”<sup>261</sup> And, that the purpose of the Fourth and Fifth Amendments, like other amendments of the Bill of Rights, is to protect the privacy of one’s “home, papers and effects,” which the court stated “is indispensable to individual dignity and self respect.”<sup>262</sup>

Therefore, the gist of the Second Circuit’s statements in *Grunewald*, and the Fifth Circuit’s statement in *Brock*, is that the purpose of certain amendments of the Bill of Rights—including the Fifth Amendment’s privilege against self-incrimination and the Fourth Amendment’s prohibition against unreasonable searches and seizures—is to protect one’s private thoughts and personal home, property and effects from unwanted governmental intrusion unless such intrusion is justified by the government’s establishing that it has met the appropriate standard for such intrusion. These protections espoused by the Bill of Rights Amendments are tantamount to a right “to be let alone” unless the government has met appropriate standards for intrusion.

As such, the relevancy—of Justice Stewart’s concurring opinion in *Whalen* (that the Fifth Amendment provides for a zone of privacy), of the Second Circuit’s similar conclusion in *Grunewald*, and of the Fifth Circuit’s statement in *Brock* (relating to privacy being protected by the Fourth and Fifth Amendment)—is that, in addition to the privilege against self-incrimination portion of the Fifth Amendment, other portions of the Amendment should be deemed to offer similar privacy protection; this protection includes the portion of the Amendment stating that one cannot be denied “life, liberty, or property, without due process of law.”<sup>263</sup> To the extent that courts are hesitant to find a constitutional right to informational privacy without attaching it to a specific constitutional amendment, the “liberty” portion of the Fifth and Fourteenth Amendments could provide the source for such protection. However, for those courts that need something other than “liberty,” the Fourth Amendment is the most appropriate constitutional source.

##### 5. *District of Columbia*

The District of Columbia Circuit Court is hesitant to recognize a constitutional right to information privacy. In *Franklin v. District of Columbia*,<sup>264</sup> the D.C. Circuit held that Spanish-speaking prisoners did not have a constitutional right to privacy that would have mandated that the prison provide Spanish-speaking medical providers.<sup>265</sup> The Court implied that *Whalen* would have been

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<sup>261</sup> *Id.* at 684.

<sup>262</sup> *Id.*

<sup>263</sup> U.S. CONST. amend. V.

<sup>264</sup> *Franklin v. District of Columbia*, 163 F.3d 625 (D.C. Cir. 1998).

<sup>265</sup> *Id.* at 638–39.

applicable only to a disclosure to the state, and not to a specific type of governmental employee.<sup>266</sup> But, the primary reason why the D.C. Circuit did not find that the Spanish-speaking prisoners had a constitutional right to have Spanish-speaking medical providers is that the court believed that such a right would have imposed too much of a financial burden on the prison, given that it had limited financial resources and that it would have to provide a different type of medical provider for each group of prisoners who spoke a different language.<sup>267</sup> Additionally, the court believed that it should not recognize a constitutional right to privacy unless the right was grounded in a specific constitutional amendment.<sup>268</sup>

Despite holding that the Spanish-speaking prisoners did not have a constitutional right to privacy, the court did make one observation that is important to the central thesis of this Article—that the Fourth Amendment can serve as the basis for a constitutional right to informational privacy:

Exactly where in the Constitution this right is located the court did not say. One place might be the Fourth Amendment. But the Supreme Court has held that the expectation of privacy of those incarcerated is severely diminished, so much so that a “right of privacy in traditional Fourth Amendment terms is fundamentally incompatible with the close and continual surveillance of inmates and their cells required to ensure institutional security and internal order.” Besides, we cannot understand how a prisoner’s telling another, bilingual prisoner about his symptoms could amount to an unreasonable search or seizure by the District.<sup>269</sup>

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<sup>266</sup> *Id.* at 638. (“What plaintiffs actually advocate, therefore, is the creation of a constitutional right for non-English speaking prisoners to disclose their medical condition *only* to certain government employees. This is an odd formulation: when recognized in the past, the constitutional right of privacy has protected against disclosure to the state.”).

