

## OUTING PRIVACY

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**ABSTRACT**—The government regularly outs information concerning people’s sexuality, gender identity, and HIV status. Notwithstanding the implications of such outings, the Supreme Court has yet to resolve whether the Constitution contains a right to informational privacy—a right to limit the government’s ability to collect and disseminate personal information.

This Article probes informational privacy theory and jurisprudence to better understand the judiciary’s reluctance to fully embrace a constitutional right to informational privacy. The Article argues that while existing scholarly theories of informational privacy encourage us to broadly imagine the right and its possibilities, often focusing on informational privacy’s ability to promote individual dignity and autonomy, there is a disconnect when courts attempt to translate those theories into workable doctrine. The extant theories are products of Fourth Amendment and decisional privacy law, and bear a more attenuated relationship to informational privacy problems, hindering recognition of the right.

This Article reorients and hones the focus of the purported informational privacy right toward what the Due Process Clause suggests as the right’s two principal and more concrete values: preventing intimate information from serving as the basis for potential discrimination and creating space for the formation of political thought. By so doing, not only is a more precise theory of informational privacy constructed, but instrumentally (and perhaps most importantly), courts will be more apt to recognize a constitutional informational privacy right thereby better insulating individuals from discrimination or marginalization.

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## INTRODUCTION

A police officer approaches two teenage boys in a parked car. During questioning, the boys allegedly admit they were there to have sex together. The officer threatens that if one of the boys does not tell his grandfather that he is gay, the officer will tell the grandfather. After his release from custody, the boy kills himself.<sup>1</sup>

A transgender individual seeks to change the gender marker on a government-issued identification—identification that all individuals are required by law to show potential employers.<sup>2</sup> To obtain an accurate ID, the

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<sup>1</sup> *Sterling v. Borough of Minersville*, 232 F.3d 190, 192–93 (3d Cir. 2000).

<sup>2</sup> Verification of Identity and Employment Authorization, 8 C.F.R. § 274a.2 (2015); U.S. CITIZENSHIP AND IMMIGRATION SERVS., DEP’T OF HOMELAND SEC., FORM I-9, EMPLOYMENT ELIGIBILITY VERIFICATION, <http://www.uscis.gov/sites/default/files/files/form/i-9.pdf> [<http://perma.cc/R5MM-BQQR>].

state requires the person to publicly profess whether they have had gender confirmation surgery.<sup>3</sup>

Litigants request that a government report detailing certain individuals' extreme political and religious views be publicly produced.<sup>4</sup>

Does our Constitution contain solutions to pressing informational privacy problems such as these, which often involve the forced outing of individuals' sexuality, gender identity, HIV status, and political beliefs by the government? Are there constitutional limits on the ability of the government to collect and disseminate our personal information (so-called informational privacy)? Despite that this year marks the fiftieth anniversary of *Griswold v. Connecticut*, where the Supreme Court first acknowledged the right to decisional privacy,<sup>5</sup> neither scholars nor the Court have definitively resolved these questions or outlined the contours of a workable right to constitutional informational privacy.<sup>6</sup> This Article attempts to fill that void. In so doing, the Article examines both informational privacy theory and jurisprudence to better understand why the judiciary has been reluctant to fully embrace a robust constitutional right to informational privacy.

While prevailing theories of informational privacy beneficially encourage us to broadly imagine the right and its possibilities, often focusing on informational privacy's ability to promote individual dignity (the value most closely associated with the Fourth Amendment's prohibition on intrusive searches) and autonomy (the value directly safeguarded by decisional privacy protections), there is a disconnect when courts attempt to translate these theories into feasible doctrine. This Article's ambition is to hone extant theories of informational privacy and articulate a conceptual, theoretical framework that more precisely captures informational privacy's distinct, perhaps more modest, normative values. In addition to more accurately identifying the values underlying an informational privacy right, this Article's reconstituted theory of

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<sup>3</sup> See, e.g., CTRS. FOR DISEASE CONTROL & PREVENTION, MODEL STATE VITAL STATISTICS ACT AND REGULATIONS § 21(d) (1992).

<sup>4</sup> *ACLU v. Mississippi*, 911 F.2d 1066, 1070 (5th Cir. 1990).

<sup>5</sup> "Decisional privacy" refers to the right recognized in cases such as *Griswold v. Connecticut*, 381 U.S. 479 (1965), wherein the Supreme Court acknowledged that individuals have the ability to control certain fundamental decisions. See *Whalen v. Roe*, 429 U.S. 589, 599–600 (1977) (distinguishing decisional privacy from informational privacy—"the individual interest in avoiding disclosure of personal matters").

<sup>6</sup> See, e.g., Mary D. Fan, *Constitutionalizing Informational Privacy by Assumption*, 14 U. PA. J. CONST. L. 953, 954, 986 (2012) (recognizing that the "law struggles to define the metes and bounds of the claimed constitutional right" to informational privacy and, in response, arguing that we "need not invent" an informational privacy right and instead should simply view other established constitutional rights through the lens of privacy).

constitutional informational privacy will translate more fluidly into a coherent doctrinal framework likely to find judicial purchase.

In short, alongside a belief that informational privacy advances individual dignity and autonomy, this Article suggests that informational privacy's two principal, more narrow and concrete values are creating space for the formation and nurturing of political thought and preventing intimate, personal information from serving as the basis of potential discrimination.<sup>7</sup> So conceived, the Article also demonstrates that the proper test for evaluating informational privacy claims that implicate those two interests is one of heightened or strict scrutiny.<sup>8</sup> Normatively, it is in part because intimate and political information tend, by their nature, to involve a higher likelihood of downstream consequences (such as employment discrimination resulting from the disclosed intimate information or marginalization caused by the monitoring of political thought) that they are entitled to special protection relative to other forms of information. Doctrinally, strict scrutiny is warranted because political thought and intimate information are closely related to already-recognized fundamental rights such as marital privacy, bodily integrity, and freedom of association.

The need for the development of a narrow but exacting informational privacy framework is acute. In addition to privacy concerns raised by government programs such as the National Security Agency's (NSA) telephone metadata surveillance regime,<sup>9</sup> informational privacy is

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<sup>7</sup> By "intimate information" I mean, for example, sexual, medical, or mental health information. "Political thought" includes information arguably pertaining to countermajoritarian viewpoints. There may be a concern that these examples are insufficient and that a more fixed meaning of "intimate" information is necessary, lest this Article's categorical approach morph into the less contained dignity-autonomy approach that I critique. While attune to this concern, it is my sense, as Tom Gerety has explained, that intimacy actually "has a quite certain and quite exact core of meaning or application." Tom Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233, 282 n.175 (1977). That is, society and courts have a general sense of what counts as intimate information—and it is a limited universe, as the following discussion of case law highlights. For present purposes, rather than prescribe a definitive, fixed set of what constitutes intimate information, it is enough to provide several examples (sexual, medical, mental health) that capture the majority of what constitutes intimate information, and let the "content of the intimacies of identity . . . be worked out case-by-case." *Id.* at 281. The presence of downstream consequences also has a limiting effect on what will be entitled to heightened protection.

<sup>8</sup> This is in contrast to the less muscular balancing test advocated by many scholars and employed by several courts. *See, e.g.*, 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, 504, 509 (1990) (noting courts' movement toward a test that balances interests and away from a strict preferred rights analysis, and then embracing that approach); *Plante v. Gonzalez*, 575 F.2d 1119, 1134 (5th Cir. 1978) (employing balancing test to resolve informational privacy claim).

<sup>9</sup> *See Klayman v. Obama*, 957 F. Supp. 2d 1, 14–15 (D.D.C. 2013) (the NSA's metadata surveillance program captures the phone numbers used to make and receive calls, when the calls took place, and how long the calls lasted, but, according to the government, does not include the content of the calls or identities of the callers), *vacated*, 800 F.3d 559 (D.C. Cir. 2015).

threatened by a host of seemingly routine government actions, including ministerial bureaucratic requirements. Surgery requirements to change the gender marker on a government ID is one important example. Notwithstanding that need, the Supreme Court has failed to definitively recognize a constitutional right to informational privacy in favor of reluctantly assuming (without deciding) that such a right exists on three occasions, most recently in 2011.<sup>10</sup> As Justice Scalia bemoaned, the Court has applied “a constitutional informational privacy standard without giving a clue as to the rule of law it is applying . . . provid[ing] no guidance whatsoever for lower courts.”<sup>11</sup> The Court has thereby added to the conceptual confusion regarding the scope of an informational privacy right and left lower courts and litigants grappling to determine how to enforce the right—should it exist at all.<sup>12</sup>

In endeavoring to remedy the persistent confusion and craft a rigorous framework for evaluating constitutional informational privacy claims by giving priority to claims infringing on intimate information or political thought, this Article proceeds in four parts.

Part I analyzes scholarship regarding the theoretical underpinnings of an informational privacy right (and privacy generally). Part I concludes that while this scholarship greatly advances our understanding of privacy’s overarching value—by framing informational privacy in terms of dignity, autonomy, and existing Fourth Amendment and decisional privacy protections—predominant theories of informational privacy are often imprecise and fail to identify the more concrete harms implicated by informational privacy claims, contributing to the judicial confusion scrutinized in Part II.<sup>13</sup> For instance, while courts recognize that personal dignity is implicated by a traditional police search of someone’s home, because informational privacy claims often lack the same visceral intrusiveness, courts struggle to conclude that a plaintiff’s dignity interest is threatened. Throughout both Parts I and II, the Article shows how a theory of informational privacy reoriented toward intimate information and

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<sup>10</sup> *NASA v. Nelson*, 131 S. Ct. 746, 751 (2011) (“We assume, without deciding, that the Constitution protects a privacy right of the sort mentioned in *Whalen* and *Nixon* [i.e., informational privacy].”); *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 457 (1977) (discussing the same privacy right); *Whalen v. Roe*, 429 U.S. 589, 605–06 (1977) (same).

<sup>11</sup> *Nelson*, 131 S. Ct. at 768 (Scalia, J., concurring in the judgment).

<sup>12</sup> See *id.* at 756 n.9 (majority opinion) (“State and lower federal courts have offered a number of different interpretations of *Whalen* and *Nixon* over the years.”).

<sup>13</sup> See, e.g., *J.P. v. DeSanti*, 653 F.2d 1080, 1090 (6th Cir. 1981) (the Framers “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, against its intrusion on a concept so vague, undefinable, and all-encompassing as individual privacy”).

political thought avoids these pitfalls and is more likely to be adopted by courts because these interests are more directly served by informational privacy.

Part III explains why a robust constitutional informational privacy framework is socially imperative. Part IV then provides constitutional support for a strict scrutiny framework that gives deference to privacy claims that implicate intimate information and political thought. These categories, intimate information and political thought, are isolated and supported by a combination of doctrinal and normative judicial undercurrents. That is, in addition to bearing a close relationship to fundamental rights already recognized by courts under the Due Process Clause<sup>14</sup> and the First Amendment of the Constitution,<sup>15</sup> these two categories track and reflect judicial discourse, suggesting that intimate information and political thought are (or at least ought to be) entitled to special constitutional protection. Until this time, in part because of the theoretical emphasis on dignity, autonomy, and “intrusion,” courts have lacked a coherent doctrinal framework to animate their normative intuition regarding the importance of intimate information and political thought.

This Article provides courts, government actors, litigants, and other scholars a blueprint for the development of an enforceable informational privacy cause of action—one that cannot be dismissed as overly broad or bearing little connection to the purported interests advanced by the right. In this way, we can out a right to informational privacy.<sup>16</sup>

## I. REORIENTING INFORMATIONAL PRIVACY THEORY

Legal scholarship is rich with attempts to craft comprehensive theories or definitions of privacy. Positively, these attempts have challenged courts

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<sup>14</sup> U.S. CONST. amend. V (“No person shall . . . be deprived of life, liberty, or property, without due process of law . . .”); U.S. CONST. amend. XIV, § 1 (“[N]or shall any state deprive any person of life, liberty, or property, without due process of law . . .”).

<sup>15</sup> U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble . . .”).

<sup>16</sup> Thirty-five years ago, Ruth Gavison offered a powerful explanation of the need for an explicit legal commitment to a freestanding right to privacy, including informational privacy. *See* Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421 (1980). Gavison explained that reductionist attempts to deny the utility of privacy as a legal concept by relying on the law’s heretofore failure to recognize such a concept was, in essence, tautological. *See id.* at 460–61. Once privacy was explicitly acknowledged, as opposed to implicitly informing other rights, the right would gain texture and validation because privacy claimants would come out of the closet, no longer needing to couch their privacy claims in terms of other, less fitting rights. *See id.* at 456–58. In some ways, this Article is a response to Gavison’s call for an “explicit commitment” within the context of American constitutional law. *See id.* at 459.

to expansively envision what role the “right to privacy” plays in a democratic society and to identify privacy’s many values.<sup>17</sup> But as a consequence, by broadly and flexibly defining informational privacy as promoting dignity and autonomy, scholarship has perhaps buried informational privacy’s more nuanced contributions to the constitutional fabric and unintentionally reinforced the judicial perception that informational privacy rights are undefinable and unenforceable.<sup>18</sup> The emphasis on dignity and autonomy within the informational privacy context has distracted courts from informational privacy’s more limited underlying interests—the protection of intimate information and political thought.<sup>19</sup>

### A. Dignity

Many have focused on privacy’s ability to protect individuals from intrusion into information not known to others, thereby protecting an individual’s dignity.<sup>20</sup> A dignity theory of informational privacy posits that the intrusion itself is an inherent harm to the individual, regardless of the subject matter of the information intruded upon or any consequent,

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<sup>17</sup> As then-Justice Rehnquist nicely described it, “[t]he concept of ‘privacy’ can be a coat of many colors, and quite differing kinds of rights to ‘privacy’ have been recognized in the law.” *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 546 n.1 (Rehnquist, J., dissenting).

<sup>18</sup> See *Russell v. Gregoire*, 124 F.3d 1079, 1093 (9th Cir. 1997) (doubting a right to informational privacy because plaintiffs “do not pinpoint the source of the right or identify its contours”); *DeSanti*, 653 F.2d at 1089 (concluding that absent a framework, “[a]nalytically we are unable to see how such a constitutional right of privacy can be restricted to anything less than the general ‘right to be let alone’” (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting))).

For different reasons, Julie Cohen has also recently argued that privacy’s “bad reputation has deep roots in privacy theory.” See Julie E. Cohen, *What Privacy Is For*, 126 HARV. L. REV. 1904, 1906 (2013). For Cohen, privacy should not be viewed exclusively as rooted in liberal individualism, but is better understood as part of a larger, social protection safeguarding informed citizenship. *Id.* So conceptualizing privacy will have real benefit in many contexts (and Cohen’s formulation is consistent with this Article’s conclusion that political information is entitled to heightened protection). But for privacy to have practical meaning in restraining government in the constitutional context, an individual rights focus is probably inescapable. Put differently, while privacy may have broader social value, privacy qua individual right is the enforcement mechanism that can lead to on-the-ground implementation of the right.

<sup>19</sup> Of course, others have also suggested that to varying degrees both intimacy and political thought deserve special privacy protections. See, e.g., Gerety, *supra* note 7, at 236 (arguing that privacy ought to be defined as autonomy over “the intimacies of personal identity”); W.A. Parent, *Privacy, Morality, and the Law*, 12 PHIL. & PUB. AFF. 269, 269–70 (1983) (suggesting that privacy be understood as “facts about a person which most individuals in a given society at a given time do not want widely known about themselves” (footnote omitted)). My contribution is to explain how in the constitutional context the prevailing focus on autonomy and dignity has overshadowed the importance of these two categories, and outline how focusing or recentering on these two categories can help a constitutional right to informational privacy garner more widespread judicial acceptance and a stronger doctrinal foothold.

<sup>20</sup> See DANIEL J. SOLOVE, UNDERSTANDING PRIVACY 85 (2008) (noting that several scholars focus on privacy’s intrinsic, nonconsequentialist value).

downstream impacts from the intrusion.<sup>21</sup> Without dismissing the relationship between informational privacy and dignity, dignity is, by itself, an insufficient organizing principle for a workable informational privacy cause of action.<sup>22</sup> And defining a broad concept such as privacy in terms of an equally if not more malleable concept such as dignity does little to aid courts in their attempts to construct an enforceable informational privacy right.<sup>23</sup>

The scholarly focus on informational privacy's connection to dignity emerged almost as soon as privacy began to be theorized as an American jurisprudential right. In their oft-analyzed article, Samuel Warren and Louis Brandeis advocated for a common law right to informational privacy.<sup>24</sup> Warren and Brandeis were attempting to demonstrate that a common law right to informational privacy had a tradition in intellectual property torts (such as defamation and copyright) but that privacy causes of action should not be limited to claims implicating property rights. For example, their right to privacy was not restricted to intrusions into literary compositions (which have a property value), but would extend to personal letters (which

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<sup>21</sup> See, e.g., Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Posser*, 39 N.Y.U. L. REV. 962, 974 (1964).

<sup>22</sup> This is not to suggest that intimate information and political thought are completely disassociated from dignity and autonomy. From a certain perspective, intimate and political information are examples of dignity and autonomy at their zenith. Nor is it to suggest that the multifaceted concept of dignity plays no role in helping to understand privacy's societal value, other provisions of the Constitution, or our broader social obligations. Certainly it does. See Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 749, 792 (2011) (noting that equality and liberty function together to advance an overarching value in dignity); Kwame Anthony Appiah, *Dignity and Global Duty*, 90 B.U. L. REV. 661, 674–75 (2010) (sustaining dignity for all should be the aim of global institutions and aiding such institutions helps us fulfill our personal responsibility to others' dignity); Jeremy Waldron, 2009 Oliver Wendell Holmes Lectures, *Dignity and Defamation: The Visibility of Hate*, 123 HARV. L. REV. 1596, 1612–13 (2010) (discussing that the protection of individual dignity forms a suitable foundation for regulation of hate speech denigrating minority groups). Rather, in terms of informational privacy doctrine and a workable cause of action, dignity (as the harm caused by intrusion) and autonomy are imprecise and lack judicial cachet because informational privacy problems often do not directly implicate dignity or autonomy concerns. Cf. Hyman Gross, *The Concept of Privacy*, 42 N.Y.U. L. REV. 34, 53–54 (1967) (commenting that privacy scholars frequently fail to bridge the gap between legal theory and a workable right).

<sup>23</sup> SOLOVE, *supra* note 20, at 39 (“[P]rivacy conceptions that are too broad fail to provide much guidance; they are often empty of meaning and have little to contribute to the resolution of concrete problems.”).

<sup>24</sup> Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 205 (1890); see also Erwin Chemerinsky, *Rediscovering Brandeis's Right to Privacy*, 45 BRANDEIS L.J. 643, 644 (2007) (“there has been minimal judicial protection for informational privacy” notwithstanding that it was “the primary focus of Brandeis and Warren”); Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 745 n.47 (1989) (observing that Brandeis's view of privacy could potentially be viewed as “limited exclusively to the informational sense”).



often do not).<sup>25</sup> To expand the right to privacy beyond a mere property right, Warren and Brandeis broadly conceived of the right as protecting the “immunity of the person” and the “right to one’s personality.”<sup>26</sup> They painted the right to privacy as focused on invasions into one’s dignity.<sup>27</sup>

Because Warren and Brandeis broadly framed informational privacy as protecting one’s dignity in part to avoid limiting it to property claims, it is understandable that, to a degree, we have lost track of the fact that Warren and Brandeis did not view all privacy invasions equally as problematic regardless of subject matter. According to several accounts, the principal motivating factor for the article was the publication of intimate details regarding Samuel Warren’s family.<sup>28</sup> At the outset of their article, Warren and Brandeis specifically lamented, “the details of sexual relations are spread broadcast in the columns of the daily papers.”<sup>29</sup> However, in their effort to persuade as to the importance of a right to informational privacy and extrapolate that right from existing property-centric common law, they broadly characterized the right as being instrumental to the preservation of human dignity. The importance of certain paramount categories of information has been lost, or at least glossed over.

The scholarly focus on dignity as the underlying value of an informational privacy right continued from there. In his important 1964 article, Edward Bloustein argued that the “gist of the wrong in the intrusion cases” (that is, Fourth Amendment search cases) is “a blow to human dignity, an assault on human personality.”<sup>30</sup> For Bloustein, “[e]aves-

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<sup>25</sup> Warren & Brandeis, *supra* note 24, at 205 (“The principle which protects personal writings and all other personal productions, not against theft and physical appropriation, but against publication in any form, is in reality not the principle of private property, but that of an inviolate personality.”).

<sup>26</sup> *Id.* at 207.

<sup>27</sup> See also *id.* at 196 (detailing the how invasions of privacy “belittle[]” one’s dignity); David A.J. Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 HASTINGS L.J. 957, 973–74 (1979) (Brandeis’s conception of information privacy had a “deep connection with personal dignity”); Rubinfeld, *supra* note 24, at 752 (Brandeis and Warren viewed the right to informational privacy as rooted in dignity and personhood theories of privacy); Turkington, *supra* note 8, at 484 (“The core theoretical concepts and assumptions employed in the [Warren and Brandeis] article view privacy as a condition and right that is essentially tied to human dignity . . .”).

<sup>28</sup> See Amy Gajda, *What If Samuel D. Warren Hadn’t Married a Senator’s Daughter?: Uncovering the Press Coverage that Led to “The Right to Privacy,”* 2008 MICH. ST. L. REV. 35, 59–60; Neil M. Richards & Daniel J. Solove, *Privacy’s Other Path: Recovering the Law of Confidentiality*, 96 GEO. L.J. 123, 128 (2007) (“[T]he private papers of the two men suggest that perceived press invasions into the ‘social privacy’ of [Boston] Brahmin families like the Warrens prompted Warren to enlist his friend Brandeis in the project.”).

<sup>29</sup> Warren & Brandeis, *supra* note 24, at 196. Despite highlighting certain categories of information as particularly concerning, to the extent arguably banal information was disseminated widely, Warren and Brandeis still viewed the dissemination as potentially problematic. *Id.* (“Even gossip apparently harmless, when widely and persistently circulated, is potent for evil.”).

<sup>30</sup> Bloustein, *supra* note 21, at 974.

dropping and wiretapping, unwanted entry into another's home, may be the occasion and cause of distress and embarrassment but that is not what makes these acts of intrusion wrongful. They are wrongful because they are demeaning of individuality, and they are such whether or not they cause emotional trauma."<sup>31</sup> But Bloustein went even further, contending that human dignity was also the key interest at stake in instances where private information was disseminated publicly.<sup>32</sup>

Philosopher Stanley Benn also argued that overall conceptions of and protections for privacy should "be grounded on the more general principle of respect for persons."<sup>33</sup> Benn believed that framing privacy as key to human dignity gave voice to society's general discomfort with being observed.<sup>34</sup> At the same time, Benn argued that a dignity conception of privacy helped preserve individual autonomy that would be curtailed and chilled by widespread observation.<sup>35</sup> In his analysis of what he labeled "the emerging unencumbered constitutional right to informational privacy," Richard Turkington, too, saw the right as rooted in "the human dignity respect for persons theory of privacy."<sup>36</sup> Turkington was explicit in noting that the right to informational privacy had jurisprudential roots in the Fourth Amendment, though he believed informational privacy rights extended beyond the narrow government actions classified as "searches" under the Fourth Amendment.<sup>37</sup>

While not necessarily focused specifically on informational privacy, other scholars have conceived of privacy's virtues in even more expansive terms than the "mere" protection of dignity.<sup>38</sup> For example, David A.J.