<sup>267</sup> *Id.*

<sup>268</sup> *Id.* at 637 n.12 (“‘Courts do not’—should not—‘adjudicate generalized claims of unconstitutionality, but rather resolve constitutional questions by applying these settled doctrines to specific constitutional claims asserted under specific constitutional clauses’”). It should be noted that the prisoners’ alleged informational privacy violation was that, without Spanish-speaking medical providers, they would have to disclose their medical information to correctional officials or other prisoners who would then translate that information to English-speaking medical providers. The court believed that such disclosure to correctional officials and other prisoners, for translation purposes, was just “one of the ordinary incidents of prison life.” *Id.* at 638.

<sup>269</sup> *Id.* at 637 (citation omitted). In an earlier case, the D.C. Circuit, in *Am. Fed’n of Gov’t Emps. v. Dep’t of Hous. & Urban Dev.*, described *Whalen* and *Nixon* as being “Delphic”; the court “decline[d] to enter the fray by concluding that there is no such constitutional right because in this case that conclusion is unnecessary.” 118 F.3d 786, 791, 793 (D.C. Cir. 1997) But, the court did recognize that other federal circuit courts—except the then-Sixth Circuit—had held that the above-referenced Supreme Court precedent did establish a constitutional right to informational privacy. *Id.* at 792–93. However, despite the D.C. Circuit’s criticism, the central thesis of this Article is that the cited Supreme Court cases in footnote 25 of *Whalen*, as well as the Court’s acknowledgements in *Nixon*, do show that the Court definitively stated, held, or otherwise sufficiently recognized a constitutional right to informational privacy.

Perhaps, the court was correct in not finding a Fourth Amendment violation regarding the Spanish-speaking prisoners in *Franklin*. However, the mere fact that it mentioned that the Fourth Amendment could possibly be a source for a constitutional right to informational privacy enhances the central thesis of this Article. At the very least, it means that such a thesis is not outside of the bounds of permissible arguments for and courts' consideration of the validity of a constitutional right to informational privacy claim premised on the Fourth Amendment.

#### V. SPECIFIC STANDARDS FOR A CONSTITUTIONAL RIGHT TO INFORMATIONAL PRIVACY CLAIM

##### A. *A Broad Interpretation of the Constitutional Right to Informational Privacy is Necessary for Maximum Privacy Protection*

In Part I, this Article discussed four potential privacy violations, many of which have already occurred.<sup>270</sup> To each of these possible claims, the broadest interpretation of a constitutional right to informational privacy should be available to one when a state government or the federal government has obtained, or attempted to obtain, his or her private information in which there is a reasonable expectation of privacy. In other words, the broad approach that the Third, Seventh, Second, Fourth, Tenth, and Fifth Circuit Courts of Appeals<sup>271</sup> use is the preferable approach. First, this broad approach does not require that one's private information involve a "fundamental right," or that the information be implicit in the "ordered liberty" concept. Instead, these federal circuits require only that the private information be such that the owner of the information has a reasonable expectation of privacy in the information.<sup>272</sup>

This reasonable expectation of privacy approach is the appropriate approach because, as this Article argues, the Fourth Amendment should be adopted as the most logical and persuasive source for the constitutional right to information privacy, which through the "liberty" clause of the Fourteenth Amendment is made applicable to the States;<sup>273</sup> therefore, an aggrieved person, who wants to challenge a state governmental intrusion into that person's private information, should be able to bring a violation of a constitutional right to informational privacy claim.

That the Fourth Amendment is the appropriate constitutional source for the informational privacy claim is further buttressed by the fact that, as in a criminal law search and seizure context, the more expansive federal circuit courts have adopted the reasonable expectation of privacy standard for determining when a constitutional right to informational privacy exists. Therefore, the use

<sup>270</sup> See *supra* notes 11–23 and accompanying text.

<sup>271</sup> See *supra* notes 184–209 and accompanying text.