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 982 ("Physical intrusion upon a private life and publicity concerning intimate affairs are simply two different ways of affronting individuality and human dignity. The difference is only in the means used to threaten the protected interest."); *see also* ARTHUR R. MILLER, *THE ASSAULT ON PRIVACY: COMPUTERS, DATA BANKS, AND DOSSIERS* 199, 203–04 (1971) (suggesting that the Fourth Amendment's protections against intrusion may "give rise to a constitutional right to withhold personal information").

<sup>33</sup> Stanley I. Benn, *Privacy, Freedom, and Respect for Persons*, in *NOMOS XIII: PRIVACY* 1, 8 (J. Roland Pennock & John W. Chapman eds., 1971).

<sup>34</sup> *Id.* at 6, 11.

<sup>35</sup> *Id.* at 26.

<sup>36</sup> Turkington, *supra* note 8, at 481, 490.

<sup>37</sup> *Id.* at 494, 502; *see also* Heidi Reamer Anderson, *Plotting Privacy as Intimacy*, 46 *IND. L. REV.* 311, 316–18 (2013) (suggesting that privacy is violated when there is an intrusion on both spatial and bodily intimacy, thereby advancing the concept of intimacy but also perpetuating the focus on physical intrusions).

<sup>38</sup> *See, e.g.*, Charles Fried, *Privacy*, 77 *YALE L.J.* 475, 482 (1968) ("In general it is my thesis that in developed social contexts love, friendship and trust are only possible if persons enjoy and accord to each other a certain measure of privacy.").

Richards has made a moving case that at stake in the right to privacy “is nothing less than the basic moral vision of persons as having human rights: that is, as autonomous and entitled to equal concern and respect.”<sup>39</sup>

While envisioning a right to informational privacy as protecting human dignity is a useful conceptual tool and helps us understand how privacy works with other constitutional rights to create a patchwork of protections for individual liberty and restrained government, it fails to pinpoint informational privacy’s specific normative value and distinguish informational privacy from other constitutional values and rights (such as the Fourth Amendment protection against search and seizure and Due Process protections for decisional privacy). Moreover, in practice and as discussed more fully in Part II, at times dignity appears of limited value to courts in actually crafting an enforceable constitutional informational privacy right.<sup>40</sup>

A dignity theory of privacy makes more sense, and is palatable to American courts, in situations where the state exercises its police power to conduct an intrusive search without an individual’s permission.<sup>41</sup> In such instances where the state’s agents physically or remotely invade a person’s body or property, a person’s dignity is obviously implicated and the Fourth Amendment presumably governs and protects that dignity interest.<sup>42</sup> A dignity theory of privacy is also more intuitive where the state is intervening directly to forbid, or even merely unduly burden, a woman’s ability to make an independent choice regarding whether to continue with a

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<sup>39</sup> David A.J. Richards, *supra* note 27, at 975.

<sup>40</sup> *Infra* Part II; see also HELEN NISSENBAUM, *PRIVACY IN CONTEXT: TECHNOLOGY, POLICY, AND THE INTEGRITY OF SOCIAL LIFE* 10, 108 (2010) (appeals to “higher-order values” in defense of privacy often fail to resolve conflicts between privacy and other societal interests); Gerety, *supra* note 7, at 234 (“A legal concept will do us little good if it expands like a gas to fill up the available space.”).

<sup>41</sup> As James Whitman observed, “the really easy cases in the American tradition are the ones involving, or resembling, criminal investigations” and that one “can count on Americans to see privacy violations . . . where the issue can be somehow analogized to penetration into the home, or sometimes the body.” James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 *YALE L.J.* 1151, 1215 (2004). Given that tradition, our preoccupation with framing informational privacy questions as governmental intrusions is not surprising. See also SOLOVE, *supra* note 20, at 188 (“Courts and legislatures respond well to more traditional privacy problems, such as intrusions that are physical in nature, disclosures of deep secrets, or distortion. This is due, in part, to the fact that these problems track traditional conceptions of privacy.”); cf. NISSENBAUM, *supra* note 40, at 93–95 (describing the role of the Cold War, antitotalitarianism, and the public/private dichotomy as shaping our conception of privacy as one designed to prevent government intrusion).

<sup>42</sup> *Skinner v. Ry. Labor Execs. Ass’n*, 489 U.S. 602, 613–14 (1989) (“The [Fourth] Amendment guarantees the privacy, dignity, and security of persons against certain arbitrary and invasive acts by officers of the Government or those acting at their direction.”); *Schmerber v. California*, 384 U.S. 757, 767 (1966) (“The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State.”); cf. *Maryland v. King*, 133 S. Ct. 1958, 1979 (2013) (holding that a cheek swab constituted a Fourth Amendment search, but that it did not significantly “increase the indignity already attendant to normal incidents of arrest”).

pregnancy.<sup>43</sup> These points are vividly illustrated by the contrasting opinions in *Obergefell v. Hodges*, where the Supreme Court struck down state bans on same-sex marriage.<sup>44</sup> In dissent, Chief Justice Roberts dismissed the majority's apparent reliance on "right of privacy" precedent (such as *Griswold*) as irrelevant to the issue of same-sex marriage because those cases involved intrusions into people's lives and bedrooms.<sup>45</sup> Conversely, the majority found those cases potent in large part because of their relationship to intimate activity, demonstrating the salience of intimacy, as detailed more fully in Section IV.A.<sup>46</sup>

But in the informational privacy context, many times there is no forced intrusion or covert invasion at all, and the information is "voluntarily" provided to the state.<sup>47</sup> For example, in the Supreme Court's most recent case addressing constitutional informational privacy, *NASA v. Nelson*, the Court held that no constitutional right to informational privacy was violated where government contractors were required to fill out an employment questionnaire that included questions about, *inter alia*, drug treatment and counseling.<sup>48</sup> In such questionnaire situations, the relationship between dignity and the asserted privacy claim is more difficult to grasp. The "intrusion" itself is less graphic. Because informational claims generally involve less visceral invasions, courts are searching for a harm other than the purported harm to human dignity.<sup>49</sup>

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<sup>43</sup> Cf. Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694, 1694 (2008) (arguing that dignity is the motivating value behind the Supreme Court's undue burden test, "which allows government to regulate abortion to demonstrate respect for the dignity of human life so long as such regulation also demonstrates respect for the dignity of women").

<sup>44</sup> *Obergefell v. Hodges*, Nos. 14–556, 14–562, 14–571 and 14–574, slip op. at 28 (U.S. June 26, 2015).

<sup>45</sup> *Id.* at 17 (Roberts, C.J., dissenting) ("Unlike criminal laws banning contraceptives and sodomy, the marriage laws at issue here involve no government intrusion."). As discussed below, the extent to which *Griswold* actually is an intrusion case is debatable. *Infra* note 49.

<sup>46</sup> *Id.* at 10 (majority opinion) (holding that Due Process "liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs"). While Justice Kennedy's majority opinion discusses both autonomy and dignity, which is only proper in the context of evaluating limits on individuals' freedom to marry, even in the marriage context, the concepts of autonomy and dignity are given teeth and limits through reliance on intimacy. Nor was Justice Kennedy referring to dignity in the sense of the harm caused by an intrusion.

<sup>47</sup> Of course, to the extent the information is provided as part of, for example, a job application requirement, there is at least a degree of compulsion in providing the information.

<sup>48</sup> 131 S. Ct. 746, 751 (2011); *see also* *Am. Fed'n of Gov't Emps. v. Dep't of Hous. & Urban Dev.*, 118 F.3d 786, 788 (D.C. Cir. 1997) (mere collection of information regarding drug use, mental health, and financial stability via employee questionnaires did not violate right to informational privacy); *Fraternal Order of Police v. City of Philadelphia*, 812 F.2d 105, 120 (3d Cir. 1987) (same).

<sup>49</sup> Gerety, *supra* note 7, at 252 n.66 (dignity serves "no indispensable purpose" in privacy cases). *Griswold* itself illustrates the outsized role that intrusion and dignity have played in analyzing

To summarize, because of the historical focus on the Fourth Amendment and government intrusions, scholars and litigants have at times emphasized intrusion and its threat to dignity. That is, they have often been attempting to make informational claims sound in the Fourth Amendment.<sup>50</sup> The constitutional right to informational privacy, if it is to mean something different than or in addition to the Fourth Amendment, is more properly and specifically oriented toward the threat of government dissemination and (to a lesser degree) collection of intimate information and nascent political thought and the social harms that flow from such collection and dissemination.<sup>51</sup>

### B. Autonomy

Alongside the focus on intrusions and dignity—closely associated with Fourth Amendment doctrine—privacy scholars have also attempted to justify the right to informational privacy by suggesting that it advances personal autonomy. In this way, scholars have attempted to draw a proximate relationship between informational privacy and the more well-established (but under attack) right to decisional privacy, which directly implicates the right to make autonomous decisions and be left alone. The right to decisional privacy, as embodied in cases such as *Loving v. Virginia*,<sup>52</sup> *Eisenstadt v. Baird*,<sup>53</sup> and *Roe v. Wade*,<sup>54</sup> provides that there are

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informational privacy claims. Notwithstanding that the police in *Griswold* never actually intruded into the bedrooms of any couples to determine if contraception was being used (the plaintiffs were doctors who prescribed contraception), the Court relied on the specter of such an intrusion to bolster its holding. *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965); see also Chemerinsky, *supra* note 24, at 650 (*Griswold*'s “focus on intrusion was misplaced because the case did not involve that at all; no one's bedroom or house had been searched”); Neil M. Richards, *The Information Privacy Law Project*, 94 GEO. L.J. 1087, 1095 (2006) (suggesting that *Griswold* contains a “substantial informational component”).

<sup>50</sup> David Sklansky has recently described the mirror of the trend I document. See David Alan Sklansky, *Too Much Information: How Not to Think About Privacy and the Fourth Amendment*, 102 CALIF. L. REV. 1069, 1074 (2014). According to Sklansky, informational privacy rhetoric has begun to bleed into Fourth Amendment jurisprudence, gradually eroding the Fourth Amendment's historic bite. *Id.*

<sup>51</sup> *Infra* Part IV. As discussed in more detail in Part IV, while the constitutional informational privacy right envisioned by this Article is primarily concerned with government dissemination of intimate and political information (and the downstream social consequences of that dissemination), the right could still implicate and invalidate government collection efforts where the government action is not justified by a compelling government interest and narrowly tailored to prevent unnecessary dissemination. In other words, while dissemination is the focus, collection is almost always an antecedent action to dissemination, and thus falls within the ambit of government action regulated by a constitutional informational privacy right. By focusing on the downstream harms of dissemination, this Article's approach also has the benefit of avoiding the red herring debate over whether certain information is nonactionable because it is purportedly “voluntarily” provided to the government via an answer to a questionnaire (as opposed to forcibly extracted by a “search”).

<sup>52</sup> 388 U.S. 1 (1967).

<sup>53</sup> 405 U.S. 438 (1972).

certain areas of life so fundamentally important and private that the government may not, absent satisfying a heightened level of scrutiny, infringe or burden an individual's autonomy or freedom to make those decisions. Examples include the rights to marry,<sup>54</sup> use contraception,<sup>56</sup> and have an abortion.<sup>57</sup> But, as with dignity, informational privacy's ability to promote autonomy of decision making over areas of such fundamental importance is often indirect, providing courts a weak theoretical foundation for development of an informational privacy right.

In *Privacy and Freedom*, Alan Westin argued that one of privacy's key functions was to promote individual freedom and, correspondingly, autonomy.<sup>58</sup> Pursuant to Westin's framing, even casual intrusions into one's privacy could threaten an individual's autonomy—Westin's informational privacy right was content neutral.<sup>59</sup> Philosopher Elizabeth Beardsley argued that the norm of privacy was animated by both a concern for individual autonomy and selective disclosure (that is, informational privacy).<sup>60</sup> But Beardsley saw “no alternative to justifying the norm of selective disclosure directly in terms of the norm of autonomy, and to recognizing the latter as an ultimate moral principle, standing on its own feet.”<sup>61</sup> While Beardsley viewed informational privacy as “the conceptual core of the norm of privacy,” the norm of autonomy gives privacy its “moral rationale.”<sup>62</sup>

Relatedly, Francis Chlapowski has argued that “[i]nformational privacy should be protected under the right to privacy because it is an

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<sup>54</sup> 410 U.S. 113 (1973).

<sup>55</sup> *Loving*, 388 U.S. at 12 (“The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free [people].”).

<sup>56</sup> *Eisenstadt*, 405 U.S. at 438 (“If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”).

<sup>57</sup> *Roe*, 410 U.S. at 153 (“This right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.”).

<sup>58</sup> ALAN F. WESTIN, *PRIVACY AND FREEDOM* 33 (1967) (“The most serious threat to the individual's autonomy is the possibility that someone may penetrate the inner zone and learn [their] ultimate secrets, either by physical or psychological means. This deliberate penetration of the individual's protective shell, [their] psychological armor, would leave [them] naked to ridicule and shame and would put [them] under the control of those who knew [their] secrets.”).

<sup>59</sup> See FRED H. CATE, *PRIVACY IN THE INFORMATION AGE* 23 (1997) (observing that under Westin's conception, “[i]nformation privacy does not depend on the content or merit of the information at issue” and has an “inherent neutrality”).

<sup>60</sup> Elizabeth L. Beardsley, *Privacy: Autonomy and Selective Disclosure*, in *NOMOS XIII: PRIVACY*, *supra* note 33, at 56, 56.

<sup>61</sup> *Id.* at 70.

<sup>62</sup> *Id.*; see also VINCENT J. SAMAR, *THE RIGHT TO PRIVACY: GAYS, LESBIANS, AND THE CONSTITUTION* 86 (1991) (urging that privacy's true value is in fostering autonomy).

element of personhood, integral to an individual's identity."<sup>63</sup> To Chlapowski, informational privacy rights are rooted in personhood because "the state, by disclosing personal information, deprives the individual of the opportunity to 'define' herself."<sup>64</sup> Although less focused on an individualistic conception of autonomy, Julie Cohen has also, at times, advanced an autonomy-focused vision of informational privacy, suggesting that such a theory of informational privacy aids in helping understand informational privacy's true value in providing space for a dynamic citizenship.<sup>65</sup> According to Cohen, "[a] protected zone of informational autonomy is valuable, in short, precisely because it reminds us what we cannot measure."<sup>66</sup> Neil Richards, too, has noted the trend among information privacy scholars of focusing on informational privacy's relationship to autonomy.<sup>67</sup>

While informational privacy no doubt enhances individual autonomy at least at the abstract level, the difficulty of an autonomy-focused theory at the lower level of doctrine is that it often involves too many causal steps between the information accessed or disseminated and the harm to autonomy.<sup>68</sup> Courts struggle to understand how collection or dissemination of certain information directly infringes on one's ability to make independent decisions.<sup>69</sup> Moreover, even if one were able to draw a more

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<sup>63</sup> Francis S. Chlapowski, Note, *The Constitutional Protection of Informational Privacy*, 71 B.U. L. REV. 133, 154 (1991).

<sup>64</sup> *Id.* As Helen Nissenbaum has observed, the relationship between privacy and autonomy has been conceptualized in at least three different ways: (1) privacy as autonomy or control over the information itself, (2) privacy as facilitating an environment where individual autonomy is likely to flourish, and (3) privacy as creating space for the ability to actually follow through on autonomous decisions. NISSENBAUM, *supra* note 40, at 81–82.

<sup>65</sup> Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373, 1423–25 (2000).

<sup>66</sup> *Id.* at 1428; see also Hyman Gross, *Privacy and Autonomy*, in NOMOS XIII: PRIVACY, *supra* note 33, at 169, 173–74, 181 (informational privacy is desirable because it permits individual self-determination over how one appears and to whom, concluding that "an offense to privacy is an offense to autonomy"); Joel Feinberg, *Autonomy, Sovereignty, and Privacy: Moral Ideals in the Constitution?*, 58 NOTRE DAME L. REV. 445, 454 (1983) (autonomy includes the right to decide "what personal information to disclose," or conceal, from others); Fried, *supra* note 38, at 483 ("Privacy, thus, is control over knowledge about oneself."); Adam D. Moore, *Toward Informational Privacy Rights*, 44 SAN DIEGO L. REV. 809, 812–13 (2007) (favoring a "control-based definition of privacy" that affords individuals the space to develop, "while maintaining autonomy over the course and direction of one's life"). To the extent that some of the "privacy as autonomy" theorists focus on "personhood," there is some overlap with those whom I characterize as dignity theorists. The line between dignity and autonomy is not always a bright one.

<sup>67</sup> Richards, *supra* note 49, at 1102–03; see also Gerety, *supra* note 7, at 236 (defining privacy as "autonomy or control over the intimacies of personal identity").

<sup>68</sup> See *infra* Section II.A (discussing the Supreme Court's difficulty in *Nelson* understanding how an informational questionnaire directly infringes one's autonomy).

<sup>69</sup> See, e.g., *Whalen v. Roe*, 429 U.S. 589, 603–04 (1977) (rejecting privacy claim because law at issue did not directly infringe on plaintiffs' ability to take medication they desired). As Helen

direct line between access to private information and its effect on decisionmaking, framing the harm in terms of self-creation or self-realization is too ethereal and is difficult, if not impossible, for a court to weigh against the government's purported interest in the information.<sup>70</sup>

Jed Rubenfeld has offered a similar critique of the autonomy theory of privacy.<sup>71</sup> For Rubenfeld, autonomy theories of privacy lack cogency (even in the decisional privacy context, which is his focus) because of their inability to line draw—that is, virtually every law impacts one's ability to self-actualize.<sup>72</sup> But Rubenfeld's solution is arguably no less boundless. He suggests that instead of construing privacy as carving out areas where the government may not restrict our activity, it is best to view privacy as limiting the government's totalitarian power to mandate conformity.<sup>73</sup> For Rubenfeld, antiabortion laws should be viewed as problematic because they, in effect, force women to be mothers.<sup>74</sup> But from whichever angle the government's power is viewed (positive or negative), Rubenfeld's modified, antitotalitarian theory requires just as many (if not more) causal steps because the plaintiff would need to show not just that they are being prevented from doing some action via the information disclosure, but would also need to demonstrate that the disclosure is forcing them to be something they would prefer not to become (in the abortion context, to become a mother). As such, while informational privacy is not Rubenfeld's principal focus, the antitotalitarianism gloss would not get us closer to a workable right to informational privacy.

To recapitulate, some privacy scholars have attempted to justify informational privacy by suggesting it advances individual autonomy. The prominent role of decisional privacy among constitutional jurisprudence seems to have bled into scholarly analysis regarding the role of

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Nissenbaum has argued, for a theory of privacy to be "plausible" and, I would add, acceptable to courts, that theory must not just include an account of its moral legitimacy, but must also include principled limits. NISSENBAUM, *supra* note 40, at 73.

<sup>70</sup> NISSENBAUM, *supra* note 40, at 83–84 (observing that while incursions into privacy may have a subtle impact on the ability to follow through on decisions, the line between acceptable and unacceptable burdens on decisionmaking is difficult to discern (but nonetheless worthy of examination)); *see also* *Plante v. Gonzalez*, 575 F.2d 1119, 1130–32 (5th Cir. 1978) (holding that the effect of financial disclosure laws on autonomy is indirect).

<sup>71</sup> Rubenfeld, *supra* note 24, at 750 ("But to call an individual 'autonomous' is simply another way of saying that he is morally free, and to say that the right to privacy protects freedom adds little to our understanding of the doctrine.").

<sup>72</sup> *Id.* at 754–55.

<sup>73</sup> *Id.* at 783–84.

<sup>74</sup> *Id.* at 782.



informational privacy, underwriting the slowness with which a distinct, precise, and coherent doctrine of informational privacy has developed.<sup>75</sup>

*C. Toward Categoricalism: The Intimate and the Political*

This Article argues that the interests served by a right to informational privacy are more concrete, and in some ways more limited, than the dominant focus on dignity and autonomy. Informational privacy's more nuanced constitutional value is in protecting two categories of information—intimate or political information—and preventing that information from serving as the basis for discrimination or political marginalization. While Part IV provides doctrinal support for a framework focused on intimate information and political thought, here I briefly contrast dignity and autonomy, on the one hand, from intimate and political information, on the other. And, I explain how a categorical approach to informational privacy captures informational privacy's normative value while simultaneously helping to avoid the judicial pitfalls of a dignity and autonomy approach.

In short, a dignity theory of informational privacy is focused on purportedly inherent harms that occur when privacy is invaded (for example, by arguing that it is the intrusion or surveillance itself that causes harm to individual personhood). While courts are able to, in essence, take for granted that dignity is harmed in the Fourth Amendment search context because the intrusion is more shocking and palpable,<sup>76</sup> courts grapple to understand how seemingly mundane bureaucratic or administrative employment questionnaires, financial disclosure laws, or birth certificate amendment requirements all infringe on one's dignity.<sup>77</sup> Similarly with autonomy, while courts understand how laws restricting access to abortion burden a woman's right to decide to have an abortion, courts must make more connective steps to conclude that, for example, a government database regarding who uses prescription drugs for which there are both a legitimate and illicit purpose unduly burdens an individual's ability to decide whether to take the medicine in the first instance.<sup>78</sup>

Conversely, intimate information and political thought are of constitutional value because absent privacy over those categories of information, individuals are more likely to be exposed to discrimination or

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<sup>75</sup> See Chemerinsky, *supra* note 24, at 650–51 (fearing that “the federal courts are unlikely to expand protection for any aspect of constitutional privacy because of the enormous controversy over privacy as autonomy” and explaining that “any aspect of privacy now suffers guilt by association”).

<sup>76</sup> See *supra* note 41.

<sup>77</sup> Cf. *infra* notes 149–67 and accompanying text.

<sup>78</sup> See *Whalen v. Roe*, 429 U.S. 589, 591 (1977).

marginalization based on their identities, practices, and beliefs.<sup>79</sup> That is, normatively, public disclosure of intimate information and political thought more directly leads to palpable downstream consequences or harms.<sup>80</sup> Informational privacy's value in preventing such harms is particularly significant for communities in transition<sup>81</sup>—that is, communities who have not yet attained full liberty and equality under the law, such as LGBTQ communities and individuals with disabilities, such as HIV.<sup>82</sup> Importantly, because courts can more readily perceive (or foresee) those tangible consequences than any harm to dignity or autonomy, and therefore more readily perceive the value of privacy over intimate information and political thought, they may be more prone to definitively recognize a right to informational privacy if framed in terms of those two values as opposed to the values of dignity and autonomy, which are only indirectly implicated by informational privacy violations.<sup>83</sup>

## II. CONSTITUTIONAL UNCERTAINTY

Partly influenced by discourse broadly conceptualizing informational privacy as advancing individuals' interest in autonomy and dignity, the Supreme Court and lower federal courts have been cautious to recognize the existence of the right out of fear that it will be all-encompassing,

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<sup>79</sup> For a fuller accounting of this point, see *infra* Part IV.

<sup>80</sup> *Infra* note 171.

<sup>81</sup> See Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1286 (1991) (observing that requests for sex equality were translated legally as a demand for privacy); Robin L. West, *The Nature of the Right to an Abortion: A Commentary on Professor Brownstein's Analysis of Casey*, 45 HASTINGS L.J. 961, 965–66 (1994) (abortion privacy rights serve as a necessary though inadequate transitional right that must exist until the participatory rights of women are no longer unequally burdened); see also Anita L. Allen, *Privacy Torts: Unreliable Remedies for LGBT Plaintiffs*, 98 CALIF. L. REV. 1711, 1764 (2010) (“As long as intolerance and discrimination against LGBT individuals remain, the need for seclusion, secrecy, and selective self-disclosure will remain as well.”); Marc S. Spindelman, *Reorienting Bowers v. Hardwick*, 79 N.C. L. REV. 359, 368 n.14 (2001) (collecting authority viewing privacy as a liminal right or doorway enabling people to come out of the closet).

<sup>82</sup> Cf. Christy Mallory & Brad Sears, *Discrimination Against State and Local Government LGBT Employees*, 4 LGBTQ POL’Y J. 37, 51 (2014) (documenting that many LGBT employees remain closeted in the workplace out of fear of discrimination and that employees who are open face higher percentages of discrimination); JAIME M. GRANT ET AL., INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY (2011) (documenting pervasive discrimination against transgender individuals).

<sup>83</sup> See Woodrow Hartzog, *The Fight to Frame Privacy*, 111 MICH. L. REV. 1021, 1021–26 (2013) (explaining that audiences are influenced by how privacy issues are framed). This is not to imply that there are no other impediments to the recognition of a robust constitutional informational privacy right that have little to do with how informational privacy's value is articulated, but rather that a focus on intimate and political information will move the judiciary to be more receptive toward informational privacy claims.

paralyze government action, and inundate courts with claims.<sup>84</sup> Unable to understand the particular concrete interests served by an informational privacy right, courts have failed to consistently and clearly outline the purported right's structure and limitations.<sup>85</sup> This Part analyzes existing Supreme Court and circuit precedent, including the recent 2011 Supreme Court opinion in *NASA v. Nelson*, and demonstrates that the confusion and disinclination towards informational privacy is in part a product of the autonomy–dignity focus that has predominated to date. However, both explicit and implicit in these decisions is a judicial undercurrent recognizing, as this Article argues, that informational privacy claims threatening intimate information or political thought should be given a privileged position and protected because such protection will prevent negative downstream consequences, such as discrimination and political marginalization.

### A. Supreme Reluctance

The Supreme Court has been squarely confronted with whether there exists a constitutional right to informational privacy on three occasions.<sup>86</sup> Each time, the Court has avoided recognizing the right. Instead, the Court

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<sup>84</sup> See *NASA v. Nelson*, 131 S. Ct. 746, 769 (2011) (Scalia, J., concurring in the judgment) (seeking to avoid “dramatically increas[ing] the number of lawsuits claiming violations of the right to informational privacy”); see also *Denoncourt v. Commonwealth of Pa.*, State Ethics Comm’n, 470 A.2d 945, 950 (Pa. 1983) (Hutchinson, J., concurring and dissenting) (expressing concern over “the shadowy reaches of the right of privacy the judiciary has interpolated into our state and federal constitutions”).

<sup>85</sup> *Denius v. Dunlap*, 209 F.3d 944, 955–56 (7th Cir. 2000) (“the scope and contours of [the right to informational privacy] have not been defined in this Circuit”); *Statharos v. N.Y.C. Taxi & Limousine Comm’n*, 198 F.3d 317, 322 (2d Cir. 1999) (“the right to privacy is one of the less easily delineated constitutional guarantees”); *Am. Fed’n of Gov’t Emps. v. Dep’t of Hous. & Urban Dev.*, 118 F.3d 786, 793 (D.C. Cir. 1997) (declining to reach a conclusion regarding the “precise contours of the supposed right”); *Eagle v. Morgan*, 88 F.3d 620, 625 (8th Cir. 1996) (“the exact boundaries of this right are, to say the least, unclear”); *Scheetz v. The Morning Call, Inc.*, 946 F.2d 202, 206 (3d Cir. 1991) (“[T]he contours of the confidentiality branch are murky.”); *Kimberlin v. U.S. Dep’t of Justice*, 788 F.2d 434, 438 (7th Cir. 1986) (“The exact nature and scope of informational privacy rights have never been fully developed.”); see also Scott Skinner-Thompson & Rashida Richardson, *Prisons and Jails*, in *AIDS AND THE LAW* 14-1, 14-52 (David W. Webber ed., 4th ed. Supp. 2015) (“the constitutional basis and parameters of the right to privacy have never been clearly defined”); Ingrid Schüpbach Martin, *The Right to Stay in the Closet: Information Disclosures by Government Officials*, 32 SETON HALL L. REV. 407, 449 (2002) (the Supreme Court’s informational privacy opinions “leave the right ill-defined and send conflicting messages about how the lower courts should treat this branch of the right to privacy”); Russell K. Robinson, *Masculinity as Prison: Sexual Identity, Race, and Incarceration*, 99 CALIF. L. REV. 1309, 1378–79 (2011) (noting that the right to informational privacy “has received limited attention in the Supreme Court’s jurisprudence” and that “the Court is divided over whether to recognize informational privacy as a right”); Timothy Azarchs, Comment, *Informational Privacy: Lessons from Across the Atlantic*, 16 U. PA. J. CONST. L. 805, 806 (2014) (“A series of Supreme Court cases reached inconclusive decisions that have done little to clarify the situation, leaving the lower courts to move in different directions.”).

<sup>86</sup> *NASA v. Nelson*, 131 S. Ct. 746 (2011); *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425 (1977); *Whalen v. Roe*, 429 U.S. 589 (1977).

has assumed for the sake of argument that such a right exists but found no violation under the facts of the case presented. The Supreme Court's reluctance appears to have been influenced by the way that privacy scholarship and jurisprudence developed, with the Fourth Amendment and decisional privacy (and their attendant focus on dignity and autonomy) receiving detailed attention prior to and instead of the right to informational privacy. I discuss each of the three Supreme Court cases in detail.

*I. Whalen v. Roe.*—The Court first considered the existence of a right to informational privacy in the 1977 case of *Whalen v. Roe*.<sup>87</sup> Decided in 1977, *Whalen* was issued just four years after that other, more famous “Roe” case—*Roe v. Wade*.<sup>88</sup> In *Roe v. Wade*, the Court advanced the right to decisional privacy first recognized in 1965 in *Griswold* to include a woman's right to have an abortion.<sup>89</sup>

*Whalen* involved a challenge to a New York State statute that recorded the names and addresses of any patient who had obtained, pursuant to a prescription, drugs for which there was both a lawful and illicit purpose, such as opium, amphetamines, and methadone.<sup>90</sup> New York's Department of Health would maintain the prescription record for five years, after which time the record was destroyed.<sup>91</sup> The records were physically secured and the number of government officials with access to the records was limited.<sup>92</sup> Public disclosure of a patient's identity was punishable by a year imprisonment and a \$2000 fine.<sup>93</sup> The purpose of the law was to help ensure that drugs with a legitimate purpose were not being abused.<sup>94</sup>

Though the most significant harm of the statute came from potential dissemination of the personal prescription information (as opposed to its mere collection) and the downstream consequences of such dissemination, the plaintiffs crafted their argument against the law as first and foremost infringing on their autonomy and dignity. For example, in a direct appeal to the autonomy concern underlying *Roe v. Wade*, the plaintiffs argued that the statute amounted to “state interference with the doctor-patient

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<sup>87</sup> 429 U.S. 589.

<sup>88</sup> 410 U.S. 113 (1973).

<sup>89</sup> *Id.* at 159–67.

<sup>90</sup> *Whalen*, 429 U.S. at 591.

<sup>91</sup> *Id.* at 593.

<sup>92</sup> *Id.* at 594–95.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 597–98.

relationship.”<sup>95</sup> They suggested that the statute would chill “the decisions [patients] make.”<sup>96</sup> The plaintiffs argued that the New York statute infringed on their “individual autonomy.”<sup>97</sup>

Elsewhere, the plaintiffs in *Whalen* framed their argument with appeals to the patients’ dignity. They repeatedly characterized the government’s action as an intrusion.<sup>98</sup> They invoked the seminal Fourth Amendment case of *Katz v. United States*<sup>99</sup> and referred to the statute as a prosecutorial “dragnet.”<sup>100</sup> The plaintiffs were attempting to analogize the New York statute to a physical police search and argue that it intruded onto their dignity. As in *Griswold*, it is questionable whether the New York recording statute amounted to the kind of intrusion triggering the Fourth Amendment.<sup>101</sup> That is, the case did not involve the kind of invasive, dignity-depriving search courts are accustomed to forbidding absent probable cause under the Fourth Amendment. The Supreme Court noted this dissonance.

Discussing the risk of dissemination, the Court held that mere disclosure to the Department of Health was not “meaningfully distinguishable from a host of other unpleasant invasions of privacy that are associated with many facets of health care.”<sup>102</sup> According to the Court, the provision of some healthcare information to public health agencies is relatively routine and “does not automatically amount to an impermissible invasion of privacy.”<sup>103</sup> The Court directly refuted plaintiffs’ efforts to compare the New York statute to a Fourth Amendment police search.<sup>104</sup>

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<sup>95</sup> Appellees’ Brief at 15, *Whalen v. Roe*, 429 U.S. 589 (1977) (No. 75-839), 1976 WL 181402, at \*15 [hereinafter *Whalen* Appellees’ Brief].

<sup>96</sup> *Id.* at \*23; see also Motion for Leave to File Brief of Amici Curiae and Brief of Amici Curiae for the Nat’l Ass’n of Mental Health et al., at 9–10, *Whalen v. Roe*, 429 U.S. 589 (1977) (No. 75-839), 1976 WL 194624, at \*9–10 (characterizing *Whalen* as focused on the patients’ right to make an autonomous decision about their healthcare).

<sup>97</sup> *Whalen* Appellees’ Brief, *supra* note 95, at \*43.

<sup>98</sup> *Id.* at \*22, \*24–25, \*32–33, \*43 (characterizing the central issue as whether a “state may systematically intrude into the physician-patient relationship,” arguing that patients expect “freedom from the intrusion of the state,” and that the “systematic intrusion into the physician-patient relationship unquestionably implicates their constitutionally protected right of privacy,” requiring the court “to determine if the intrusion is justified,” and raising the specter of “frightening intrusion by even more subtle state surveillance”). In fact, the plaintiffs in *Whalen* mention their concern over government intrusion at least ten times.

<sup>99</sup> *Id.* at \*26; see also *Katz v. United States*, 389 U.S. 347, 353 (1967) (government wiretapping of phone calls constitutes an intrusion implicating the Fourth Amendment).

<sup>100</sup> *Whalen* Appellees’ Brief, *supra* note 95, at \*17.

<sup>101</sup> See *supra* note 49.

<sup>102</sup> *Whalen v. Roe*, 429 U.S. 589, 602 (1977).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 604 n.32 (“The *Roe* appellees also claim that a constitutional privacy right emanates from the Fourth Amendment, citing language in *Terry v. Ohio*, at a point where it quotes from *Katz v. United*

Nor did the Court believe there was a significant impingement on patients' autonomy. The Court held that the statute did not infringe on patients' decisions to take prescription drugs, noting that access was not conditioned on preapproval of any state official and that the decision to prescribe or use the drug was left to the physician and patient.<sup>105</sup> The Court acknowledged that some patients may be concerned about their reputations should it become public that they were prescribed drugs that have both a permissible and illicit purpose, but that such a threatened impact was insufficient to implicate any autonomy interest.<sup>106</sup>

Finding no violation of a right to informational privacy, the Court left unclear whether there exists such a right and its contours. The Court recognized that unsecured collection and unwarranted disclosure of "potentially embarrassing or harmful" information may implicate a constitutional right to informational privacy.<sup>107</sup> But, the Court believed the New York statute at issue did not implicate those security concerns, and so did not more fully inquire into the constitutional groundings of a right to informational privacy.<sup>108</sup>

The test applied to determine whether the New York statute violated any assumed right to informational privacy was unclear. At times, the Court characterized the law as a "rational legislative decision" that was not "unreasonable," perhaps suggesting that a rational basis test was applied.<sup>109</sup> The Court also characterized the state's interest in controlling dangerous drugs as "vital," arguably indicating that a more rigorous standard of scrutiny was employed.<sup>110</sup>

2. *Nixon v. Administrator of General Services*.—The Supreme Court had an opportunity to clarify its approach to informational privacy in a case argued just two months after *Whalen* was decided. In *Nixon v. Administrator of General Services*, former President Richard Nixon

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*States*. But those cases involve affirmative, unannounced, narrowly focused intrusions into individual privacy during the course of criminal investigations. We have never carried the Fourth Amendment's interest in privacy as far as the *Roe* appellees would have us. We decline to do so now." (internal citations omitted)).

<sup>105</sup> *Id.* at 603.

<sup>106</sup> *Id.* at 603–04; *cf.* *Paul v. Davis*, 424 U.S. 693, 712–13 (1976) (rejecting claim that police violated right to privacy when they publicly disclosed that a person had been arrested for shoplifting, seeing no connection between the disclosure and the Fourth Amendment or plaintiff's decisional privacy interests).

<sup>107</sup> *Whalen*, 429 U.S. at 605.

<sup>108</sup> *Id.* at 605–06.

<sup>109</sup> *Id.* at 597.

<sup>110</sup> *Id.* at 598.

challenged a federal statute directing the Administrator of General Services to take possession of Nixon's presidential papers and tape recordings and promulgate regulations for the screening of materials into those which should be returned to Nixon as personal and those which should be retained for potential future public access.<sup>111</sup> The materials consisted of over 42 million pages of documents and 880 recordings.<sup>112</sup>

Relying heavily on the Fourth Amendment, Nixon argued that the statute was "tantamount to a general warrant" permitting a search of all his papers.<sup>113</sup> In a portion of Nixon's brief quoted by the Court, Nixon claimed, "the real evil aimed at by the Fourth Amendment is the search itself."<sup>114</sup> The Court dismissed this comparison, distinguishing an "intrusion into an individual's home to search and seize personal papers in furtherance of a criminal investigation" from the purported impact of an archivist reviewing Nixon's papers for "the sole purpose of separating private materials to be returned" to Nixon from nonprivate papers to be retained as a record of his Presidency.<sup>115</sup>

So, once again, the litigant bringing an ostensible informational privacy claim appealed to his dignity interest in avoiding an intrusive search. And again, the Court found that no dignity interest was implicated by the informational privacy claim.<sup>116</sup>

The Court also failed to take advantage of *Nixon* to clarify the test for evaluating informational privacy claims. The Court, perhaps as a result of the way Nixon framed the claim as sounding in the Fourth Amendment, suggested that to the extent there was an intrusion, it "must be weighed against the public interest" in preserving a President's official documents.<sup>117</sup> Continuing, the Court characterized the law as not "an unreasonable solution."<sup>118</sup> The Court's analysis, therefore, was similar to the traditional Fourth Amendment analysis employed when nonprosecutorial government action not amounting to a "search" is at issue,

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<sup>111</sup> 433 U.S. 425, 429 (1977).

<sup>112</sup> *Id.* at 430.

<sup>113</sup> *Id.* at 455–60.

<sup>114</sup> *Id.* at 460 (quoting Brief for Appellant at 148, *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425 (1977) (No. 75-1605), 1977 WL 189790, at \*148).

<sup>115</sup> *Id.* at 462.

<sup>116</sup> See *J.P. v. DeSanti*, 653 F.2d 1080, 1089 n.4 (6th Cir. 1981) (the Supreme Court's "analysis of the privacy issue in *Nixon* appears to be based on the fourth amendment's requirement that all searches and seizures be reasonable").

<sup>117</sup> *Nixon*, 433 U.S. at 458.

<sup>118</sup> *Id.* at 464–65.

or when determining whether a search ought to be exempted from warrant requirement.<sup>119</sup>

3. *NASA v. Nelson*.—More than three decades passed before the Supreme Court again addressed the constitutional right to informational privacy.<sup>120</sup> Those years of silence did not prompt the Court to say much more. In *NASA v. Nelson*, government contractors at the JET Propulsion Laboratory challenged government background check questionnaires that went to both the contractors and their references.<sup>121</sup> The questionnaire to the contractor probed whether the contractor had ever used, supplied, or manufactured illegal drugs and, if so, whether the contractor had sought any treatment for such drug use.<sup>122</sup> The questionnaire noted that the information could not be used as evidence in a criminal proceeding.<sup>123</sup> The form sent to references similarly scrutinized whether the contractor had ever abused alcohol or drugs or whether there were reasons to question the contractor's mental stability.<sup>124</sup> All responses to the questionnaires were protected by the Privacy Act, which restricts public access to the completed questionnaires subject to certain (debatably broad) exceptions.<sup>125</sup>

While the *Nelson* plaintiffs emphasized to the Supreme Court that the questionnaires constituted an intrusion into their privacy even if the information was not disseminated publicly,<sup>126</sup> their arguments relied much less heavily on dignity and autonomy and much less on Fourth Amendment precedent and decisional privacy than did the plaintiffs' arguments in

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<sup>119</sup> *Infra* note 208.

<sup>120</sup> Arguably, the Supreme Court's hesitance to recognize a right to informational privacy in the 1970s was a Bickelian move during a transitional social period—the Court was seeking to start, rather than truncate, a national discussion regarding privacy. *Cf.* Neil S. Siegel, *Federalism as a Way Station: Windsor as Exemplar of Doctrine in Motion*, 6 J. LEGAL ANALYSIS 87, 144 (2014) (arguing that the Court used federalism as a form of “Bickelian passive virtue and an enabling device” in *United States v. Windsor* to incrementally promote same-sex relationship equality). This interpretation seems even more plausible considering that both *Whalen* and *Nixon* were decided shortly after *Roe v. Wade*, where the Court, by some accounts, proceeded without Bickelian caution, thus prompting social backlash. *Cf. id.* at 138. However, irrespective of the Court's motivations when first confronted with informational privacy in the 1970s, as the Court's 2011 decision in *Nelson* and the intervening circuit court confusion demonstrate (discussed *infra*), the Court seems to have let the conversation languish without direction for too long.

<sup>121</sup> 131 S. Ct. 746, 754–55 (2011).

<sup>122</sup> *Id.* at 753.

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

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> Brief for Respondents at 36, *NASA v. Nelson*, 131 S. Ct. 746 (2011) (No. 09-530), 2010 WL 3048324, at \*36.



*Whalen* and *Nixon*.<sup>127</sup> Instead, the *Nelson* plaintiffs highlighted first and foremost that the questionnaires targeted highly “sensitive personal” and “intimate health” information, and that this category of information was entitled to constitutional protection.<sup>128</sup> Plaintiffs also noted that, as part of NASA’s “suitability matrix” used to evaluate employees, NASA considered such factors as sodomy, homosexuality, adultery, and mental or psychological issues.<sup>129</sup>

The Court seemed not to take issue with the assertion that the questionnaires implicated privacy interests of constitutional significance. This is in contrast to the *Whalen* and *Nixon* decisions, where the Court downplayed the privacy interests at stake because it could not see the intrusion; that is, it could not see the purported connection to dignity and autonomy.<sup>130</sup> In *Nelson*, to overcome the privacy interest in intimate, personal information, the Court spent the lion’s share of its opinion trumpeting the countervailing governmental interests in this information, including the importance of the positions to the nation’s space program.<sup>131</sup> The Court also distinguished the Government’s role as employer (where background checks are not uncommon) from its policing function, concluding that the Government has more latitude when acting in its capacity as employer.<sup>132</sup> Finally, as in *Whalen* and *Nixon*, the Court emphasized that there were statutory protections limiting the risk of public dissemination of this information<sup>133</sup> and any consequent downstream harm.

While the Court in *Nelson* seemed compelled by the plaintiffs’ concern over intimate, personal information, in its efforts to override that interest, the Court once again left unclear the appropriate test or framework for evaluating informational privacy claims. The Court emphasized the reasonableness of the government questionnaire no less than ten times in its opinion.<sup>134</sup> The Court also rejected a requirement that the Government demonstrate that its questionnaires are “‘necessary’ or the least restrictive

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<sup>127</sup> That said, the *Nelson* plaintiffs did not totally abandon appeals to dignity. *See id.* at \*40. Nor did *Nixon* totally neglect to highlight the intimate nature of some of the information at stake. *See, e.g.*, Brief for Appellant at 22, *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425 (1977) (No. 75-1605), 1977 WL 189790, at \*22.

<sup>128</sup> *Id.* at \*17, \*20.

<sup>129</sup> *Id.* at \*29–30.

<sup>130</sup> *See supra* Sections II.A.1–2.

<sup>131</sup> *NASA v. Nelson*, 131 S. Ct. 746, 759 (2011) (noting that “the work that contract employees perform is critical to NASA’s mission,” that it is “important work,” and that the government has an interest in conducting background checks for employees engaged in such work).

<sup>132</sup> *Id.* at 760–61.

<sup>133</sup> *Id.* at 762.

<sup>134</sup> *See, e.g., id.* at 761.

means of furthering its interests,” at least in the context of when it is issuing an employment background check.<sup>135</sup>

But as Justice Scalia’s concurrence noted, the majority opinion did little to clarify the “doctrinal obscurity” surrounding the right to informational privacy, and used the “vague” opinions in *Whalen* and *Nixon* to justify issuing another vague opinion regarding the assumed informational privacy right.<sup>136</sup> Justice Scalia continued, lambasting the majority for listing a “multiplicity of unweighted, relevant factors,” all of which could be used to evaluate the hypothetical right to informational privacy.<sup>137</sup>

As demonstrated above, the Supreme Court has confronted, and avoided, the constitutional right to informational privacy on three occasions. Each time, the Court has assumed that such a right exists but found no violation under the facts. The Court’s reluctance appears in part to be a result of unclear conceptions of the interests directly served by constitutional informational privacy. The Court’s hesitant and inconsistent analysis has sewn confusion among the circuit courts.

### B. Circuit Confusion

Faced with this “doctrinal obscurity,” the circuit courts continue to wrestle with constitutional informational privacy. As the Supreme Court observed in *Nelson* but did little to correct, “[s]tate and lower federal courts have offered a number of different interpretations of *Whalen* and *Nixon* over the years.”<sup>138</sup> While the majority of circuits have concluded that a constitutional right to informational privacy does exist, the circuits are divided.<sup>139</sup> Those circuits that do recognize the right have rarely enforced it.<sup>140</sup>

The circuits have also been unclear on the appropriate level of scrutiny for evaluating informational privacy claims.<sup>141</sup> Several employ a rational

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<sup>135</sup> *Id.* at 750.

<sup>136</sup> *Id.* at 767 (Scalia, J., concurring in the judgment).

<sup>137</sup> *Id.* at 768.

<sup>138</sup> *Id.* at 756 n.9 (majority opinion).

<sup>139</sup> For a discussion of cases expressing skepticism regarding the right, see notes 149–67 and accompanying text.

<sup>140</sup> See, e.g., *Doe v. Se. Pa. Transp. Auth. (SEPTA)*, 72 F.3d 1133, 1138, 1143 (3d Cir. 1995) (acknowledging existence of right to informational privacy over HIV status, but failing to enforce the right); *Powell v. Schriver*, 175 F.3d 107, 109 (2d Cir. 1999) (similar).