<sup>272</sup> See *supra* notes 184–209 and accompanying text.

<sup>273</sup> *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

of the Fourth Amendment as the source of the constitutional right to informational privacy would not be a far stretch, especially given that the Supreme Court in *Whalen* used Justice Brandeis's dissenting opinion in *Olmstead*, a Fourth Amendment case, as a major authority for the *Whalen* Court's conclusion that one aspect of privacy includes the "avoiding disclosure of personal matters" interest, which is the same interest as the constitutional right to informational privacy.

Furthermore, in addition to the adoption of the broadest interpretation of the constitutional right to informational privacy, courts should apply "strict scrutiny" to an alleged violation of the right. Presently, many federal circuit courts use a balancing approach where they weigh one's right to informational privacy against a state's articulated interest for requesting or otherwise using the private information.<sup>274</sup> This is mostly a rational basis test, which is the lowest level of protection from governmental intrusions.<sup>275</sup> Using a strict scrutiny test will mandate that the government show that the request for, or use of, private information is for a compelling governmental interest and that it is using the least restrictive means in obtaining or using the information.<sup>276</sup> For example, the First Circuit, in *Nunes*, held that the prison officials did not have to look for an alternative means of distributing HIV-infected prisoners' medicine such that the method of distribution would not disclose the prisoners' HIV status by requiring them to stand in a line to obtain the medicine.<sup>277</sup> At a minimum, that prison should have been required to show that there were no equal or less expensive means available to distribute the medicine without disclosing the inmates' HIV status.

To the extent that one would object to the use of strict scrutiny, then the response could be that, given that the Fourth Amendment is the proper source for a constitutional right to informational privacy, and that the Fourth Amendment is one of the Bill of Rights Amendments, the constitutional right to informational privacy is a fundamental right<sup>278</sup> which could support a strict scrutiny analysis when a person alleges a violation of her right to informational privacy.<sup>279</sup>

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<sup>274</sup> See *supra* text accompanying note 203.

<sup>275</sup> *Nunes v. Mass. Dep't of Corr.*, 766 F.3d 136, 144 (1st Cir. 2014). See also *supra* note 219 and accompanying text.

<sup>276</sup> Although a strict scrutiny standard might impose an added burden on states and their officials, that standard is needed, given the substantial and pervasive risk that each of us face from invasions of our privacy from governmental intrusions, and from private intrusions. Strict scrutiny is needed to ensure that state governments and their employees do their best job in determining whether one's private information is really needed, and if needed, whether the least restrictive and minimally invasive means are used to obtain, use, and disclose the information.

<sup>277</sup> *Nunes*, 766 F.3d at 143–44.

<sup>278</sup> *Weeks v. United States*, 232 U.S. 383, 390 (1914).

<sup>279</sup> *Walls v. City of Petersburg*, 895 F.2d 188, 192 (4th Cir. 1990); see also *supra* note 199 and accompanying text. In the criminal law search and seizure context, scholars disagree on whether courts should use strict scrutiny to resolve Fourth Amendment issues. See Wayne D.

Applying the above-stated concepts and analysis to the four possible violations that this Article discussed in Part I, one who has a reasonable expectation of privacy in any of the four situations should be allowed to allege and litigate a violation of a constitutional right to informational privacy claim; this right extends to situations where the government requests the information for a job application, public benefits, or other application for governmental services. And, one should have a similar claim when either the state government or the federal government improperly obtains private information from Facebook, Google or other social media providers, when the private information is such that the person had a reasonable expectation of privacy in the information. The same claim should exist when governmental employees misuse private information for an unauthorized purpose, as well as when either the state or federal government, through too-pervasive surveillance, prevents the person from having a private existence.<sup>280</sup> As long as the aggrieved person has a reasonable expectation of