<sup>141</sup> See Fan, *supra* note 6, at 957–58 (“The courts—including the Supreme Court—have wavered and seesawed between flexible reasonableness interest-balancing all the way up to what looks like strict scrutiny.”).

basis “balancing test” tilted in favor of the government,<sup>142</sup> some utilize what sounds like intermediate scrutiny,<sup>143</sup> and others require strict scrutiny in certain circumstances.<sup>144</sup> Others still reflect internal, intra-circuit confusion and seem to employ some permutation of the traditional three levels of scrutiny.<sup>145</sup> Some apply a different test depending on the content of the information at stake.<sup>146</sup> Finally, some at times appeared to apply the Fourth Amendment reasonable expectation of privacy test,<sup>147</sup> and others hint that at

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<sup>142</sup> *In re Crawford*, 194 F.3d 954, 959 (9th Cir. 1999) (applying nonexhaustive, multifactor balancing test); *Borucki v. Ryan*, 827 F.2d 836, 848 (1st Cir. 1987) (indicating that some balancing of interests may be appropriate, but that there is little guidance on “how such interests would be balanced”); *Hester v. City of Milledgeville*, 777 F.2d 1492, 1497 (11th Cir. 1985) (employing a balancing test with little analysis); *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 578 (3d Cir. 1980) (weighing multiple factors); *Duplantier v. United States*, 606 F.2d 654, 670 (5th Cir. 1979) (employing a rational basis test and evaluating whether “the legitimate governmental interests” outweigh the “incidental intrusion” into privacy).

<sup>143</sup> *Denius v. Dunlap*, 209 F.3d 944, 956 (7th Cir. 2000) (requiring that plaintiff’s substantial interest in medical information be “overcome by a sufficiently strong state interest,” but not stating how strong); *Am. Fed’n of Gov’t Emps. v. Dep’t of Hous. & Urban Dev.*, 118 F.3d 786, 793 (D.C. Cir. 1997) (government has presented “sufficiently weighty interests” that “justify the intrusions”); *Doe v. City of New York*, 15 F.3d 264, 269 (2d Cir. 1994) (confirming that intermediate scrutiny applies in Second Circuit); *Fadjo v. Coon*, 633 F.2d 1172, 1176 (5th Cir. 1981) (rejecting rational basis, but focusing on “legitimate” government interests); *Plante v. Gonzalez*, 575 F.2d 1119, 1131–34 (5th Cir. 1978) (rejecting rational basis and noting that strict scrutiny has been applied in autonomy privacy cases, but employing a balancing test with regard to financial information).

<sup>144</sup> *Bloch v. Ribar*, 156 F.3d 673, 686 (6th Cir. 1998) (employing strict scrutiny where government action implicated fundamental right to privacy of sexual information); *Walls v. City of Petersburg*, 895 F.2d 188, 192 (4th Cir. 1990) (requiring the government “to prove that a compelling governmental interest in disclosure outweighs the individual’s privacy interest”); *Mangels v. Pena*, 789 F.2d 836, 839 (10th Cir. 1986) (applying strict scrutiny to informational privacy claim).

<sup>145</sup> *Doe v. Att’y Gen. of the U.S.*, 941 F.2d 780, 796 (9th Cir. 1991) (applying an inconsistent standard requiring the government to show that “its use of the information would advance a legitimate state interest and that its actions are narrowly tailored”); *Fraternal Order of Police v. City of Philadelphia*, 812 F.2d 105, 110 (3d Cir. 1987) (observing that the “Supreme Court has applied a flexible balancing approach,” but that “[m]ost circuits appear to apply an ‘intermediate standard of review’ for the majority of confidentiality violations, with a compelling interest analysis reserved for ‘severe intrusions’ on confidentiality”) (citation omitted); *Taylor v. Best*, 746 F.2d 220, 225 (4th Cir. 1984) (describing the governmental interest as “compelling,” but noting simply that the competing interests must be “weighed”); *Barry v. City of New York*, 712 F.2d 1554, 1559, 1564 (2d Cir. 1983) (purporting to apply intermediate scrutiny because “some form of scrutiny beyond rational relation is necessary to safeguard the confidentiality interest,” but elsewhere relying on rational basis precedent and concluding that the law “must stand unless ‘very wide of any reasonable mark’”); *Thorne v. City of El Segundo*, 726 F.2d 459, 469 (9th Cir. 1983) (requiring the government to show that its inquiry was justified by “legitimate interests” (the rational basis standard) and that it was narrowly tailored (the strict scrutiny standard)).

<sup>146</sup> *Lambert v. Hartman*, 517 F.3d 433, 443–46 (6th Cir. 2008) (declining to apply strict scrutiny—or any other substantive weighing of interests—where only financial information was at stake, as opposed to a fundamental right); *J.P. v. DeSanti*, 653 F.2d 1080, 1091 (6th Cir. 1981) (evaluation of government interest only required if fundamental right implicated). In this way, the Sixth Circuit’s approach, which has been criticized by some as the most restrictive, is perhaps most consistent with the approach advocated here.

<sup>147</sup> *Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1269 (9th Cir. 1998) (applying Fourth Amendment reasonable expectation of privacy balancing test to informational privacy claim).

the applicability of the undue burden test governing decisional privacy cases in the abortion context.<sup>148</sup>

As with the Supreme Court, the circuits' confusion regarding the appropriate standard and reluctance to rigorously enforce a right to informational privacy appears, at least partially, to be a product of the lack of a direct connection between traditional appeals to dignity and autonomy and informational privacy. Some examples are instructive.

By certain accounts, the Sixth Circuit has been the most reticent to embrace a constitutional right to informational privacy.<sup>149</sup> In *J.P. v. DeSanti*, the court considered the constitutionality of an Ohio law that permitted the "social histories" of juvenile offenders to be made available to over fifty-five government, social, and religious agencies.<sup>150</sup> The social histories included "intimate biographical details."<sup>151</sup> Following the Supreme Court's example in *Nixon*, the Sixth Circuit relied on *Katz*—one of the leading Fourth Amendment intrusion cases—to downplay the extent of the intrusion caused by the law.<sup>152</sup> The court retorted (quoting *Katz*) that "[v]irtually every governmental action interferes with personal privacy to some degree."<sup>153</sup> With that, the court concluded that courts could not possibly be called upon to review and balance "every government action against the corresponding intrusion on individual privacy."<sup>154</sup> Not only did the court fail to see how the limited disclosure of the social histories constituted an actionable intrusion analogous to those protected by the Fourth Amendment, but it could not fathom policing every such potential privacy claim.<sup>155</sup> The court seemed to be searching for some limiting principle. It held "that not all rights of privacy or interests in nondisclosure of private information are of constitutional dimension, so as to require balancing government action against individual privacy,"<sup>156</sup> seemingly

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related to medical tests); *Kimberlin v. U.S. Dep't of Justice*, 788 F.2d 434, 438 (7th Cir. 1986) (whether plaintiff has an informational privacy interest depends on whether "he has a reasonable expectation of privacy in the information").

<sup>148</sup> *Seaton v. Mayberg*, 610 F.3d 530, 538–39 (9th Cir. 2010) (analyzing whether the type of information requested would have placed an "undue burden" on "any other right other than the putative right to privacy of the information itself").

<sup>149</sup> See, e.g., Martin, *supra* note 85, at 425; Elizabeth Pollman, *A Corporate Right to Privacy*, 99 MINN. L. REV. 27, 57 n.127 (2014).

<sup>150</sup> 653 F.2d at 1082.

<sup>151</sup> *Id.* at 1086.

<sup>152</sup> *Id.* at 1089–90.

<sup>153</sup> *Id.* at 1090 (quoting *Katz v. United States*, 389 U.S. 347, 350 n.5 (1967)).

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 1091.

leaving the door open to a more nuanced, categorical approach to informational privacy claims.

The D.C. Circuit has characterized itself as sharing the Sixth Circuit's trepidation.<sup>157</sup> In *American Federation of Government Employees v. Department of Housing and Urban Development*, members of the American Federation of Government Employees and the union itself challenged two form employment questionnaires issued by federal agencies.<sup>158</sup> The forms were not unlike those subsequently addressed by the Supreme Court in *Nelson*, and included questions regarding the employees' drug use, mental health history, and financial stability.<sup>159</sup> Although part of the court's decision rested on the government safeguards against public dissemination of the information collected via questionnaire, the court also criticized as "Delphic" the Supreme Court's attempt to support the existence of an informational privacy right with reliance on Fourth Amendment case law.<sup>160</sup> The D.C. Circuit also specifically took issue with the district court's characterization of one questionnaire as "so vast an intrusion."<sup>161</sup> In the end, the court was unpersuaded by attempts to analogize the right to informational privacy to the Fourth Amendment and failed to see the questionnaires as directly implicating the dignity interest served by the Fourth Amendment.<sup>162</sup>

Courts have likewise been unpersuaded by attempts to argue that collection or disclosure of private information violates an informational privacy right implicating an autonomy interest. For example, in *Barry v. City of New York*, employees of the New York City police and fire departments challenged the constitutionality of certain financial disclosure

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<sup>157</sup> *Am. Fed'n of Gov't Emps. v. Dep't of Hous. & Urban Dev.*, 118 F.3d 786, 792 (D.C. Cir. 1997) ("The Sixth Circuit, which until today was alone among the courts of appeals, has been dubious.").

<sup>158</sup> *Id.* at 788–89.

<sup>159</sup> *Id.* at 788.

<sup>160</sup> *Id.* at 791.

<sup>161</sup> *Id.* at 794; *see also* *Big Ridge, Inc. v. Fed. Mine Safety & Health Review Comm'n*, 715 F.3d 631 (7th Cir. 2013) (analyzing miners' informational privacy claims to medical records under the Fourth Amendment and finding no violation).

<sup>162</sup> The outsized role of dignity in discussion of informational privacy claims emerged early on in circuit jurisprudence, perhaps because informational privacy claims were brought in tandem with cases that also clearly implicated traditional Fourth Amendment searches. For example, in *York v. Story*, 324 F.2d 450, 451–52 (9th Cir. 1963), the Ninth Circuit addressed whether a woman's informational privacy rights were violated when she came to report a sexual assault to the police, the police subsequently photographed her nude, and then distributed the photos among the department for no law enforcement purpose. The case was an easy one for the court because it fit nicely into the dignity–intrusion paradigm. There was a search (the photographs), which by itself infringed on her dignity, and the distribution further denigrated her dignity. *Id.* at 455. But in the vast majority of cases when there is no illegitimate search or intrusion in the first instance (as "intrusion" is classically conceived under the Fourth Amendment), courts continue to lack a coherent framework for addressing government dissemination of intimate information.

laws.<sup>163</sup> They argued that “public disclosure will impair their autonomy interests by forcing them to redefine their marital and family relationships.”<sup>164</sup> When the court balanced the purported privacy interests against the governmental interests, it noted that disclosure could be “personally embarrassing,” but seemed to give little weight to any harm to autonomy.<sup>165</sup> Evidently, the court believed that such a harm was too specious and concluded that the government’s interests in deterring official malfeasance outweighed any possible disclosure of personally embarrassing facts.<sup>166</sup> Similarly, in *Seaton v. Mayberg*, the Ninth Circuit rejected a medical informational privacy claim in part because the plaintiff failed to allege that disclosure of the information would have placed an “undue burden” on or discouraged the plaintiff from obtaining medical assistance.<sup>167</sup>

At the same time that they have been largely unpersuaded by generic appeals to dignity or autonomy, circuits have expressed greater concern over dissemination than mere government collection.<sup>168</sup> This intensified concern highlights the shortcomings of the traditional intrusion-based dignity approach to informational privacy claims. The types of government action at play in informational privacy claims, frequently involving government questionnaires or information obtained through less obviously coercive means than a police search, simply do not register with courts as constituting an intrusion implicating the plaintiff’s personal dignity.<sup>169</sup>

Judicial emphasis on the dangers of dissemination of private information not only demonstrates the relatively tangential role of an intrusion–dignity theory of informational privacy, but also the pertinence of

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<sup>163</sup> 712 F.2d 1554, 1556 (2d Cir. 1983).

<sup>164</sup> *Id.* at 1561.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 1563.

<sup>167</sup> 610 F.3d 530, 538–39 (9th Cir. 2010).

<sup>168</sup> See *Kerns v. Bader*, 663 F.3d 1173, 1186 (10th Cir. 2011) (observing that courts seem more likely to find informational privacy violations where state actors have publicly disclosed a citizen’s private information); *Am. Fed’n of Gov’t Emps. v. Dep’t of Hous. & Urban Dev.*, 118 F.3d 786, 793 (D.C. Cir. 1997) (“[T]he individual interest in protecting the privacy of the information sought by the government is significantly less important where the information is collected by the government but not disseminated publicly.”); *Fraternal Order of Police v. City of Philadelphia*, 812 F.2d 105, 111, 118 (3d Cir. 1987) (“[T]he federal courts also apply stricter scrutiny when there is unguarded public disclosure of confidential information.”); *Barry*, 712 F.2d at 1561 (“[t]he adverse effect of public disclosure on privacy interests is considerably greater than the effect of disclosure to the” government); *Statharos v. N.Y.C. Taxi & Limousine Comm’n*, 198 F.3d 317, 326 (2d Cir. 1999) (same).

<sup>169</sup> See *Hester v. City of Milledgeville*, 777 F.2d 1492, 1497 (11th Cir. 1985) (characterizing as “limited intrusion[s]” general polygraph control questions to fire department employees that did not touch on sexual relations).

a categorical approach<sup>170</sup> focused on downstream, social consequences. Courts appear more open to informational privacy claims when the dissemination of certain categories of information presages direct, downstream consequences, such as potential discrimination.<sup>171</sup>

As outlined more completely in Part IV, not all categories of information are treated equally (nor should they be) and courts have been particularly sympathetic towards informational privacy claims where plaintiffs have been able to demonstrate that either intimate information or political thought is being jeopardized.<sup>172</sup>

### III. CONSTITUTIONAL IMPERATIVES

We now know where we are (confusion over the existence of the right to informational privacy and its contours) and how we got here (in part, the imprecise extant focus on autonomy and dignity as the principal values of informational privacy).

Why does it matter? Why should we care about establishing a clear framework for evaluating constitutional informational privacy claims? I offer three reasons. First, informational privacy threats continue to grow, particularly as both the administrative state and technology's power continue to augment. Second, to the extent one level of scrutiny or framework has emerged as a frontrunner among the circuits, it is a rational-

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<sup>170</sup> See *Eagle v. Morgan*, 88 F.3d 620, 625 (8th Cir. 1996) ("must examine the nature of the material opened to public view to assess whether" it is protected); *Thorne v. City of El Segundo*, 726 F.2d 459, 471 (9th Cir. 1983) (suggesting that different levels of scrutiny apply based on the type of privacy interest at stake).

<sup>171</sup> *Tuscon Woman's Clinic v. Eden*, 379 F.3d 531, 551 (9th Cir. 2004) (giving weight to "the potential for harm in any subsequent non-consensual disclosure"); *In re Crawford*, 194 F.3d 954, 959–60 (9th Cir. 1999) (no privacy violation for disclosure of a social security number because "its disclosure does not lead directly to injury, embarrassment or stigma," unlike the disclosure of one's HIV status); *Powell v. Schriver*, 175 F.3d 107, 111 (2d Cir. 1999) (recognizing a constitutional right to keep changes in gender identity private because to reveal such information would result in discrimination); *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1062–63 (6th Cir. 1998) (applying strict scrutiny where disclosure of information "created a very real threat" to the plaintiff's security); *In re Doe*, 15 F.3d 264, 267 (2d Cir. 1994) ("An individual revealing that she is HIV seropositive potentially exposes herself not to understanding or compassion but to discrimination and intolerance, further necessitating the extension of the right to confidentiality over such information."); *Alexander v. Peffer*, 993 F.2d 1348, 1350 (8th Cir. 1993) (if disclosure implicated a tangible interest such as employment, it would be constitutionally protected); *Fadjo v. Coon*, 633 F.2d 1172, 1174 (5th Cir. 1981) (in concluding that plaintiff stated a claim, noting that plaintiff alleged "he has been forced to move his residence" and "has been unable to obtain meaningful employment"); *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 578 (3d Cir. 1980) (weighing "the potential for harm in any subsequent nonconsensual disclosure"); *Tosh v. Buddies Supermarkets, Inc.*, 482 F.2d 329, 332 (5th Cir. 1973) (considering whether the release of private information "damaged [plaintiffs'] reputations and interfered with their ability to engage in their occupation"). But see *Plante v. Gonzalez*, 575 F.2d 1119, 1135 (5th Cir. 1978) ("When a legitimate expectation of privacy exists, violation of privacy is harmful without any concrete consequential damages.").

<sup>172</sup> See *infra* Part IV.

basis balancing test insufficiently robust to provide meaningful informational privacy protection. Finally, the prevalence of the third-party doctrine also continues to bar many informational privacy claims.<sup>173</sup> A framework for informational privacy giving primacy to intimate information and political thought would remedy many of these pressing problems.

#### A. *Privacy Threats, New and Old*

That advances in collection, aggregation, and dissemination technologies have been accompanied by threats to privacy is widely recognized.<sup>174</sup> Privacy scholars have seen the burgeoning threat from technology for some time.<sup>175</sup> As has the Supreme Court.<sup>176</sup> Just this past year, the Court explicitly recognized the threat posed by digitized information and data, taking the rare step of enhancing Fourth Amendment protections in response to that threat.<sup>177</sup>

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<sup>173</sup> See *infra* Section III.C (explaining that the third-party doctrine, which holds that there is no reasonable expectation of privacy when the information has not been kept completely secret and has been shared with a so-called third party, is a product of the Fourth Amendment, dignity-intrusion theory of informational privacy).

<sup>174</sup> Sklansky, *supra* note 50, at 1084 (“Control over the collection, processing, and dissemination of personal information matters, and it matters more and more as the technologies of data collection, data processing, and data sharing gain power exponentially and penetrate ever deeper into daily life.”); J. Roland Pennock & John W. Chapman, *Preface* to NOMOS XIII: PRIVACY, *supra* note 33, at vii, vii (“Among the wasting assets of modern society, privacy ranks high. The products of modern technology and some of the direct and indirect effects of mass society combine to enhance its scarcity value.”); Katherine J. Strandburg, *Home, Home on the Web and Other Fourth Amendment Implications of Technosocial Change*, 70 MD. L. REV. 614, 626 (2011) (technological growth threatens privacy by both enhancing the government’s means to intrude into traditional private areas, and by creating more opportunities for intrusion through the creation of “technology-mediated social” interactions) [hereinafter, Strandburg, *Home, Home*]; Katherine J. Strandburg, *Monitoring, Datafication, and Consent: Legal Approaches to Privacy in the Big Data Context*, in PRIVACY, BIG DATA, AND THE PUBLIC GOOD: FRAMEWORKS FOR ENGAGEMENT 5, 10–12 (Julia Lane et al. eds., 2014) (noting that datafication increases the ability to which collected information can be catalogued and organized, therefore increasing the potential it will be used for unintended purposes); NISSENBAUM, *supra* note 40, at 21 (documenting the rise of technically mediated monitoring); Scott R. Peppet, *Regulating the Internet of Things: First Steps Toward Managing Discrimination, Privacy, Security, and Consent*, 93 TEX. L. REV. 85, 129–33 (2014) (documenting the privacy threats posed by the “Internet of Things”).

<sup>175</sup> MILLER, *supra* note 32, at 205 (foreshadowing in 1971 that “the available [legal] protection is not adequate to meet the threat to informational privacy that already exists and is certain to become more acute in the future”).

<sup>176</sup> See *Whalen v. Roe*, 429 U.S. 589, 605 (1977) (“We are not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files.”).

<sup>177</sup> In *Riley v. California*, the Supreme Court addressed whether pursuant to the search-incident-to-arrest exception to the warrant requirement, police could search digital information on the cell phone of a person being lawfully arrested. 134 S. Ct. 2473, 2480 (2014). The Court held that such a search was unreasonable under the Fourth Amendment. *Id.* at 2494–95. In distinguishing cell phones from other



As such, this Article will not dwell on what others have artfully documented regarding the rising tide of technologically-advanced privacy infringements from both the public and private sector. However, while much attention has been paid to the fact that the formal state and its apparatuses no longer possess a monopoly when it comes to large-scale invasions of privacy,<sup>178</sup> it is important to emphasize that the government continues to deploy its immense resources in sophisticated ways, which jeopardize individual privacy.<sup>179</sup> The NSA's telephone metadata program is but one prominent example.<sup>180</sup> There are many others, most of which receive less public attention.<sup>181</sup> Moreover, the government regularly borrows from and relies on private sector databases,<sup>182</sup> blurring the lines between state and private action. Accordingly, a constitutional solution focused on the government is necessary.

Finally, while the digital Information Age has amplified many privacy risks from the government, certain threats to informational privacy of a more traditional vintage remain of vital concern. For example, as noted in the Introduction, purportedly vanilla policies requiring individuals to provide proof of surgery before changing gender designations on

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tangible items found on a person (such as cigarette packets), the Court documented the vast quantity and intimate quality of digital information potentially contained on a cell phone. *Id.* at 2489, 2492.

<sup>178</sup> For a compelling, postmodern account of some ways in which state and private power work in tandem to jeopardize constitutional rights, including the right to privacy, see Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1478–81 (1992) (embracing a Foucaultian conception of power in analyzing the relationship between state regulation of sexual practices and private enforcement of those regulations).

<sup>179</sup> See ERWIN CHERMERINSKY, *THE CASE AGAINST THE SUPREME COURT* 73 (2014) (“We likely know only a fraction of what the government has done in the area of illegal surveillance since 9/11.”).

<sup>180</sup> *Klayman v. Obama*, 957 F. Supp. 2d 1, 33 (D.D.C. 2013) (“[T]he almost-Orwellian technology that enables the Government to store and analyze the phone metadata of every telephone user in the United States is unlike anything that could have been conceived in 1979.”), *vacated*, 800 F.3d 559 (D.C. Cir. 2015); see also *ACLU v. NSA*, 493 F.3d 644, 648, 692–93 (6th Cir. 2007) (outlining the NSA's Terrorist Surveillance Program by which the government, without a warrant, intercepted telephone and e-mail communications where at least one party was located outside of the United States, but concluding that the plaintiffs' lacked standing to challenge the law).

<sup>181</sup> For instance, until recently, the Department of Health and Human Services (HHS) failed to encrypt, and therefore risked exposing, the identities of visitors to AIDS.gov, a HHS-operated website that provides visitors with information on services for the treatment of HIV and AIDS. See Craig Timberg, *Federal Sites Leaked the Locations of People Seeking AIDS Services for Years*, WASH. POST: THE SWITCH (Nov. 7, 2014), <http://www.washingtonpost.com/blogs/the-switch/wp/2014/11/07/federal-sites-leaked-the-locations-of-people-seeking-aids-services-for-years/> [<http://perma.cc/Q33U-S7P2>]; see also NISSENBAUM, *supra* note 40, at 54 (noting the vast amounts of intimate information available via court records).

<sup>182</sup> See, e.g., Craig Timberg, *U.S. Threatened Massive Fine to Force Yahoo to Release Data*, WASH. POST (Sept. 11, 2014), [http://www.washingtonpost.com/business/technology/us-threatened-massive-fine-to-force-yahoo-to-release-data/2014/09/11/38a7f69e-39e8-11e4-9c9f-ebb47272e40e\\_story.html](http://www.washingtonpost.com/business/technology/us-threatened-massive-fine-to-force-yahoo-to-release-data/2014/09/11/38a7f69e-39e8-11e4-9c9f-ebb47272e40e_story.html) [<http://perma.cc/QEJ8-J4DF>].

government-issued identification documents<sup>183</sup> directly infringe on transgender individuals' informational privacy.<sup>184</sup> For the many transgender people who are unable or choose not to have gender confirmation surgery,<sup>185</sup> the government's surgery requirement publicly outs the individual to anyone (such as an employer) who observes the dissonance between the person's identification and gender presentation, subjecting them to potential discrimination.<sup>186</sup> To the extent transgender individuals do comply with the surgery requirement, they are forced to provide intimate medical and sexual details to the state, in many cases leaving a public record.<sup>187</sup>

In addition to laws pertaining to government IDs, transgender people are also outed when governments, schools, or employers refuse to let them use a bathroom consistent with their gender expression, and force them to use bathrooms that align with the sex assigned at birth or segregate them in unisex restrooms.<sup>188</sup> In a handful of states, so-called papers-to-pee laws have been proposed which, if enacted, penalize transgender people for using restrooms inconsistent with the sex they were assigned at birth.<sup>189</sup>

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<sup>183</sup> See, e.g., Lisa Mottet, *Modernizing State Vital Statistics Statutes and Policies to Ensure Accurate Gender Markers on Birth Certificates: A Good Government Approach to Recognizing the Lives of Transgender People*, 19 MICH. J. GENDER & L. 373, 400–01 (2013) (documenting jurisdictions with a surgery requirement for birth certificates). A revised Model State Vital Statistics Act that would remove the surgery requirement for obtaining an accurate birth certificate is under review by HHS, but as of October 2015 has not yet been approved. See MODEL STATE VITAL STATISTICS ACT & MODEL STATE VITAL STATISTICS REGULATIONS § 24(a)(4) (CTRS. FOR DISEASE CONTROL & PREVENTION, 2011 Revision), <http://www.naphsis.org/Documents/FinalMODELLAWSeptember72011.pdf> [http://perma.cc/Q5F7-MR3A]. It would then need to be adopted by the various states. *Id.* at 4.

<sup>184</sup> See *K.L. v. State of Alaska*, No. 3AN-11-05431 CI, 2012 WL 2685183, at \*8 (Alaska Super. Ct. Mar. 12, 2012). The author provided early research assistance to the ACLU, plaintiff's counsel in *K.L. v. State of Alaska*, on fertile jurisdictions for an informational privacy lawsuit challenging strict gender marker modification requirements.

<sup>185</sup> Scott Skinner-Thompson & Ilona M. Turner, *Title IX's Protections for Transgender Student Athletes*, 28 WIS. J.L. GENDER & SOC'Y 271, 291 (2013) (noting that "medical transition—particularly genital surgery—is not affordable, necessary, or appropriate for all transgender people").

<sup>186</sup> Mottet, *supra* note 183, at 391–92 (2013) ("This is not an abstract issue; inspection of one's birth certificate (or documents it generates) can lead directly to discrimination and even violence, especially when a situation involves interactions with security officers, employment, or access to sex-segregated facilities."); Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 754–57 (2008) (describing the employment consequences caused by lack of an accurate identification document).

<sup>187</sup> Mottet, *supra* note 183, at 432 (arguing that policies which provide access to records indicating that a person changed their gender marker create privacy concerns).

<sup>188</sup> See, e.g., Complaint at 2, *G.G. v. Gloucester Cty. Sch. Bd.*, No. 4:15cv54 (E.D. Va. June 11, 2015) (alleging that the school district forbids trans boy from using boys' restroom, isolating and stigmatizing him).

<sup>189</sup> See Jana Kasperkevic, *'Papers to Pee': Texas, Kentucky and Florida Consider Anti-Transgender Bills*, GUARDIAN (Mar. 24, 2015, 9:30 AM), <http://www.theguardian.com/society/2015/mar/24/papers-to-pee-texas-kentucky-and-florida-consider-anti-transgender-bills> [http://perma.cc/3EYC-U27U].

Some of these proposed laws would charge owners of public accommodations with enforcement of the laws and punish those owners with liability in civil suits if they permit patrons to use the “wrong” restroom.<sup>190</sup> The impact such laws would have on individuals’ privacy is apparent.<sup>191</sup>

Providing privacy to LGBTQ individuals is particularly important given that federal law and most states do not provide comprehensive or explicit employment discrimination protections based on gender identity and sexual orientation.<sup>192</sup> In other words, privacy serves as a liminal right while queer individuals continue to fight for full inclusion.<sup>193</sup>

Similarly, while there are employment discrimination protections for people living with HIV through the Americans with Disability Act,<sup>194</sup>

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<sup>190</sup> See, e.g., H.B. 583, 2015 Leg., Reg. Sess. (Fla. 2015) (“An owner of public accommodations, a school, or a place of employment who maintains single-sex public facilities and knowingly advertises, promotes, or encourages use of those facilities in violation of subsection (2), or fails to take reasonable remedial measures after learning of such use, is liable in a civil action to any person who is lawfully using those facilities at the time of the unlawful entry for the damages caused by the unlawful entry, together with reasonable attorney fees and costs.”).

<sup>191</sup> Transgender individuals are also uniquely vulnerable to being outed during airport screening procedures. See NAT’L CTR. FOR TRANSGENDER EQUAL., A BLUEPRINT FOR EQUALITY: FEDERAL AGENDA FOR TRANSGENDER PEOPLE 35 (2015), [http://transequality.org/sites/default/files/docs/resources/NCTE\\_Blueprint\\_2015\\_Travel.pdf](http://transequality.org/sites/default/files/docs/resources/NCTE_Blueprint_2015_Travel.pdf) [<http://perma.cc/4RZ4-S8SD>].

<sup>192</sup> The Employment Non-Discrimination Act, which would prohibit employment discrimination on the basis of sexual orientation and gender identity, has been introduced on several occasions but has failed to pass Congress. See Lydia DePillis, *This Is the Next Front in the Battle for Gay Rights*, WASH. POST: WONKBLOG (June 26, 2015), <http://www.washingtonpost.com/news/wonkblog/wp/2015/06/26/this-is-the-next-frontier-in-the-battle-for-gay-rights/> [<http://perma.cc/GD4N-JY92>] (“The federal Employment Non-Discrimination Act has been introduced in most sessions of Congress since 1994, but failed each time, most recently in 2013.”). In the summer of 2015, a much broader bill, called the Equality Act, was introduced and would provide protections for LGBT individuals not just in employment, but in housing, credit, and public accommodations. See Paul Kane, *The Next Battle in the Gay Rights Movement Kicks off on Capitol Hill*, WASH. POST (July 23, 2015), [http://www.washingtonpost.com/politics/the-next-battle-in-gay-rights-movement-kicks-off-on-capitol-hill/2015/07/23/0d565804-314b-11e5-8f36-18d1d501920d\\_story.html](http://www.washingtonpost.com/politics/the-next-battle-in-gay-rights-movement-kicks-off-on-capitol-hill/2015/07/23/0d565804-314b-11e5-8f36-18d1d501920d_story.html) [<http://perma.cc/R427-PBAA>]. That said, there is compelling authority indicating that Title VII’s prohibition on sex discrimination prohibits discrimination on the basis of gender identity and sexual orientation. See *Complainant v. Foxx*, No. 0120133080, 2015 WL 4397641, at \*9–10 (E.E.O.C. July 15, 2015); *Macy v. Holder*, No. 0120120821, 2012 WL 1435995, at \*7–9 (E.E.O.C. Apr. 20, 2012); see also *Skinner-Thompson & Turner*, *supra* note 185, at 283–85 (collecting authority extending Title VII protections to transgender individuals). However, there is not yet national judicial consensus on the extent of Title VII’s reach. Moreover, as the recent social debate regarding Indiana’s Religious Freedom Restoration Act highlights, sexual orientation remains an unprotected basis for discrimination by public accommodations in many states. See, e.g., Erik Eckholm, *Religious Protection Laws, Once Called Shields, Are Now Seen as Cudgels*, N.Y. TIMES (Mar. 30, 2015), [http://www.nytimes.com/2015/03/31/us/politics/religious-protection-laws-once-called-shields-are-now-seen-as-cudgels.html?\\_r=0](http://www.nytimes.com/2015/03/31/us/politics/religious-protection-laws-once-called-shields-are-now-seen-as-cudgels.html?_r=0) [<http://perma.cc/CF9M-QRU6>].

<sup>193</sup> See *supra* note 81.

<sup>194</sup> See generally Scott Skinner-Thompson, *HIV and Employment, in AIDS AND THE LAW*, *supra* note 85; Scott Thompson, *Abbott, AIDS, and the ADA: Why a Per Se Disability Rule for HIV/AIDS is Both Just and a Must*, 15 DUKE J. GENDER L. & POL’Y 1 (2008).

providing robust privacy protections for people living with HIV is an important antecedent protection that will help ensure that the discrimination does not happen in the first instance. Because misunderstandings of and stigma towards people living with HIV remains prevalent in the United States,<sup>195</sup> people living with HIV must retain the ability to keep their medical status confidential.<sup>196</sup> Despite the limited privacy protections afforded by statutory regimes such as the Health Information Portability and Accountability Act (HIPAA), which provides no private cause of action and generally only applies to healthcare entities and providers,<sup>197</sup> state officials, such as corrections officers or police officers, have repeatedly disclosed individuals' HIV statuses, exposing the individuals to discrimination and possible violence.<sup>198</sup>

Moreover, we live in an increasingly polarized, politically charged time,<sup>199</sup> requiring that individuals' political beliefs remain within their power to disclose if and when they see fit. Otherwise, individuals risk being exposed to subtle forms of discrimination if their unpopular beliefs are collected and forcibly disclosed by the government. While government employees are protected from employment discrimination based on their

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<sup>195</sup> THE HENRY J. KAISER FAMILY FOUND., HIV/AIDS AT 30: A PUBLIC OPINION PERSPECTIVE 3–11 (2011), [https://kaiserfamilyfoundation.files.wordpress.com/2013/07/8186-hiv-survey-report\\_final.pdf](https://kaiserfamilyfoundation.files.wordpress.com/2013/07/8186-hiv-survey-report_final.pdf) [<http://perma.cc/KPG5-HVYQ>] (documenting sustained but declining stigma towards those living with HIV).

<sup>196</sup> To be clear, privacy alone will not solve persistent stigma and discrimination regarding HIV. Education regarding the disease is the most potent antidote towards continued misunderstanding. But privacy is a necessary tool to protect people living with HIV while discrimination persists, and, from a public health perspective, is key to encouraging people to be tested and discover their HIV status, lest they fear that if they are HIV-positive, it will become public, causing them to be ostracized. Similarly, while some have suggested that in some ways “privacy” perpetuates the oppression of LGBTQ individuals and forces them into the closet, *see* Thomas, *supra* note 178, at 1455–56, privacy remains an important safeguard as individuals decide—on their own terms and not on the government’s—when and with whom to discuss their sexuality or gender identity.

<sup>197</sup> 45 C.F.R. § 160.102–03 (2014) (defining covered entities under HIPAA as health care plans, providers, or clearinghouses). While HIPAA does not directly provide a private cause of action, the Connecticut Supreme Court recently held that it could be used to establish the standard of care for a negligence suit. *Byrne v. Avery Ctr. for Obstetrics & Gynecology, P.C.*, 102 A.3d 32, 49 (Conn. 2014). Additionally, law enforcement officers that necessarily must observe a prisoner’s medical details have been held to be covered by HIPAA. *See, e.g., Warren v. Corcoran*, No. 9:09-CV-1146 (DNH/ATB), 2011 U.S. Dist. LEXIS 135012, at \*21 (N.D.N.Y. Oct. 20, 2011).

<sup>198</sup> *See, e.g., Herring v. Keenan*, 218 F.3d 1171, 1172 (10th Cir. 2000) (public disclosure of HIV status by probation officer); *see also infra* note 251 (collecting several cases where state officials disclosed an individual’s HIV status).

<sup>199</sup> Nate Cohn, *Polarization Is Dividing American Society, Not Just Politics*, N.Y. TIMES (June 12, 2014), [http://www.nytimes.com/2014/06/12/upshot/polarization-is-dividing-american-society-not-just-politics.html?\\_r=0&abt=0002&abg=0](http://www.nytimes.com/2014/06/12/upshot/polarization-is-dividing-american-society-not-just-politics.html?_r=0&abt=0002&abg=0) [<http://perma.cc/J6VL-EE2P>] (summarizing a Pew survey documenting the trenchant ideological divisions in America).

political beliefs,<sup>200</sup> private sector employees lack comprehensive protections.<sup>201</sup> Accordingly, ensuring that political thought is not collected and disclosed is a key preliminary bulwark against potential discrimination.

Put briefly, the state's formal power to collect and disseminate private information remains very real, if at times subtle, and the potential for constitutional privacy protection warrants our attention and that of the courts.<sup>202</sup>

### B. Balancing Failures

Notwithstanding these threats to informational privacy, many circuits employ a balancing test that flexibly weighs the government's interest in either obtaining or disseminating the information with the plaintiff's interest in maintaining confidentiality.<sup>203</sup> This balancing test, which resembles the test employed for evaluating much government conduct under the Fourth Amendment, takes a handful of forms, and has been advocated by several scholars. It provides no real protection.

A brief review of cases employing a balancing test illustrates the test's limitations. The Third Circuit has provided the most guidance regarding the factors to be considered in weighing the competing interests of the state and an individual's privacy. In *United States v. Westinghouse Electric Corp.*, the court established that multiple factors must be weighed, including the type of record requested, any potential for harm from any subsequent nonconsensual dissemination, the adequacy of any safeguards limiting further dissemination, the degree of need for access, and the existence of any express statutory mandate for access.<sup>204</sup> Other circuits are

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<sup>200</sup> See *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 65 (1990) (holding that the *Elrod-Branti* rule prohibiting hiring discrimination by government officials on the basis of party affiliation extends to low-level government positions).

<sup>201</sup> Cf. *Bd. of Cty. Comm'rs v. Umbehr*, 518 U.S. 668, 673 (1996) (extending constitutional protections to government contractors, but presumably leaving other private sector employees unprotected).

<sup>202</sup> See Chemerinsky, *supra* note 24, at 656 (informational privacy law is in "dramatic need of development"); cf. *Riley v. California*, 134 S. Ct. 2473, 2491 (2014) (constitutional protection cannot wait for legislative action because "the Founders did not fight a revolution to gain the right to government agency protocols"); Erin Murphy, *The Politics of Privacy in the Criminal Justice System: Information Disclosure, the Fourth Amendment, and Statutory Law Enforcement Exemptions*, 111 MICH. L. REV. 485, 537 (2013) (arguing that both the Court and Congress should take active responsibility for regulating privacy in the twenty-first century). But see Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 805 (2004) (arguing that courts should proceed with caution in regulating criminal justice technologies under the Fourth Amendment).

<sup>203</sup> *Supra* note 142.

<sup>204</sup> 638 F.2d 570, 578 (3d Cir. 1980); see also *Seaton v. Mayberg*, 610 F.3d 530, 539 (9th Cir. 2010) (also applying a multifactor balancing test).

less precise. For example, the Eleventh Circuit has simply employed a balancing test “comparing the interests [the action] serves with those it hinders.”<sup>205</sup> In practice, the balancing test—whether multifactored or open-ended—rarely results in the vindication of privacy rights<sup>206</sup> and amounts to little more than rational basis review.<sup>207</sup>

There are two principal reasons for the balancing test’s failure. First, because of the influence of the intrusion–dignity theory of privacy on informational privacy jurisprudence, the balancing test is a product of Fourth Amendment case law.<sup>208</sup> Because that balancing test was originally designed to redress intrusions upon one’s dignity (even if the intrusion was not serious enough to require a warrant),<sup>209</sup> it is ill suited to addressing the separate interests served by an informational privacy right. In other words, because harms to human dignity and autonomy are incidental in the informational privacy context, often not involving forcible searches or a direct impact on one’s decisional freedoms, informational privacy claims rarely prevail under the nonrigorous balancing test. The test’s vague contours contain no specific mechanism to give weight to claims not involving what courts traditionally encounter as “intrusions” within the

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<sup>205</sup> *Hester v. City of Milledgeville*, 777 F.2d 1492, 1497 (11th Cir. 1985) (quoting *Plante v. Gonzalez*, 575 F.2d 1119, 1134 (5th Cir. 1978) (alteration in original)).

<sup>206</sup> *See, e.g., Westinghouse*, 638 F.2d at 580 (no violation under balancing test, notwithstanding that sensitive medical information was at stake).

<sup>207</sup> JON L. MILLS, *PRIVACY: THE LOST RIGHT* 124–25 (2008) (noting that some courts have utilized a balancing test amounting to rational basis review for informational privacy claims). *But see Plante*, 575 F.2d at 1131–34 (employing a balancing test, but suggesting it is somehow more rigorous than rational basis review).

<sup>208</sup> Pursuant to the Fourth Amendment’s terms, the government may not conduct a search without probable cause. U.S. CONST. amend. IV. Probable cause requires the presence of facts that would “warrant a person of reasonable caution” to believe the existence of evidence of a particular crime is present. *Florida v. Harris*, 133 S. Ct. 1050, 1055 (2013) (quoting *Texas v. Brown*, 460 U.S. 730, 742 (1983) (plurality opinion)). But, in practice, the relatively robust “probable cause” test is rarely employed because the definition of what constitutes a “search” triggering the probable cause standard has been narrowed considerably. For example, where a person lacks a “legitimate expectation of privacy” in the information, no search occurs. *Smith v. Maryland*, 442 U.S. 735, 740 (1979). Similarly, the Supreme Court has distinguished between criminal investigatory searches, which are subject to probable cause, and administrative searches, which are not. Eve Brensike Primus, *Disentangling Administrative Searches*, 111 COLUM. L. REV. 254, 256–57 (2011). Absent a narrowly-defined criminal “search,” the government’s actions are generally governed by a balancing of interests test that resembles rational basis review. *Id.*; *see also Riley v. California*, 134 S. Ct. 2473, 2484 (2014) (“[W]e generally determine whether to exempt a given type of search from the warrant requirement ‘by assessing, on the one hand, the degree to which it intrudes upon an individual’s privacy and, on the other hand, the degree to which it is needed for the promotion of legitimate governmental interests.’” (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999))).

<sup>209</sup> *See supra* notes 40–50 and accompanying text.

Fourth Amendment context.<sup>210</sup> That is, the test does not speak directly to, and undervalues, the interests served by an informational privacy right.

Second, and relatedly, the test is fundamentally subjective.<sup>211</sup> Courts are accustomed to hearing Fourth Amendment cases that involve actual, physical intrusions implicating the dignity interest, as well as decisional privacy claims directly infringing on a person's autonomy. No such interests are directly implicated in most informational privacy claims. Given the subjectivity of the test, and courts' relative lack of experience outside the intrusion and decisional contexts, courts' natural tendency to defer to the state is amplified even more than in the Fourth Amendment or decisional privacy contexts.<sup>212</sup> This tendency is likely to become even more pronounced as the government continues to recast private conduct as implicating matters of public concern, at least where that private conduct involves public employees and could reflect poorly on the public institution or be construed as conduct unbecoming a public employee.<sup>213</sup>

Notwithstanding that the balancing test has proved to be a relatively meaningless restraint on government incursions into individual informational privacy, the test has been advocated by several scholars.<sup>214</sup>

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<sup>210</sup> Cohen, *supra* note 18, at 1904 ("Pleas to 'balance' the harms of privacy invasion against the asserted gains lack visceral force."); Rubinfeld, *supra* note 24, at 761 (1989) ("There is nothing like a good balancing test for avoiding rigorous argument."); *see also* DANIEL J. SOLOVE, NOTHING TO HIDE: THE FALSE TRADEOFF BETWEEN PRIVACY AND SECURITY 2 (2011) ("Privacy often loses out to security when it shouldn't. Security interests are readily understood, for life and limb are at stake, while privacy rights remain more abstract and vague.").

<sup>211</sup> Chlapowski, *supra* note 63, at 157 ("Vague balancing tests lend themselves too easily to the subjective choices of the presiding judge."); Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1431 (1974) ("[T]he jurisprudence of judicial balancing remains essentially ad hoc and subjective.").

<sup>212</sup> David H. Flaherty, *On the Utility of Constitutional Rights to Privacy and Data Protection*, 41 CASE W. RES. L. REV. 831, 833 (1991) (balancing tests may be tilted in favor of governmental interest and values); SOLOVE, *supra* note 20, at 88 (agreeing that balancing "is often done in a perfunctory manner or in ways that skew the result in one way or another" and suggesting that the challenge is to ensure "that the balancing process be as rigorous and thoughtful as possible"); *cf.* NISSENBAUM, *supra* note 40, at 8 ("Business and government interests in accumulating and using personal information have often prevailed in the face of public complaints, with a few well-known exceptions.").

<sup>213</sup> *See, e.g.,* Seegmiller v. Laverkin City, 528 F.3d 762, 772 (10th Cir. 2008) (upholding as constitutional a reprimand of a police officer for engaging in an extramarital affair while attending a work conference, after the conference session had ended for the day).

<sup>214</sup> *See, e.g.,* Seth F. Kreimer, *Sunlight, Secrets, and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, 140 U. PA. L. REV. 1, 145–47 (1991) (arguing that a balancing test would provide plaintiffs with flexibility and be more resilient than a bright-line rule eliminating certain claims from consideration); Sara E. Stratton, Note, *Passwords Please: Rethinking the Constitutional Right to Informational Privacy in the Context of Social Media*, 41 HASTINGS CONST. L.Q. 649, 677–78 (2014) (advocating a balancing test for resolution of informational privacy claims); *cf.* Lior Jacob Strahilevitz, *Reunifying Privacy Law*, 98 CALIF. L. REV. 2007, 2032 (2010) (suggesting that the basic question is whether the gravity of plaintiff's privacy interest is "outweighed by a paramount public policy interest").

For instance, Richard Turkington seemed to endorse a “flexible balancing of interest approach.”<sup>215</sup> Turkington critiqued a categorical approach separating rights into those deemed fundamental and nonfundamental as perpetuating “a rigid classification system” or “caste system of rights.”<sup>216</sup> Instead, Turkington’s balancing approach involved two questions: first, an examination of whether the information acquired was “intimate” or of a “personal nature;” second, if so, it is weighed against the government’s interest.<sup>217</sup> In this way, Turkington recognized that certain types of information are entitled to more protection than others, but nevertheless advocated subjecting those privacy interests to a mere balancing test (although he believed the balancing test had judicial teeth). Turkington therefore seemed unable to escape what he labeled the “caste” system of rights. For example, Turkington noted that medical information, such as a person’s HIV status, has “special force” because of “both the intrinsic and consequential features of such information.”<sup>218</sup>

Others have also noted the limitations of a balancing test, but their proposed solutions have, thus far, fallen short. For example, Christina Moniodis has contributed a powerful critique of those who have read the Supreme Court’s informational privacy triad as endorsing a balancing test.<sup>219</sup> As she notes, informational privacy claims regularly raise an “individual’s concern for the data in the abstract,” making it difficult for a court to weigh the harm suffered by the plaintiff against a more concretely articulated government interest.<sup>220</sup> In lieu of balancing, Moniodis advocates a “holistic analysis” that would empower courts to consider the context in which a particular privacy challenge arises.<sup>221</sup>

Similarly, privacy expert Daniel Solove notes that, as currently structured, balancing tests undervalue privacy.<sup>222</sup> Solove continues to believe that balancing is the correct approach, but suggests that courts will be able to balance more effectively if they understand that privacy is not just an individual right, but serves larger social values, such as its

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<sup>215</sup> Turkington, *supra* note 8, at 504.