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Holly, *The Fourth Amendment Hangs in the Balance: Resurrecting the Warrant Requirement Through Strict Scrutiny*, 13 N.Y.U. J. HUM. RTS. 531, 540–41 (1997) (arguing that strict scrutiny should be required for “the warrant requirement” and “warrantless searches” “because Fourth Amendment rights are at least as fundamental as other rights which the Court closely scrutinizes”); Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of Camara and Terry*, 72 MINN. L. REV. 383, 436 (1988) (“Adopting a strict scrutiny standard would fully bestow preferred status upon the fourth amendment as a fundamental right and in the process would yield a more structured reasonableness inquiry”). *But see* Cynthia Lee, *Package Bombs, Footlockers, and Laptops: What the Disappearing Container Doctrine Can Tell Us About the Fourth Amendment*, 100 J. CRIM. L. & CRIMINOLOGY 1403, 1491 (2010).

<sup>280</sup> In *United States v. Jones*, 545 U.S. 400 (2012), the Court held that that the Government’s installation of a GPS device on a target’s vehicle, and its use of that device to monitor the vehicle’s movements, constituted a “search.” *Id.* at 404. *Jones* involved the Court’s use of the trespass approach to determine that the government’s attaching of a GPS device to a vehicle was a search under the Fourth Amendment. *Id.* at 406. *Jones* may be used to argue that a government entity’s pervasive surveillance can be a violation of one’s constitutional right to informational privacy, especially if the surveillance is too pervasive and if it involves digital devices. The Court stated:

The concurrence posits that “relatively short-term monitoring of a person’s movements on public streets” is okay, but that “the use of longer term GPS monitoring in investigations of most offenses” is no good. That introduces yet another novelty into our jurisprudence. There is no precedent for the proposition that whether a search has occurred depends on the nature of the crime being investigated. And even accepting that novelty, it remains unexplained why a 4–week investigation is “surely” too long and why a drug-trafficking conspiracy involving substantial amounts of cash and narcotics is not an “extraordinary offens[e]” which may permit longer observation. What of a 2–day monitoring of a suspected purveyor of stolen electronics? Or of a 6–month monitoring of a suspected terrorist? We may have to grapple with these “vexing problems” in some future case where a classic trespassory search is not involved and resort must be had to *Katz* analysis; but there is no reason for rushing forward to resolve them here.

*Id.* at 412–413 (alteration in original) (citation omitted). Perhaps, one could argue that—through the use of *Katz*’s reasonable expectation of privacy test (the same test for a constitutional right to informational privacy)—the length and pervasiveness of governmental surveillance and information gathering could be a violation of one’s constitutional right to informational privacy. This argument is especially appropriate when one did not know that a governmental entity was monitoring and gathering all or a substantial portion of his or her

daily existence—when the person had a reasonable expectation of privacy that such pervasive monitoring and information gathering was not occurring.

As a matter of fact, during the editing of this Article, the Court, in *Carpenter v. United States*, 138 S. Ct. 2206 (2018) opined on a related issue in a case involving a petitioner's criminal conviction. *Id.* at 2211–13. The Court held that the Fourth Amendment required that the government obtain a warrant, on a showing of probable cause, before it could obtain one's cell-site location information (CSLI) from cell phone service providers. *Id.* at 2221. The Court held that the Fourth Amendment applied because the petitioner had a reasonable expectation of privacy in the CSLI given the persistent and pervasive nature of the surveillance:

While individuals regularly leave their vehicles, they compulsively carry cell phones with them all the time. A cell phone faithfully follows its owner beyond public thoroughfares and into private residences, doctor's offices, political headquarters, and other potentially revealing locales . . . . Accordingly, when the Government tracks the location of a cell phone it achieves near perfect surveillance, as if it had attached an ankle monitor to the phone's user.

*Id.* at 2218.

The Court further stated:

Whoever the suspect turns out to be, he has effectively been tailed every moment of every day for five years, and the police may—in the Government's view—call upon the results of that surveillance without regard to the constraints of the Fourth Amendment. Only the few without cell phones could escape this tireless and absolute surveillance.