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

<sup>217</sup> *Id.* at 505, 508–09.

<sup>218</sup> *Id.* at 511.

<sup>219</sup> Christina P. Moniodis, *Moving from Nixon to NASA: Privacy’s Second Strand—A Right to Informational Privacy*, 15 YALE J. L. & TECH. 139, 158–63 (2012).

<sup>220</sup> *Id.* at 159.

<sup>221</sup> *Id.* at 165–66.

<sup>222</sup> SOLOVE, *supra* note 20, at 88 (“Balancing privacy against opposing interests has suffered from systemic difficulties that often result in the undervaluation of privacy interests.”).



contributions to democracy.<sup>223</sup> I agree that privacy's value is not limited to its role as an individual right, and plays an important social role, and with Moniodis that a broader view of the interests at play may be useful. But, I remain skeptical that a shift in narrative from an emphasis on individual rights to broader social rights (without a change in the structure of the test itself) will overcome judicial deference to government decisions if the test remains an open-ended flexible balancing approach.<sup>224</sup>

Instead, I advocate that the primary interests served by an informational privacy right be given explicit, structural recognition within the test itself, providing courts concrete guidance on informational privacy's true, underlying value. It is not clear how Solove's or Moniodis's proffered solution would be much different in practice than the prevailing balancing test or provide courts the kind of direct guidance necessary to objectively evaluate privacy claims. Nor is it clear under Turkington's analysis why a categorical approach should not be implemented given that different types of private information are seemingly more important. The categorical approach advanced herein has the advantage of avoiding the vagaries of a "flexible" balancing approach, and, in a more intellectually direct way, explicitly recognizes that certain types of information (intimate and political) are entitled to greater protection.<sup>225</sup> The test then provides that

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<sup>223</sup> *Id.* at 89–93; SOLOVE, *supra* note 210, at 50–51 (2011) (concluding that when being balanced against security interests, privacy must be understood as a "greater social good" and not just an individual interest); *see also* PRISCILLA M. REGAN, *LEGISLATING PRIVACY: TECHNOLOGY, SOCIAL VALUES, AND PUBLIC POLICY* xv–xvi, 213 (1995) ("privacy is not only of value to the individual as an individual but also to society in general"); James P. Nehf, *Recognizing the Societal Value in Information Privacy*, 78 WASH. L. REV. 1, 7 (2003) ("information privacy should be viewed as a societal value justifying a resolution in the public interest, much like environmental policy and other societal concerns, with less emphasis on individual self-policing").

<sup>224</sup> While Solove's august analysis acknowledges that broad conceptions of informational privacy will prove of little practical use in enforcing privacy rights, part of his solution (which admittedly was not uniquely focused on the constitutional informational privacy context) is to advance a pluralistic conception of privacy that focuses on the different privacy "problems" raised by different surveillance, aggregation, and information processing cases. SOLOVE, *supra* note 20, at 187–88. Solove's taxonomy involves sixteen different kinds of privacy problems. *Id.* at 10–11. Solove views this as a bottom-up, pragmatic solution preferential to a one-size-fits-all approach. I concur that different types of privacy problems require different approaches (much of this Article is focused on differentiating intrusion and decisional concerns from informational concerns). But at times, Solove's solution of flexibly focusing on privacy problems to identify the determinative interests involved seems just as malleable as the unstructured balancing test that he, too, critiques. My position is a relatively simple one: at least in the constitutional context, courts need more concrete guidance instructing them that certain types of information are entitled to heightened protection. Courts must triage different kinds of information. *See also* M. Ryan Calo, *The Boundaries of Privacy Harm*, 86 IND. L.J. 1131, 1133, 1142 (2011) (advancing the need to set boundaries on privacy harms, and gently critiquing Solove's approach as overly pluralistic).

<sup>225</sup> Kreimer, *supra* note 214, at 144 (suggesting that for certain types of information, balancing may be unnecessary and, instead, constitutional bulwarks should be established, which provide shortcuts for vindicating such claims without the need for ad hoc balancing).

greater protection in the form of strict scrutiny, whereas under the prevailing status quo approach, all claims to informational privacy, even those involving intimate or political information, are vulnerable as a result of the “flexible” and unclear rule of law.<sup>226</sup>

A strict scrutiny test would also make it clear that certain categories of information were entitled to constitutional protection, limiting the extent to which qualified immunity could be invoked (as it frequently is) to bar informational privacy claims based on the conclusion that the right is not “clearly established.” Private suits for money damages against government officials are one of the principal methods of enforcing the Constitution.<sup>227</sup> Qualified immunity shields government officials from liability for such suits if the officials’ conduct did not violate clearly established constitutional or statutory rights “of which a reasonable person would have known.”<sup>228</sup> Despite the fact that many circuits have recognized—in broad strokes—a right to informational privacy for nearly four decades, defendants and courts still routinely invoke qualified immunity to defeat informational privacy claims because the right’s contours remain ill-defined.<sup>229</sup> A firmly and clearly established judicial framework for

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<sup>226</sup> In contrast to the amorphous balancing test, a strict scrutiny test would streamline the analysis and save the judiciary resources because in claims involving intimate or political information, courts would not be bogged down comparing the unweighted factors, as criticized by Justice Scalia in *Nelson*, 131 S. Ct. 746, 768 (2011) (Scalia, J., concurring in the judgment).

<sup>227</sup> As it stands, suits for money damages against state officials (authorized pursuant to 42 U.S.C. § 1983) or against federal officials (authorized in certain circumstances pursuant to *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971)) are a key method of constitutional enforcement. Cf. Susan Bandes, *Reinventing Bivens: The Self-Executing Constitution*, 68 S. CAL. L. REV. 289, 291 (1995) (questioning the need for statutory authorization for constitutional enforcement); Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 857, 915 (1999) (explaining that “rights and remedies in constitutional law are interdependent and inextricably intertwined,” and observing, for example, that if qualified immunity were eliminated, “the effect would be a wholesale rewriting of constitutional rights”).

<sup>228</sup> *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Absent a more clearly defined informational privacy right, qualified immunity will likely continue to delay the development of informational privacy law in the wake of the Supreme Court’s decision in *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). Prior to *Pearson*, courts were required to first determine if the plaintiff had alleged or shown a violation of a constitutional right and, if so, then determine whether that right was clearly established at the time of the defendant’s alleged misconduct. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). The Court required that the merits of the constitutional claim be addressed first to prevent the stagnation of constitutional rights. *Id.* But less than a decade later, in 2009, the Court in *Pearson* reversed itself and held that judicial efficiency necessitated the relaxing of the *Saucier* two-step process, permitting courts to skip over the first step of determining if a constitutional violation had been alleged. *Pearson*, 555 U.S. at 236. As long as courts skip over that crucial first step, the law on any given point will never become clearly established, permitting government officials to avoid liability based on the murkiness of the law.

<sup>229</sup> See, e.g., *Wyatt v. Fletcher*, 718 F.3d 496, 508, 510 (5th Cir. 2013) (granting defendant high school coaches qualified immunity where they allegedly disclosed a student’s sexual orientation to the student’s parents because the right to informational privacy was not clearly established). For additional recent examples of cases invoking qualified immunity to deny informational privacy claims even

evaluating informational privacy claims, such as the one advanced by this Article, is necessary to avoid qualified immunity, be meaningful in practice, and provide victims with redress.

### C. *Third-Party Exclusivity*

In addition to the (over-) limiting effect of the balancing test and qualified immunity, the third-party doctrine is often used to deny informational privacy claims.<sup>230</sup> The third-party doctrine—sometimes referred to as the “secrecy” paradigm—requires that in order for information to be entitled to protection from government surveillance or dissemination, it must not have been previously shared with a third party. The third-party doctrine is also a product of the Fourth Amendment jurisprudence, which only protects individuals from government searches when they have a “legitimate expectation” of privacy.<sup>231</sup> According to well-established formulations of the legitimate expectation test, an individual’s reasonable expectation of privacy is destroyed if they share the information with a third party.<sup>232</sup> The third-party doctrine relies on the false premise that if a person shares intimate information with a closed, limited universe of family and friends, the person has objectively manifested their indifference

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concerning intimate information, see *Kerns v. Bader*, 663 F.3d 1173, 1187 (10th Cir. 2011); *Ismail v. Fulkerson*, No. SA CV 10-00901-VBF-AJW, 2014 WL 3962488, at \*16 (C.D. Cal. Aug. 12, 2014); *Ward v. Bolek*, No. 3:12-cv-00136-SI, 2014 U.S. Dist. LEXIS 25155, at \*36–37 (D. Ore. Feb. 27, 2014); *Hubacz v. Protzman*, No. 2:12-cv-39, 2013 WL 1386287, at \*8–9 (D. Vt. Apr. 4, 2013); and *O’Neill v. Bannister*, No. 3:12-cv-00030-LRH (WGC), 2012 U.S. Dist. LEXIS 185433, at \*9 (D. Nev. Aug. 29, 2012).

<sup>230</sup> See, e.g., *Big Ridge, Inc., v. Fed. Mine Safety & Health Review Comm’n*, 715 F.3d 631, 652 (7th Cir. 2013) (rejecting informational privacy claim partly because medical records requested by the government were no longer in the miners’ custody, but instead were in custody of their employers); *Kerns*, 663 F.3d at 1187 (relying in part on third-party doctrine to deny informational privacy claim); *Eagle v. Morgan*, 88 F.3d 620, 625–26 (8th Cir. 1996) (no right to privacy where information was previously publicly available, notwithstanding that information should have previously been expunged); *Doe v. Lockwood*, No. 95-3499, 1996 U.S. App. LEXIS 19088, at \*13–17 (6th Cir. June 27, 1996) (informational privacy claim denied where HIV-positive plaintiff had previously disclosed his positive status in court proceeding); *Fraternal Order of Police v. City of Philadelphia*, 812 F.2d 105, 116 (3d Cir. 1987) (rejecting informational privacy challenge to questionnaire regarding alcohol and gambling habits, in part because those activities largely occur in public, and concluding that “[i]nformation readily disclosed or available carries no protection”).

<sup>231</sup> See, e.g., *United States v. Miller*, 425 U.S. 435, 442 (1976) (no legitimate expectation of Fourth Amendment privacy where defendant deposited negotiable instruments with a bank); see also *Nehf*, *supra* note 223, at 33–34 (cataloguing the Supreme Court’s reluctance to recognize a privacy interest when the information has been voluntarily provided to a third party, including through job applications or through online searches).

<sup>232</sup> *Katz v. United States*, 389 U.S. 347, 351 (1967) (“What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.”).

to further sharing of the information.<sup>233</sup> Unfortunately, just as the Fourth Amendment balancing test has influenced the development of informational privacy law, the third-party doctrine, too, has infected evaluation of informational privacy claims.<sup>234</sup>

The third-party doctrine has come under increasing scrutiny, even in the Fourth Amendment context. As Laurent Sacharoff has explained, ostensibly private information is rarely kept completely secret.<sup>235</sup> Instead, our expectation of privacy exists “in widening circles, expecting the least privacy with respect to those to whom we are closest.”<sup>236</sup> Solove has also noted the third-party doctrine misapprehends the nature of the injury caused by disclosure—“[t]he harm of disclosure is not so much the elimination of secrecy as it is the spreading of information beyond expected boundaries.”<sup>237</sup> The third-party doctrine wrongly assumes that information is either openly public or completely secret.<sup>238</sup>

Members of the Supreme Court likewise have signaled some newfound reservations regarding the rigidity of the third-party doctrine. For example, in *United States v. Jones*, the Court held that monitoring of a vehicle via a law-enforcement-attached GPS tracking device constituted a search under the Fourth Amendment.<sup>239</sup> As such, a warrant was required.<sup>240</sup>

<sup>233</sup> See, e.g., SOLOVE, *supra* note 210, at 101, 108 (explaining that the third-party doctrine relies on the faulty reasoning that when one shares information with a friend, one assumes that it will be shared freely and widely).

<sup>234</sup> For examples, see *supra* note 230.

<sup>235</sup> Laurent Sacharoff, *The Relational Nature of Privacy*, 16 LEWIS & CLARK L. REV. 1249, 1270–71 (2012).

<sup>236</sup> *Id.* at 1271; see also Fried, *supra* note 38, at 483 (observing that there are “modulations” in both the quantity and quality of information we share with different individuals and entities).

<sup>237</sup> SOLOVE, *supra* note 20, at 145; see also JEFFREY ROSEN, THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA 63 (2000) (“[I]t makes no sense for the Court to say that when I reveal private information in one context, I relinquish the right to conceal the same information in other contexts.”).

<sup>238</sup> See SOLOVE, *supra* note 20, at 150; see also Erin Murphy, *The Case Against the Case for Third-Party Doctrine: A Response to Epstein and Kerr*, 24 BERKELEY TECH. L.J. 1239, 1252 (2009) (“A reconstituted third-party doctrine might recognize that some disclosures are made in confidence, that there is value to such confidence, and that if the parties respect it, then the government should too.”); cf. Helen Nissenbaum, *A Contextual Approach to Privacy Online*, 140 DAEDALUS 32, 33 (2011) (explaining that expectations regarding flows of information are context dependent); NISSENBAUM, *supra* note 40, at 103–04 (focus on whether information has been shared in the “public” sphere is insufficiently tuned to respond to realities of modern-day information flows). But see Parent, *supra* note 19, at 271 (arguing that dissemination of information regarding activities that occur in public domain, such as gambling or drinking, cannot be described as privacy violations); Strandburg, *Home, Home*, *supra* note 174, at 642 (agreeing that an aggressive application of the third-party doctrine makes little sense when applied to technology-mediated communications, but observing that “courts are increasingly disinclined to take a simplistic and aggressive third party doctrine approach”).

<sup>239</sup> 132 S. Ct. 945, 949 (2012).

The U.S. Government had argued that because a vehicle's movements are exposed to the public, the third-party doctrine meant that the individual being tracked by GPS had no reasonable expectation of privacy.<sup>241</sup> In her concurrence, Justice Sotomayor seemingly rejected this argument and posited, "it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties."<sup>242</sup> According to Justice Sotomayor, the third-party doctrine makes particularly little sense in a digital age, where people disclose information about themselves online while performing now routine, daily tasks.<sup>243</sup>

A formulation of informational privacy that is more divorced from the Fourth Amendment and the "legitimate expectation of privacy test" would also have the salutary effect of divorcing informational privacy from the anachronistic third-party doctrine. Privacy claims would not be hamstrung by concerns regarding whether the information was shared within a small circle. By highlighting that intimate information and political thought are almost *de jure* entitled to privacy protections absent a compelling interest and narrowly tailored law, courts could largely sidestep the "legitimate expectation" test and related third-party inquiry. A categorical emphasis on intimate information and political thought would recognize that such information is often but not always shared with other individuals. Sexuality is rarely expressed or discussed in a vacuum. Nor is political dialogue. But the mere fact that the information had been shared within a close circle would not stymie informational privacy claims based on intimate information or political thought because the individual's legitimate expectation or interest in that information is already acknowledged as presumptively entitled to protection by the test.

This Part has demonstrated why a clear informational privacy framework is a constitutional imperative. As outlined above, informational

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<sup>240</sup> *See id.*

<sup>241</sup> Brief for the United States at 17–31, *United States v. Jones*, 132 S. Ct. 945 (2012) (No. 10-1259), 2011 WL 3561881, at \*17–31.

<sup>242</sup> *Jones*, 132 S. Ct. at 957 (Sotomayor, J., concurring); *see also* *Grady v. North Carolina*, No. 14-593, slip op. at 2–3 (U.S. Mar. 30, 2015) (per curiam) (satellite-based monitoring of convicted sex offender constitutes a Fourth Amendment search).

<sup>243</sup> *Jones*, 132 S. Ct. at 957; *see also* *Couch v. United States*, 409 U.S. 322, 343–44 (1973) (Douglas, J., dissenting) (rejecting notion that merely because defendant shares information with an accountant, the documents are committed to the public domain); *Multimedia WMAZ, Inc. v. Kubach*, 443 S.E.2d 491, 493–94 (Ga. Ct. App. 1994) (plaintiff's disclosure of his HIV status to family and friends did not bar his privacy tort claim against television station that disclosed his medical status); *cf.* *Patel v. City of Los Angeles*, 738 F.3d 1058, 1062, 1065 (9th Cir. 2013) (en banc) (declaring unconstitutional under the Fourth Amendment a search of hotel guest records, and narrowly interpreting the third-party doctrine, concluding that the records were private), *aff'd*, 135 S. Ct. 2443 (2015) (affirming on narrow grounds).

privacy threats continue to grow as a result of augmented powers from the administrative state and technology. The rational-basis balancing test employed by courts is insufficient to provide robust, meaningful protection to informational privacy in the face of these growing threats. Informational privacy's precarious position is further exacerbated by the prevalence of the third-party doctrine, built on the false premise that information shared within circumscribed circles is automatically public information. I turn next to a blueprint for an enforceable constitutional informational privacy right.

#### IV. THE UNCOVERED CONSTITUTIONAL BLUEPRINT

As it happens, not all types of information are created equal.<sup>244</sup> By acknowledging (and then following) this simple proposition, a more precise and concrete theory of informational privacy that is conceptually distinguishable from the Fourth Amendment and decisional privacy right can take shape. This acknowledgment will also help courts move beyond the dignity and autonomy myopia and give shape to an enforceable right to informational privacy that safeguards the proffered right's precise underlying interests—the right to privacy over intimate information and political thought. As this Part's evaluation of precedent elucidates, there is an undercurrent within informational privacy jurisprudence suggesting that, normatively, both intimate information and information pertaining to political thought are *sui generis* and should be subject to strict constitutional protection under an informational privacy rubric. Doctrinally, both categories are closely related to already-recognized fundamental rights. Moreover, disclosure of intimate and political information is more likely to result in tangible, negative downstream consequences in addition to any intrinsic harm resulting from disclosure, heightening their normative importance.<sup>245</sup> In recognizing fundamental rights and subjecting them to heightened scrutiny, courts have historically done so when such negative downstream consequences would result absent constitutional protection.<sup>246</sup>

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<sup>244</sup> See PEW RESEARCH CTR., PUBLIC PERCEPTIONS OF PRIVACY AND SECURITY IN THE POST-SNOWDEN ERA 6 (2014), [http://www.pewinternet.org/files/2014/11/PI\\_PublicPerceptionsofPrivacy\\_111214.pdf](http://www.pewinternet.org/files/2014/11/PI_PublicPerceptionsofPrivacy_111214.pdf) [<http://perma.cc/R6TT-2W2W>] (observing that “[d]ifferent types of information elicit different levels of sensitivity among Americans”).

<sup>245</sup> Cf. Paul Ohm, *Sensitive Information*, 88 S. CAL. L. REV. 1125, 1161 (2015) (documenting that laws designed to protect sensitive information do so because the information is believed to cause some sufficiently high probability of harm if shared publicly; in other words, whether information causes harm goes a long way in determining whether it is considered sensitive and entitled to protection under regulatory frameworks).

<sup>246</sup> See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (highlighting the “far-reaching consequences” of criminalizing sodomy); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (emphasizing in its

Certain categories of information (intimate and political) are more likely to result in negative downstream consequences (such as discrimination, stifled political discourse, or marginalization) and, as such, are entitled to more fundamental protection. In that sense, this Article's categorical approach to apprehending informational privacy's true value finds support in constitutional doctrine and is poised to harness underlying normative judicial intuition.<sup>247</sup>

By focusing on intimate information, political thought, and the role of downstream consequences, the framework is reflective of courts' hunch that these factors are of constitutional import.<sup>248</sup> Viewed accordingly, the Article is, in some ways, a simple exegesis of preexisting currents within existing jurisprudence. The approach is not a departure from standard modes of constitutional interpretation. Finally, by isolating these two categories of information, this Article's approach also shapes the right to informational privacy as manageable and limited in scope, increasing its likelihood of judicial acceptance, while decreasing the availability of the qualified immunity defense.

#### A. *Intimate Information*

Intimate information is entitled to strict constitutional protection under the Due Process Clause of the Fifth and Fourteenth Amendments. As used here, intimate information includes highly personal information: principally, sexual, medical, and mental health information.<sup>249</sup>

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Due Process analysis that denying interracial couples the right to marriage denied a right fundamental to "our very existence and survival" and resulted in discrimination).

<sup>247</sup> See JEROME FRANK, *LAW AND THE MODERN MIND* 104 (1930) (explaining that jurisprudence and case law reflect judicial "hunches," which in turn shape doctrine).

<sup>248</sup> While I suggest that case law demonstrates the existence of a judicial hunch or intuition that intimate information and political thought deserve greater constitutional protection, particularly when coupled with downstream consequences, I am not making a reductive, cynical realist argument that this "hunch" has resulted in a clear shift in doctrine based on what judges view, in their supposed "unfettered" discretion, as right and wrong. Nor am I advocating that judges decide cases based purely on their "hunches." Cf. Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 268 (1997) (critiquing as inaccurate the received view of realism as positing that judges exercise unfettered discretion and use doctrine to after-the-fact rationalize their preconceived beliefs). Quite the opposite. I believe the relatively widespread "hunch" supports the existence of a right and serves as evidence of a constitutional norm in favor of intimate and political information, but that courts have struggled to animate that hunch in their judicial decisions because of multiple doctrinal barriers resulting from the imprecise focus on dignity and autonomy. In other words, one of the goals of this Article is to provide a doctrinal solution or outlet for the normative judicial appetite in favor of intimate information and political thought.

<sup>249</sup> For a more detailed discussion regarding the definition of "intimate information," see *supra* note 7.

Despite confusion regarding the existence of a right to informational privacy and the right's contours,<sup>250</sup> the circuit courts have been most sympathetic when claims implicate intimate information. For example, several courts have recognized (at least rhetorically) that medical information should be entitled to constitutional protection.<sup>251</sup> Others have specifically indicated that mental health information is protected.<sup>252</sup> The circuits have also widely recognized that sexual information, including but not limited to information regarding an individual's sexual orientation and gender identity, is subject to constitutional safeguards.<sup>253</sup> At a higher level

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<sup>250</sup> See *supra* Part II.

<sup>251</sup> *Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 553 (9th Cir. 2004) (release of ultrasound information "is obviously very sensitive"); *Herring v. Keenan*, 218 F.3d 1171, 1173 (10th Cir. 2000) ("[T]here is a constitutional right to privacy that protects an individual from the disclosure of information concerning a person's health."); *Denius v. Dunlap*, 209 F.3d 944, 956 (7th Cir. 2000) (individuals have a "clearly established 'substantial' right in the confidentiality of medical information"); *Powell v. Schriver*, 175 F.3d 107, 111 (2d Cir. 1999) (reiterating interest in maintaining privacy over health information such as one's HIV status); *Norman-Bloodshaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1269 (9th Cir. 1998) ("One can think of few subject areas more personal and more likely to implicate privacy interests than that of one's health or genetic make-up."); *Eagle v. Morgan*, 88 F.3d 620, 625 (8th Cir. 1996) (medical records fall within the category of "extremely personal" information subject to constitutional protection); *Doe v. City of New York*, 15 F.3d 264, 267 (2d Cir. 1994) ("[i]ndividuals who are infected with the HIV virus clearly possess a constitutional right to privacy regarding their condition" as "there are few matters that are quite so personal as the status of one's health, and few matters the dissemination of which one would prefer to maintain greater control over"); *Alexander v. Pepper*, 993 F.2d 1348, 1351 (8th Cir. 1993) ("highly personal medical" information is subject to constitutional protection); *Doe v. Att'y Gen. of the U.S.*, 941 F.2d 780, 795 (9th Cir. 1991) ("clear that medical information [including HIV status] was encompassed within the first privacy interest related to disclosure of personal matters"); *Fraternal Order of Police v. City of Philadelphia*, 812 F.2d 105, 113 (3d Cir. 1987) ("we have repeatedly held that medical information . . . is entitled to privacy protection against disclosure"); *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 577 (3d Cir. 1980) ("There can be no question that an employee's medical records, which may contain intimate facts of a personal nature, are well within the ambit of materials entitled to privacy protection."). *But see Lee v. City of Columbus*, 636 F.3d 245, 261 (6th Cir. 2011) (no constitutional violation where police department required employees to submit a doctor's note describing in general terms the nature of their illness upon return from sick leave).

<sup>252</sup> *Am. Fed'n of Gov't Emps. v. Dep't of Hous. & Urban Dev.*, 118 F.3d 786, 794 (D.C. Cir. 1997) (finding no violation, but recognizing that a questionnaire "concerning an employees' [sic] mental health, on the other hand, may solicit highly personal information").

<sup>253</sup> *Lambert v. Hartman*, 517 F.3d 433, 441 (6th Cir. 2008) (finding that there is a "fundamental right of privacy in one's sexual life"); *Sterling v. Borough of Minersville*, 232 F.3d 190, 196 (3d Cir. 2000) ("It is difficult to imagine a more private matter than one's sexuality and a less likely probability that the government would have a legitimate interest in disclosure of sexual identity. . . . [S]exual orientation [is] an intimate aspect of [one's] personality entitled to privacy protection . . ."); *Powell*, 175 F.3d at 111 ("The excruciatingly private and intimate nature of transsexualism, for persons who wish to preserve privacy in the matter, is really beyond debate."); *Bloch v. Ribar*, 156 F.3d 673, 685–86 (6th Cir. 1998) (concluding that "a rape victim has a fundamental right of privacy in preventing government officials from gratuitously and unnecessarily releasing the intimate details of the rape" because "sexuality and choices about sex" are significant, intimate interests); *ACLU v. Mississippi*, 911 F.2d 1066, 1070 (5th Cir. 1990) (noting that "plaintiffs undeniably have an interest in restricting the disclosure of" information pertaining to "allegations of homosexuality" and promiscuity); *Eastwood v. Dep't of Corr.*, 846 F.2d 627, 631 (10th Cir. 1988) ("This constitutionally protected right [to



of abstraction, there seems to be a growing consensus that “highly personal information” is encompassed within the right to informational privacy.<sup>254</sup> These decisions serve as evidence of a judicial intuition or undercurrent that certain categories of intimate information normatively ought to be entitled to robust constitutional protection. But notwithstanding their instinct that intimate information is subject to heightened protection, lacking a clear framework, circuit courts have frequently failed to actually protect such information in their holdings.<sup>255</sup>

There are also hints within the Supreme Court’s informational privacy trifecta that the Court may be prepared to acknowledge that certain types of information are subject to more rigorous constitutional protection. For example, in *Nixon*, the Court seemed to recognize—at least in the abstract—that Nixon’s communications with his wife and physician were of special importance, but concluded that the statutory safeguards in place were sufficient.<sup>256</sup> Chief Justice Burger’s dissent in *Nixon* also provides powerful support for distinguishing intimate information as constitutionally protected. In concluding that the legislative scheme for perusing Nixon’s papers did violate Nixon’s informational privacy rights, Burger highlighted the personal nature of some of the documents to distinguish them from other types of records, such as commercial records.<sup>257</sup> Burger also noted that when fundamental liberties were threatened, the burden was on the Government to demonstrate that a compelling government interest was at

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informational privacy] is implicated when an individual is forced to disclose information regarding personal sexual matters.”); *Thorne v. City of El Segundo*, 726 F.2d 459, 468 (9th Cir. 1983) (forcing a police officer applicant “to disclose information regarding personal sexual matters” implicated her constitutional right to privacy); *York v. Story*, 324 F.2d 450, 455 (9th Cir. 1963) (“We cannot conceive of a more basic subject of privacy than the naked body.”). But see *Walls v. City of Petersburg*, 895 F.2d 188, 193 (4th Cir. 1990) (concluding no right to privacy in same-sex relations based on *Bowers v. Hardwick*, which has since been repudiated by the Supreme Court).

<sup>254</sup> *Fraternal Order*, 812 F.2d at 112–13 (“The more intimate or personal the information, the more justified is the expectation that it will not be subject to public scrutiny.”); *Barry v. City of New York*, 712 F.2d 1554, 1562 (2d Cir. 1983) (concluding that “highly personal” information is subject to constitutional protection, in contrast to nonpersonal information).

<sup>255</sup> See, e.g., *Powell*, 175 F.3d at 115 (finding that a right to informational privacy was not sufficiently clearly established to defeat qualified immunity); *Bloch*, 156 F.3d at 686–87 (same); *Doe v. Se. Pa. Transp. Auth. (SEPTA)*, 72 F.3d 1133, 1143 (3d Cir. 1995) (under a balancing test, no violation where a public employee’s HIV status was disclosed to his government employer by a government doctor); *Borucki v. Ryan*, 827 F.2d 836, 849 (1st Cir. 1987) (finding that a right to informational privacy was not sufficiently clearly established to defeat qualified immunity); *J.P. v. DeSanti*, 653 F.2d 1080, 1089–90 (6th Cir. 1981) (rejecting a universal balancing approach to informational privacy in favor of a case-by-case inquiry into whether the plaintiff claims a “fundamental” right); *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 577–82 (3d Cir. 1980) (no informational privacy violation notwithstanding recognition that medical records were sensitive, but remanding for further deliberation into whether highly sensitive information might require protection).

<sup>256</sup> 433 U.S. 425, 459, 465 (1977).

<sup>257</sup> *Id.* at 529 & n.27 (Burger, C.J., dissenting).

stake and that the legislation was “needed to achieve those goals.”<sup>258</sup> Then-Justice Rehnquist echoed many of Burger’s concerns in a separate dissent.<sup>259</sup>

Additionally, as discussed above, in *Nelson* the Court was very attentive to the fact that intimate information—including mental health information—was at issue.<sup>260</sup> And as Jed Rubenfeld observed in the decisional privacy context, courts seem more comfortable striking down laws “under the rubric of privacy” when the laws concern sexuality, broadly defined.<sup>261</sup> Rubenfeld’s observation, made at a time when *Bowers v. Hardwick*<sup>262</sup> (sanctioning the criminalization of sodomy) was still good law, is even more true today now that *Lawrence v. Texas*<sup>263</sup> has overturned *Bowers*.<sup>264</sup>

Outside the context of cases characterized as asserting informational privacy claims, the Supreme Court has also signaled that intimate information—as a category of information—is subject to greater constitutional protection. For example, in *Riley v. California*, a Fourth Amendment case involving the search of a cell phone incident to an arrest, the Court recognized that “certain types of data are also qualitatively different.”<sup>265</sup> The principal example was that a cell phone could reveal that a person had researched “certain symptoms of disease, coupled with

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<sup>258</sup> *Id.* at 527, 534.

<sup>259</sup> *Id.* at 546–47 n.1 (Rehnquist, J., dissenting).

<sup>260</sup> *Supra* text accompanying notes 126–34.

<sup>261</sup> Rubenfeld, *supra* note 24, at 738, 744; *see also* ROSEN, *supra* note 237, at 48 (“And sexual identity is the most personal of all aspects of identity.”); Nehf, *supra* note 223, at 33 (noting that “courts have occasionally found a constitutionally protected right to information privacy when the records involve highly personal issues such as sexual practices or medical conditions”); Elbert Lin, Note, *Prioritizing Privacy: A Constitutional Response to the Internet*, 17 BERKELEY TECH. L.J. 1085, 1126 (2002) (observing that courts more routinely recognize a right to informational privacy when “intimate or highly personal information” is at stake).

<sup>262</sup> 478 U.S. 186 (1986).

<sup>263</sup> 539 U.S. 558, 578–79 (2003).

<sup>264</sup> Philosopher Julie Inness has also suggested that intimacy is the touchstone of both the right to informational and decisional privacy. JULIE C. INNESS, *PRIVACY, INTIMACY, AND ISOLATION* 56 (1992). But Inness’s definition of intimacy is probably too broad and too subjective to be functional. Inness’s definition of what constitutes intimate information is determined almost purely subjectively by the person asserting that the information is intimate, so long as the information derives its significance from love, caring, or like. *Id.* at 87. As a matter of constitutional enforcement, such a broad and subjective definition of intimacy would require courts to, in effect, police every state action for privacy infringements.

<sup>265</sup> 134 S. Ct. 2473, 2490 (2014).

frequent visits to WebMD.”<sup>266</sup> The Court also noted that a cell phone’s “apps” could disclose information regarding a person’s romantic life and alcohol or drug addictions.<sup>267</sup> And as the Court’s decision in *United States v. Windsor* illustrates, the Constitution protects individuals’ “moral and sexual choices.”<sup>268</sup> Similarly, in *Obergefell v. Hodges*, the Court emphasized the importance of intimacy.<sup>269</sup>

Finally, while Congress’s attempts to enact privacy protections have been piecemeal (and insufficient), the modern federal privacy statutes have been largely influenced by concerns over “governmental collection and abuse of intimate information.”<sup>270</sup> As Paul Ohm has recently highlighted, attempts to pass laws regulating and protecting what he calls “sensitive information” have been much more successful than attempts to regulate channels of communication, in part because sensitive information is both narrower in scope and more emotionally salient to lawmakers.<sup>271</sup> That intimate information, as a category, ought to be entitled to protection is also supported by common law invasion of privacy jurisprudence. Pursuant to the Restatement (Second) of Torts, an individual is liable for public disclosure of private facts if the publicized information “would be highly offensive to a reasonable person.”<sup>272</sup>

Of course, the Supreme Court is not in the habit of impulsively recognizing “new” fundamental constitutional rights under the Due Process

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<sup>266</sup> *Id.*; cf. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2659 (2011) (in a First Amendment challenge to a pharmaceutical marketing law, acknowledging that the government’s interest in safeguarding medical privacy is significant).

<sup>267</sup> *Riley*, 134 S. Ct. at 2490; cf. *California v. Ciraolo*, 476 U.S. 207, 212 (1986) (noting that historically, the curtilage surrounding a home has been constitutionally protected because “intimate activity” is conducted therein (quoting *Oliver v. United States*, 466 U.S. 170, 180 (1984))).

<sup>268</sup> 133 S. Ct. 2675, 2694 (2013). Although *Windsor* was at its core an equal protection case, the Court’s analysis, at times, sounded in substantive due process.

<sup>269</sup> *Obergefell v. Hodges*, Nos. 14–556, 14–562, 14–571 and 14–574, slip op. at 10 (U.S. June 26, 2015) (noting that the Due Process Clause protects “intimate choices that define personal identity and beliefs”).

<sup>270</sup> *Murphy*, *supra* note 202, at 495.

<sup>271</sup> Ohm, *supra* note 245, at 1137–38. However, Ohm’s descriptive account of what constitutes sensitive information is somewhat broader than what would be encompassed by this Article’s Due Process protections for intimate and political information.

<sup>272</sup> RESTATEMENT (SECOND) OF TORTS § 652D (AM. LAW INST. 1977); see also Mark Bartholomew, *Intellectual Property’s Lessons for Information Privacy*, 92 NEB. L. REV. 746, 772 (2014) (observing that tort law has taken a categorical approach to information privacy). For a fascinating account of the relationship between privacy torts and constitutional privacy, and how the two bodies of law could be merged, see Strahilevitz, *supra* note 214, at 2032–33. The growing number of states with laws penalizing so-called revenge porn provides additional support for the norm against disclosure of intimate information. For a list of such state laws, see *26 States Have Revenge Porn Laws*, END REVENGE PORN, <http://www.endrevengeporn.org/revenge-porn-laws/> [http://perma.cc/5MJK-8TB4].

Clause.<sup>273</sup> Instead, the Court recognizes as fundamental those substantive due process rights that have a foundation in the nation's history and tradition.<sup>274</sup> That being said, the Court has been very clear that rights need not be specifically delineated in the text of the Fifth and Fourteenth Amendments to be considered fundamental.<sup>275</sup> And as the Court held in *Obergefell*, “[h]istory and tradition guide and discipline [the Due Process] inquiry but do not set its outer boundaries. That method respects our history and learns from it without allowing the past alone to rule the present.”<sup>276</sup> Similarly, in *Lawrence*, when the Court struck down antisodomy laws as violating Due Process, it held that:

[h]ad those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.<sup>277</sup>

Significantly, intimate information, as defined here, bears a striking similarity to already recognized fundamental rights.<sup>278</sup> As Chief Justice Rehnquist explained, “we have held that . . . the ‘liberty’ specially protected by the Due Process Clause includes the rights to marry, to have children, to direct the education and upbringing of one’s children, to

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<sup>273</sup> *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992) (“[T]he Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended.”).

<sup>274</sup> *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (“[W]e 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] we have required in substantive-due-process cases a ‘careful description’ of the asserted fundamental liberty interest.” (citations omitted)); see also *Collins*, 503 U.S. at 126.

<sup>275</sup> Cf. *Olmstead v. United States*, 277 U.S. 438, 472 (1928) (Brandeis, J., dissenting) (“Clauses guaranteeing to the individual protection against specific abuses of power, must have a similar capacity of adaptation to a changing world.”); MARTHA C. NUSSBAUM, FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW 71 (2010) (“[N]obody should be surprised to find that the Constitution protects rights that are not enumerated in it. Some of our most cherished rights (the right to vote, the right to travel) have this status . . . Even the most conservative jurists do not contest these unenumerated rights.”).

<sup>276</sup> *Obergefell v. Hodges*, Nos. 14–556, 14–562, 14–571 and 14–574, slip. op. at 10–11 (U.S. June 26, 2015) (citation omitted).

<sup>277</sup> 539 U.S. 558, 578–79 (2003); see also *Obergefell*, slip. op. at 18 (suggesting that when matters of intimacy, such as marriage, are involved, the Due Process analysis is even less stringent than outlined in *Glucksberg*).

<sup>278</sup> See NUSSBAUM, *supra* note 275, at 74 (“[T]here is a long tradition of recognizing, under the Due Process Clause, a set of liberty interests in the area of intimate association.”).

marital privacy, to use contraception, to bodily integrity, and to abortion.”<sup>279</sup> The right to limit the government’s ability to disseminate and collect sexual or medical information is closely related to the subject matter of these fundamental rights. In order for many of these fundamental rights to have real, practical meaning, as an antecedent right, privacy over intimate information seems required. For example, the right to make decisions about contraception use or engage in consensual sexual activity will be of little use if the government is able to learn of and disseminate information regarding that activity, policing one’s behavior.<sup>280</sup>

Accordingly, existing Supreme Court and circuit precedent implicitly supports recognition of a fundamental right to limit collection and dissemination of intimate information. The next step is for the courts to make that underlying principle explicit.

Government imposition on fundamental rights is subject to strict scrutiny,<sup>281</sup> suggesting that, rather than a milquetoast balancing test, heightened scrutiny is the proper standard of review for privacy claims implicating intimate information.<sup>282</sup> Skeptics of this position will be quick to point out that the Court in *Nelson* seemed to suggest that strict scrutiny was not appropriate. The Court “reject[ed] the argument that the Government, when it requests job-related personal information in an employment background check, has a constitutional burden to demonstrate that its questions are ‘necessary’ or the least restrictive means of furthering its interests.”<sup>283</sup> Importantly, the Court’s pronouncement was a limited one—directed specifically to the context where the government is an employer and has more latitude than when serving as regulator or exercising police powers. Moreover, while the Court seems to reject the second half of the strict scrutiny test analyzing the closeness of the relationship between the Government’s objective and the means chosen for achieving that objective, the Court notably did not hold that the Government’s interest must be anything less than compelling. Put

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<sup>279</sup> *Glucksberg*, 521 U.S. at 720 (citations omitted).

<sup>280</sup> Importantly, that the right to informational privacy may help give life to preexisting fundamental rights does not mean that plaintiffs are required to show that, in fact, the government’s actions did chill their activity. *See supra* Section IV.C.

<sup>281</sup> *See, e.g., Glucksberg*, 521 U.S. at 721 (The Due Process Clause “forbids the government to infringe ‘fundamental’ liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.” (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993))); *cf. United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (if government action infringes on fundamental rights, it is subject to “more exacting judicial scrutiny”).

<sup>282</sup> *See Whalen v. Roe*, 429 U.S. 589, 606 (1977) (Brennan, J., concurring) (“Broad dissemination by state officials of [medical] information, however, would clearly implicate constitutionally protected privacy rights, and would presumably be justified only by compelling state interests.”).

<sup>283</sup> 131 S. Ct. 746, 760 (2011).

succinctly, *NASA v. Nelson* does not wholesale reject strict scrutiny for informational privacy claims. Conversely, as noted earlier, some circuits have concluded that strict scrutiny is the most appropriate standard of review for informational privacy claims.<sup>284</sup>

While there is a general aversion to applying strict scrutiny,<sup>285</sup> it is important to recognize that the right advanced herein is a very narrow one that has been carefully described, keeping with the Supreme Court's preferences when recognizing fundamental rights.<sup>286</sup> Not all information implicates a fundamental right. Not all information is entitled to strict scrutiny. To the extent that information falls outside these narrow categories, the government action is subject to less rigorous review. As it stands, only intimate information and, as discussed in the following section, political thought, are fundamental and entitled to strict scrutiny.<sup>287</sup>

### B. Political Thought

Like intimate information, data pertaining to political thought (including religious thought) is subject to strict, constitutional protection. The fundamental value of political information is evinced by the history and very purpose of the Constitution, circuit precedent directly addressing informational privacy claims, and related First Amendment precedent.

A key goal of the Constitution, and the Revolution that preceded it, was ensuring a pluralistic political process. Any constitutional right to privacy must be viewed through this history. As others have noted, one of informational privacy's principal values is in creating space for countermajoritarian ideas to take seed, ensuring a fruitful marketplace of

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<sup>284</sup> *Supra* note 144; *see also* SAMAR, *supra* note 62, at 185 (explaining that *Nixon* may be consistent with requiring informational privacy violations to be justified by a compelling state interest).

<sup>285</sup> While it is true that in recent years the Court seems less eager to describe its constitutional analysis in terms of the rigid three-tier levels of scrutiny, *see, e.g.*, *United States v. Windsor*, 133 S. Ct. 2675 (2013), the Court has not rejected the three-tier heuristic and, at the very least, it remains a useful shorthand for describing when a right is entitled to more rigorous protection.

<sup>286</sup> *See Flores*, 507 U.S. at 302.

<sup>287</sup> Importantly, a robust but narrow informational privacy right focused on intimate information may be a partial doctrinal solution to Mary Dunlap's call for a "right to be sexual," *see* Mary Dunlap, *Toward Recognition of "A Right to Be Sexual,"* 7 WOMEN'S RTS. L. REP. 245 (1982), as well as Martha Nussbaum's concern that *Lawrence*'s protection for sodomy is confined to certain spatial zones, such as the home, *see* NUSSBAUM, *supra* note 275, at 89. A right to privacy over intimate information would create freedom for private, sexual expression, and that activity, and information regarding that activity, would not need to be confined to the home (although, admittedly the right to informational privacy would not necessarily create space for all forms of public sexual expression). Similarly, a right to privacy over intimate information would provide employees with a doctrinal response to government attempts to learn of and regulate their sexual conduct through, for example, employee codes of conduct.

ideas and a democratic society.<sup>288</sup> The Constitution of the United States itself was drafted and discussed in a closed-door meeting in Philadelphia, illustrating the importance of informational privacy to the democratic process, a point powerfully made by Alan Westin.<sup>289</sup>

Other scholars have also observed the relationship between informational privacy, freedom of thought, and democracy,<sup>290</sup> though fewer have been focused on doctrinal solutions. For example, in a recent article, Neil Richards argues that information-gathering programs threaten what he calls “intellectual privacy” and “chills the exercise of vital civil liberties.”<sup>291</sup> In the same vein, Cornel West has documented how the “tightening of surveillance” in America and the corresponding “loosening of legal protection” pose a threat to our democratic foundation.<sup>292</sup> Julie Cohen, too, has persuasively observed that freedom from surveillance is critical to dynamic self-determination and, in turn, reflective citizenship and democratic innovation.<sup>293</sup>

Recognition that informational privacy plays an important role in preserving the structure of our democracy, and accordingly, that privacy of political discourse and thought is of constitutional relevance, is not limited

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<sup>288</sup> Gavison, *supra* note 16, at 456 (“[I]ndividuals must have the right to keep private their votes, their political discussions, and their associations if they are to be able to exercise their liberty to the fullest extent. . . . Denying the privacy necessary for these interactions would undermine the democratic process.”); Nehf, *supra* note 223, at 69 (informational privacy “is necessary to the proper functioning of a democratic political system”); Paul M. Schwartz, *Privacy and Democracy in Cyberspace*, 52 VAND. L. REV. 1609, 1651–53 (1999) (without informational privacy protections, the democratic potential of the Internet will be quashed).

<sup>289</sup> WESTIN, *supra* note 58, at 46–47.

<sup>290</sup> Sklansky, *supra* note 50, at 1094–1101 (cataloguing other scholars who have noted the relationship between informational privacy and democracy).

<sup>291</sup> Neil M. Richards, *The Dangers of Surveillance*, 126 HARV. L. REV. 1934, 1945 (2013). As Richards nicely describes,

Intellectual-privacy theory suggests that new ideas often develop best away from the intense scrutiny of public exposure; that people should be able to make up their minds at times and places of their own choosing; and that a meaningful guarantee of privacy—protection from surveillance or interference—is necessary to promote this kind of intellectual freedom. It rests on the idea that free minds are the foundation of a free society, and that surveillance of the activities of belief formation and idea generation can affect those activities profoundly and for the worse.

*Id.* at 1945–46; *see also* Neil M. Richards, *Intellectual Privacy*, 87 TEX. L. REV. 387, 408–24 (2008) (observing the relationship between intellectual privacy and freedom of thought).

<sup>292</sup> CORNEL WEST, DEMOCRACY MATTERS: WINNING THE FIGHT AGAINST IMPERIALISM 6–7 (2004).