*Id.*

The Court was also concerned with the government's being able to piece together a map of the petitioner's entire existence during a certain period of time: "From the 127 days of location data it received, the Government could, in combination with other information, deduce a detailed log of Carpenter's movements, including when he was at the site of the robberies." *Id.* Given the above, the Court held that, "Accordingly, when the Government accessed CSLI from the wireless carriers, it invaded Carpenter's reasonable expectation of privacy in the *whole of his physical movements.*" *Id.* (emphasis added).

The Court then held that the "third-party doctrine"—whereby the Court has previously held that the Fourth Amendment does not apply when law enforcement obtain information from a third party (such as a bank) instead of from a suspect—did not apply. *Id.* at 2220. The doctrine did not apply, in part, because of the type of information and the pervasiveness of the surveillance, given that such surveillance "is about a detailed chronicle of a person's physical presence compiled every day, every moment, over several years." *Id.* And, the Court asserted that because cell phone usage is "indispensable to participation in modern society" and because location information is automatically transmitted to wireless service providers, the transmitting of petitioner's CSLI was not voluntary; and therefore, the third-party doctrine did not prevent the application of the Fourth Amendment. *Id.* As such, this Article further argues that there are other conveyances of private information—including, but not limited to, one's use of the internet—that are just as indispensable and pervasive as the use of one's cell phone; and therefore, such conveyances should not be deemed either voluntary or subject to the third-party doctrine (which hopefully the Court will continue to erode as it did in *Carpenter*, as discussed above).

Although *Carpenter* involves the application of the Fourth Amendment to a criminal prosecution, its analysis and holding should be applicable to a constitutional right to informational privacy claim, in the civil context, when such claim involves pervasive and persistent governmental surveillance that intrudes on private information in which one has a reasonable expectation of privacy, even when the surveillance involves the government's patching together of different types of private information to create a map of one's daily existence and even when that private information is in the hands of third parties. The application of the Fourth Amendment to the constitutional right to informational privacy is further appropriate because the reasonable expectation of privacy standard is used in both contexts; and there-

privacy in the subject information, the government, when sued for a violation of the constitutional right to informational privacy, should have to show that the request for, demand for, or use of the information serves a compelling governmental interest that could not be satisfied with less restrictive and less invasive intrusions on, and use of, one's private information.<sup>281</sup>

#### CONCLUSION

Today, citizens' private information is subject to being obtained and used by a multiplicity of persons and entities. Some of the usage will be without one's consent and the usage might disclose private information which is either embarrassing, or injurious to one's reputation, future employability, and personal freedom. The disclosure or use could also lead to losses of privacy, and emotional distress deriving from the knowledge that one's private information is no longer private. This Article discusses the constitutional right to informational privacy claim, and shows the confusion created by the Court's misinterpretation of *Whalen*, its own precedent, and how the federal circuit courts have taken the lead in this area of the law. However, the law needs to be more uniform, and this Article, throughout its various sections, offers clarity and support for the most expansive approach to the claim, including the use of the Fourth Amendment and strict scrutiny.

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fore, as this Article argues, that amendment should be the foundational constitutional support for a constitutional right to information privacy. *See supra* notes 25–85 and accompanying text; *see also supra* notes 182–269 and accompanying text.

<sup>281</sup> The specific methods or procedures used to bring a constitutional right to informational privacy claim are beyond the scope of this Article. However, such claims can be brought as section 1983 claims against state employees who are acting under color of state law when they commit a violation of one's constitutional right to informational privacy. *See* 42 U.S.C. § 1983 (2018); *Wyatt v. Fletcher*, 718 F.3d 496, 499 (5th Cir. 2013) (resolving a section 1983 claim—that alleged a violation of a constitutional right to informational privacy—on qualified immunity grounds). Perhaps, a Biven-type claim could be brought against a federal employee who violates one's right to informational privacy. *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971). And, one might be able to bring the claim directly under the Fourth Amendment or under the “liberty” interest clause of the Fourteenth Amendment or Fifth Amendment to seek an injunction or declaration that a certain statute or other procedure that mandates the disclosure of private information is a violation of the person's constitutional right to informational privacy.