<sup>293</sup> Cohen, *supra* note 18, at 1905 (“[F]reedom from surveillance, whether public or private, is foundational to the practice of informed and reflective citizenship. Privacy therefore is an indispensable structural feature of liberal democratic political systems.”); Cohen, *supra* note 65, at 1425 (“The recognition that anonymity shelters constitutionally-protected decisions about speech, belief, and political and intellectual association—decisions that otherwise might be chilled by unpopularity or simple difference—is part of our constitutional tradition.”); *see also* SOLOVE, *supra* note 210, at 149 (“Government information gathering can make people reticent to read controversial books or investigate unpopular viewpoints.”)

to scholarly, historical descriptions. The Supreme Court has also highlighted the important role privacy plays in advancing political thought. For example, in *Riley*, mentioned previously, the Court highlighted that political information and thought were of heightened importance, observing that warrantless cell phone searches were prohibited because cell phones contained political information revealing whether the person looked “for Democratic Party news and Republican Party news.”<sup>294</sup>

Circuit courts that have addressed informational privacy claims touching on political thought have also emphasized its constitutional importance. For example, in *ACLU v. Mississippi*, the Fifth Circuit concluded that the constitutional right to informational privacy restricted the state’s ability to publicly disclose files from the Mississippi State Sovereignty Commission, the state’s disbanded secret intelligence arm previously committed to perpetuating racial segregation.<sup>295</sup> Because the Commission reports included documentation of “extreme political and religious views” and other sensitive information, the Court reasoned that the “plaintiffs undeniably have an interest in restricting the disclosure of” that information and vacated the district court’s order publicly releasing the files without restriction.<sup>296</sup>

In addition to the fact that the nation’s history and tradition indicate that protection of political thought is one of the fundamental interests served by an informational privacy right, protection of political thought information is also supported by First Amendment jurisprudence. Beginning with *NAACP v. Alabama ex rel. Patterson*, the Supreme Court has held that organizations cannot, absent a compelling government interest, be forced to disclose their membership.<sup>297</sup> In concluding that

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<sup>294</sup> *Riley v. California*, 134 S. Ct. 2473, 2490 (2014). Jeffrey Rosen has offered a slightly different but also apt democracy-oriented justification for privacy that also connects the protection of intimate information with democracy promotion. According to Rosen, ensuring that individuals’ intimate information is given privacy protection frees the public sphere for more important, civic-focused discussions. ROSEN, *supra* note 237, at 140.

<sup>295</sup> 911 F.2d 1066, 1068 (5th Cir. 1990).

<sup>296</sup> *Id.* at 1070, 1075.

<sup>297</sup> 357 U.S. 449, 463–66 (1958); *cf.* *Doe v. Reed*, 130 S. Ct. 2811, 2818 (2010) (collecting authority and concluding that disclosure requirements within the electoral context are subject to “exacting scrutiny”); *Hollingsworth v. Perry*, 130 S. Ct. 705, 712–13 (2010) (refusing to permit even limited broadcast of the Proposition 8 trial in part because witnesses’ politically charged views would be disseminated); *Talley v. California*, 362 U.S. 60, 64 (1960) (“Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind.”); *Watkins v. United States*, 354 U.S. 178, 198–99 (1957) (limiting power of the Committee on Un-American Activities to conduct investigations because the judiciary must not abdicate its constitutional responsibility “to insure that the Congress does not unjustifiably encroach upon an individual’s right to privacy nor abridge his liberty of speech, press, religion or assembly”).



forced disclosure of private membership lists is “subject to the closest scrutiny,” the Court has noted the link between private points of view, freedom of expression, and democratic governance.<sup>298</sup> This First Amendment right to limit the government’s ability to disclose one’s membership in a political organization directly supports a due process right to limit the government’s ability to collect and disseminate one’s political thoughts.<sup>299</sup> Of course, membership in an organization is but one way that private, political thoughts may be expressed.<sup>300</sup> It is certainly not the only way. And the Court’s predilection for protecting the privacy of political association (and freedom of expression more broadly) logically directly extends to protection of private political thought,<sup>301</sup> even if not expressed via associational membership.<sup>302</sup> In addition, the First Amendment’s heightened protection for free expression of religion provides additional doctrinal support for viewing political and religious thought as subject to strict constitutional privacy protections.<sup>303</sup>

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<sup>298</sup> *Patterson*, 357 U.S. at 460–62 (holding that “[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association,” that “[i]t is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the ‘liberty’ assured by the Due Process Clause,” and that there is a “vital relationship between freedom to associate and privacy in one’s associations”); see also *Am. Fed’n of Gov’t Emps. v. Dep’t of Hous. & Urban Dev.*, 118 F.3d 786, 792 (D.C. Cir. 1997) (suggesting that one potential reading of *Whalen* is that the Constitution limits disclosure where it threatens particularized rights “such as the associational rights protected by the First Amendment”); Anita L. Allen, *Associational Privacy and the First Amendment*: *NAACP v. Alabama*, *Privacy and Data Protection*, 1 ALA. C.R. & C.L. L. REV. 1, 3 (2011) (associational privacy “minimizes the risk of stigma or reprisal flowing from group membership”).

<sup>299</sup> MILLER, *supra* note 32, at 199 (suggesting that First Amendment protections for freedom of association could provide the basis for a right to informational privacy).

<sup>300</sup> Justice Brandeis insightfully recognized that private political thought served as a foundation for political speech and action many years ago. See *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (“Those who won our independence believed . . . that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth . . . and that this should be a fundamental principle of the American government.”).

<sup>301</sup> See Julie E. Cohen, *A Right to Read Anonymously: A Closer Look at “Copyright Management” in Cyberspace*, 28 CONN. L. REV. 981, 1006–07 (1996) (explaining that “[t]houghts and opinions, which are the predicates to speech, cannot arise in a vacuum” and that “[i]t is this iterative process of ‘speech-formation’—which determines, ultimately, both the content of one’s speech and the particular viewpoint one espouses—that the First Amendment should shield from scrutiny”); Richards, *Intellectual Privacy*, *supra* note 291, at 403 (arguing that intellectual privacy, or privacy of thought, is an important First Amendment value).

<sup>302</sup> Similarly, to the extent that the Constitution protects the fundamental right to vote, those protections also support a right to informational privacy over political thought. Cf. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (declaring the right to vote a “fundamental political right”).

<sup>303</sup> *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993) (a law, which burdens religious practice and is not of general applicability, must meet strict scrutiny). Katherine Strandburg has made a similar but distinct argument, compellingly suggesting that the First Amendment freedom of association—by itself and without aid of the Due Process Clause—can serve as a strict scrutiny limitation on government surveillance of networks. Katherine J. Strandburg, *Freedom of Association in a Networked World: First Amendment Regulation of Relational Surveillance*, 49 B.C.

In sum, undercurrents within informational privacy jurisprudence, supported by First Amendment authority, suggest that information pertaining to political thought is subject to heightened protection under the Due Process Clause.<sup>304</sup>

### C. Downstream Consequences

At various points, this Article argues that downstream consequences play a role in establishing the normative value of intimate information and political thought and in influencing judicial evaluation of informational privacy claims. Let me be clear about what that role is. First, I am not suggesting that to state a claim a plaintiff *must* plead or prove that the collection and dissemination of information caused a concrete, economic or physical harm.<sup>305</sup> Rather, my claim regarding judicial decisionmaking, based on a review of informational privacy jurisprudence, is that informational privacy claims are more likely to prevail when the plaintiff can show that there are such downstream consequences to information collection or dissemination.<sup>306</sup> In this way, while the presence or absence of

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L. REV. 741, 794–97 (2008). To the extent Strandburg broadly conceives of what it means to be “associated” with someone else, and thus broadly conceives of the First Amendment’s application, her position supports, rather than detracts from, the position advanced here that the First Amendment buttresses a due process informational privacy right in political thought and communication. Strandburg’s First Amendment relational surveillance paradigm and my informational privacy framework are reinforcing, rather than conflicting. However, a purely First Amendment approach is perhaps too narrow in that it may not squarely protect intimate information.

<sup>304</sup> If intimate and political information is subject to strict constitutional protection, what is excluded? One prominent example would be financial information. Financial information does not bear a close relationship to already existing constitutional rights. Moreover, in contrast to intimate information and political thought, courts have rather routinely minimized the privacy interests affected by financial disclosure laws—that is, there is not as robust of a social or judicial undercurrent recognizing that financial information is of such constitutional importance to warrant heightened scrutiny. *See, e.g., Fraternal Order of Police v. City of Philadelphia*, 812 F.2d 105, 115 (3d Cir. 1987) (certain financial information may be less intimate than medical information); *Duplantier v. United States*, 606 F.2d 654, 671 (5th Cir. 1979) (financial information “has received little constitutional protection” (quoting *O’Brien v. DiGrazia*, 544 F.2d 543, 546 (1st Cir. 1976))); *see also Flint v. Stone Tracy Co.*, 220 U.S. 107, 174–76 (1911) (Fourth Amendment did not prohibit public inspection of tax returns as means of ensuring “fullness and accuracy” of corporate tax returns). With time, attitudes toward financial information may change, particularly as abuse of others’ financial information grows.

<sup>305</sup> Nothing in the Supreme Court’s standing jurisprudence suggests that a plaintiff must plead such an injury to satisfy Article III standing. *Cf. Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1154–55 (2013) (concluding that plaintiffs had no standing to challenge certain provisions of the Foreign Intelligence Surveillance Act because they could not demonstrate that they have been surveilled, but suggesting that if they had evidence they had been surveilled, they would satisfy Article III standing requirements); *see also Scott G. Thompson & Christopher Klimmek, Tenth Amendment Challenges After Bond v. United States*, 46 U.S.F. L. REV. 995, 997–98 (2012) (outlining Article III standing requirements).

<sup>306</sup> Ann Bartow has also suggested that emphasizing more tangible harms is important to successfully vindicating privacy rights. Ann Bartow, Response, *A Feeling of Unease About Privacy*

downstream consequences has a limiting effect on the right to informational privacy, the absence of such harms is not necessarily and should not be a *per se* bar.<sup>307</sup>

How, then, do downstream consequences interact with the two categories of information subject to strict scrutiny and help establish their normative import as the values underlying informational privacy? This is the second point. Intimate information and political thought are the values underlying an informational privacy right (and are entitled to strict scrutiny) in part because they are likely to result in negative downstream consequences, such as discrimination, marginalization, or even violence.<sup>308</sup>

The presence or absence of downstream consequences appears to have a significant impact on judicial appetite for privacy claims.<sup>309</sup> The Second Circuit's decision in *Powell v. Schriver*<sup>310</sup> is a good example. There, a prison guard disclosed that a particular inmate was HIV-positive and had undergone a "sex-change operation" to other inmates and guards.<sup>311</sup> In concluding that the inmate did have a constitutional right to privacy over this information—even in the prison setting—the court emphasized that disclosing the information exposed the inmate to potential discrimination

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*Law*, 155 U. PA. L. REV. PENNUMBRA 52, 61–62 (2006); *cf.* OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881) ("The life of the law has not been logic: it has been experience."); JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* 408 (1949) ("However much the letter law extends its precedents, however much the statute law may seek to make the standards of law concrete and definite, there is an instinct in the soul of man which bids him look, not to the unending scrolls of the law, but to" one's sense of justice.).

<sup>307</sup> *Cf.* SOLOVE, *supra* note 210, at 30 (arguing that "demanding more palpable" privacy harms may be problematic); Ryan Calo, *Privacy Harm Exceptionalism*, 12 COLO. TECH. L.J. 361, 364 (2014) (arguing that privacy victims should not be required "to move theoretical or evidentiary mountains before they see recovery").

<sup>308</sup> GRANT ET AL., *supra* note 82; Mottet, *supra* note 183; Spade, *supra* note 186; Skinner-Thompson & Richardson, *supra* note 85, at 14–5 (discussing prison violence against inmates known to have HIV).

<sup>309</sup> *See supra* note 171 (cataloguing circuit court informational privacy cases emphasizing downstream harms); *cf.* *Sterling v. Borough of Minersville*, 232 F.3d 190, 193, 198 (3d Cir. 2000) (granting relief in an informational privacy claim that was preceded by the privacy victim's death). Moreover, while not controlling in the privacy context (i.e., where the government discloses true but sensitive information), in the defamation context (where the government espouses false information), the Supreme Court has held that to state a procedural due process claim, the plaintiff must allege more than mere reputational damages, and must allege so-called stigma-plus. The "plus" may include, for example, loss of a government job following the defamation. *Paul v. Davis*, 424 U.S. 693, 710–11 (1976). The stigma-plus requirement in the defamation context signals the importance of downstream consequences to the Court. For an important critique of the stigma-plus doctrine, see Eric J. Mitnick, *Procedural Due Process and Reputational Harm: Liberty as Self-Invention*, 43 U.C. DAVIS L. REV. 79 (2009).

<sup>310</sup> 175 F.3d 107 (2d Cir. 1999).

<sup>311</sup> *Id.* at 109. An increasingly preferred term today is "gender confirmation surgery." *See* Loren S. Schechter, 'Gender Confirmation Surgery': *What's in a Name?*, HUFFINGTON POST (June 20, 2012, 5:12 AM), [http://www.huffingtonpost.com/loren-s-schechter-md-facs/gender-confirmation-surgery\\_b\\_1442262.html](http://www.huffingtonpost.com/loren-s-schechter-md-facs/gender-confirmation-surgery_b_1442262.html) [<http://perma.cc/8LMC-G7C3>].

and harassment.<sup>312</sup> The court observed that the potential for such downstream discrimination was “obvious” when dealing with intimate information such as one’s HIV status or gender identity.<sup>313</sup> Conversely, in cases such as *Nixon*, where the former President was unable to articulate a downstream harm to having his voluminous papers reviewed where personal papers were segregated from publication, courts have been reluctant to find informational privacy violations.<sup>314</sup> Similarly, in *Nelson*, the Supreme Court emphasized that the responses to the employment questionnaires could not be used as evidence in any criminal proceeding, mitigating any downstream harm.<sup>315</sup>

Judicial emphasis on the presence of downstream consequences in privacy cases has occurred in other contexts as well. For example, in *Lawrence*, the Court emphasized that the proscription of sodomy did much more than prohibit a specific sex act, but instead had “more far-reaching consequences, touching upon the most private human conduct, sexual behavior.”<sup>316</sup> The importance of downstream consequences is also consistent with the Supreme Court’s constitutional jurisprudence suggesting that vulnerable groups are entitled to enhanced protection. In *Windsor*, the Supreme Court emphasized that laws that impose a legal disability on vulnerable groups are constitutionally suspect.<sup>317</sup>

The saliency of downstream harms is, in a way, corollary to the analysis indicating that courts, outside of the Fourth Amendment intrusion context, are unable to see the connection between informational privacy claims and dignity harms.<sup>318</sup> Absent direct, forceful government searches, courts expect more than an injury to mere dignity. They expect a downstream harm. That harm is often inherently and palpably present in

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<sup>312</sup> *Powell*, 175 F.3d at 111–12.

<sup>313</sup> *Id.* The fact that the court in *Powell* ultimately denied the claim based on qualified immunity, *id.* at 114, highlights the need for the clear doctrinal framework outlined in this Article.

<sup>314</sup> 433 U.S. 425, 458 (1977) (privacy claim “cannot be considered in the abstract”).

<sup>315</sup> 131 S. Ct. 746, 753 (2011).

<sup>316</sup> 539 U.S. 558, 567 (2003). *See* Nehf, *supra* note 223, at 26 (“The more cognizable and immediate problem with a loss of information privacy, and the problem that is most likely to produce a political resolution, is our inability to avoid circumstances in which others control information that can affect us in material ways—whether we get a job, become licensed to practice in a profession, obtain a critical loan, or fall victim to identity theft.”); *see also* *Hollingsworth v. Perry*, 130 S. Ct. 705, 712–13 (2010) (prohibiting limited broadcast of Proposition 8 trial because witnesses could be subject to harassment as a result of the broadcast of their testimony).

<sup>317</sup> 133 S. Ct. 2675, 2693–94 (2013); *see also* *Romer v. Evans*, 517 U.S. 620, 635 (1996) (emphasizing the “immediate, continuing and real injuries” inflicted on LGBT individuals); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985) (“mere negative attitudes, or fear . . . are not permissible bases” for differential treatment).

<sup>318</sup> *Supra* Section I.A.

cases involving disclosure of intimate information and political thought. This Article's framework recognizes that reality and provides courts a clear course to follow in adjudicating informational privacy claims.

#### *D. In Defense of a Categorical Approach*

Before closing, it is necessary to respond to critiques of categorical approaches to privacy. Of note, Jeffrey Rosen has suggested that isolating certain types of information as protected should not be the principal regard of a privacy regime.<sup>319</sup> As a hypothetical, he compares the harm of a school monitoring a student's music downloads and discovering that the student liked Richard Wagner to being seen by a classmate waiting in line to listen to Wagner at the opera.<sup>320</sup> According to Rosen, the monitoring is an indignity while bumping into the classmate is an "embarrassment but not injury to privacy and dignity" because the student was caught in plain view.<sup>321</sup>

This hypothetical is problematic for a couple of reasons. First, by employing a relatively benign example, it trivializes the possibility that certain types of information may be more important than others. Privacy violations revealing details of a sexual assault, a person's HIV status, or planned political opposition simply are not on the same level as the revelation of one's music preferences. Informational privacy case law discursively reflects that reality,<sup>322</sup> but until this point courts have lacked the doctrinal framework to give that reality consistent meaning in the context of case adjudication. Second, by focusing on control and "plain view," Rosen, perhaps unintentionally, reifies the third-party doctrine. By forthrightly recognizing that certain types of information are entitled to more protection than other types regardless of whether they have been shared within a confined circle, the framework I advance could chip away at the flawed third-party doctrine, which presumes that personal information is only entitled to protection if it has been kept completely secret.

Others may be concerned that any attempt to define categories of information deserving special consideration is insufficiently flexible to deal with modern-day privacy problems, may leave significant gaps, and

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<sup>319</sup> Jeffrey Rosen, *The Purposes of Privacy: A Response*, 89 GEO. L.J. 2117, 2121 (2001). That being said, elsewhere Rosen seems to suggest that intimate information is of special importance. See *supra* note 261.

<sup>320</sup> *Id.*

<sup>321</sup> *Id.*

<sup>322</sup> See *supra* Sections IV.A–B; see also Henkin, *supra* note 211, at 1429 (foreseeing a categorical approach to decisional privacy).

instead, a contextual approach to privacy claims ought to be adopted.<sup>323</sup> While I am sympathetic to concerns of creating privacy gaps, at least in the constitutional arena, the structural playing field is currently tilted far away from privacy interests (as outlined in Part II), causing privacy interests to be routinely undervalued.<sup>324</sup> As such, privacy concerns should be triaged to put the constitutional right to informational privacy on firmer normative and doctrinal ground, with future gap-filling embellishments potentially to follow. In other words, a categorical approach at least gets informational privacy's foot in the constitutional door. Moreover, some gaps may, in fact, be warranted—again, at least with regard to constitutional privacy. That is to say that when confronting a constitution of limited rights, there are bound to be certain gaps. As outlined above, the categories of information identified herein as entitled to enhanced constitutional protection have the virtue of being supported by constitutional provisions and precedent; it is not clear that can be said for *all* types of information.

What is more, this Article's approach is consistent with a contextual approach to privacy, such as that insightfully advanced by Helen Nissenbaum.<sup>325</sup> A categorical approach privileging certain subject matters as deserving special treatment merely helps us identify the contexts where privacy is entitled to meaningful protection.<sup>326</sup>

Nor does this Article's approach completely ignore that there may be certain contexts in which the government does have legitimate reasons for collecting, or even disseminating, certain data. The government is faced with immense challenges and one can easily imagine circumstances where it might actually be compellingly important for the government and, for example, the transgender community to know how many people identify as transgender. For instance, if treatment for transgender-related medical care becomes increasingly covered by government-sponsored health insurance,<sup>327</sup> it might be beneficial to ascertain for actuarial or budgetary purposes the number of transgender people that will require coverage. Rather, a categorical approach suggests that when dealing with intimate or political information, the government's needs must be compelling and the

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<sup>323</sup> See, e.g., NISSENBAUM, *supra* note 40, at 232 (suggesting that efforts “to define a category of sensitive information deserving special consideration” be laid to rest).

<sup>324</sup> See *supra* Section III.B.

<sup>325</sup> See generally NISSENBAUM, *supra* note 40 (advancing theory of contextual integrity).

<sup>326</sup> Cf. Ohm, *supra* note 245, at 1145–46 (observing that attempts to identify certain categories of sensitive information are not necessarily in conflict with Nissenbaum's contextual approach).

<sup>327</sup> See Nat'l Convergence Determination 140.3, Transsexual Surgery, Decision No. 2576, Docket No. A-13-87, (Dep't of Health & Human Servs. May 30, 2014) (lifting ban on Medicare coverage for gender confirmation surgery).

means must be narrowly tailored. It does not, in fact, paralyze government action, but alters the playing field for when context is ultimately considered by courts.

Finally, there may also be apprehension that a categorical approach privileging intimate and political information, but not, for example, financial information, may not be an effective tool to limit wide sweeping government surveillance programs, such as NSA programs that do not exclusively target intimate information (arguably such programs do target political information). Not necessarily so. If the government's broad collection or dissemination includes the intimate information or political information of certain individuals, then those individuals would presumably have a cause of action—and one with teeth: strict scrutiny. The fact that some, but not all, of the people observed by the surveillance program may not have robust causes of action does not make the informational privacy claim a less effective means of private regulation of government surveillance. As in the First Amendment speech context, the Supreme Court has recognized that where laws prohibit both protected and unprotected speech, they are overbroad and constitutionally impermissible.<sup>328</sup> Here, too, if a surveillance regime infringes on intimate information or political thought, in addition to nonprotected information, it could be deemed constitutionally overbroad.<sup>329</sup>

#### CONCLUSION

As outlined in this Article, moving beyond dignity and autonomy and reorienting the right to informational privacy toward those categories of information of paramount importance not only more precisely captures the underlying normative value of an informational right, but could also increase judicial recognition of the right. By centering intimate information and political thought and demonstrating their close relationships to other fundamental rights, this Article may help move the judicial needle toward robust, heightened judicial protection for intimate and political information,

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<sup>328</sup> *United States v. Stevens*, 130 S. Ct. 1577, 1592 (2010) (statute that criminalized the creation, sale, or purchase of depictions of animal cruelty was unconstitutionally overbroad under the First Amendment); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 397–98 (1992) (White, J., concurring in judgment) (law that “criminalizes not only unprotected expression but expression protected by the First Amendment” is unconstitutional).

<sup>329</sup> Where secret surveillance programs are involved, learning that a plaintiff's intimate or political information has been gathered may be difficult and pose an obstacle under the Supreme Court's narrow standing jurisprudence. See *ACLU v. NSA*, 493 F.3d 644, 648 (6th Cir. 2007), *cert. denied*, 552 U.S. 1179 (2008). The problem of standing is beyond the scope of this Article, but has been the subject of important critique. See Jenny S. Martinez, *Process and Substance in the “War on Terror,”* 108 COLUM. L. REV. 1013, 1059 (2008) (examining whether the decision in *ACLU v. NSA* was “substance disguised as process”).

preventing (among other things) the forced outing of LGBTQ individuals and individuals living with HIV by the government.

Consistent with this Article's conceptual reorientation to the confusion over informational privacy, the Supreme Court seems comfortable with a categorical approach to the right to privacy.<sup>330</sup> Bifurcation of rights into those that are fundamental and nonfundamental is almost by definition a categorical approach. The categories, of course, have limitations and exclude vigorous constitutional protection for certain activities. But it is preferential (and at the very least strategic) to harness those categories in the interest of protecting various, private activities, as opposed to the continued efforts to protect informational privacy through visionary but imprecise dignity or autonomy conceptualizations.

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<sup>330</sup> Rubinfeld, *supra* note 24, at 751 n.83 ("The Court has repeatedly made clear that some criterion, imperfectly defined as yet, of 'fundamentality' must be present in the conduct at issue before the right of privacy will apply."); *cf.* Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 405–06 (2009) (the Supreme Court has embraced a categorical approach protecting certain arms and individuals from regulation under the Second Amendment).