The Right to Stay in the Closet: Information Disclosures by Government Officials

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In recent years, there has been a dramatic expansion of the volume of information government officials have at their fingertips. Developments such as giant computer databases, the Internet, and improved surveillance technologies make the lives of individuals more accessible and transparent to the government and its employees. As government officials' access to the details of citizens' lives increases, so does the risk that they could harm citizens by accidentally or maliciously disclosing information citizens would prefer to keep private. Therefore, the information age demands that we more clearly define the limits the Constitution imposes on information disclosure by the government. Unfortunately, in interpreting the constitutional limits of government disclosure, courts look to confusing precedent and the ill-defined scope of the right to privacy.

This article will rely on a recent Third Circuit decision, *Sterling v. Borough of Minersville*, to explore the current tensions and potential inconsistencies in this area of constitutional privacy law. The court in *Sterling* held that a police officer violated the Constitution when he threatened to disclose a young man's homosexuality to the young man's grandfather. As this article will explore, *Sterling* made no mention of a series of Supreme Court holdings, which sharply limit the ability of citizens to sue governmental officials. This omission places the soundness and durability of *Sterling* into question. While the *Sterling* court's effort to create constitutional protections for gays, lesbians, and bisexuals is laudable, this effort falls flat if it fails to adequately address relevant precedent. A more enduring attempt to protect individuals from wrongful governmental disclosures must

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1 232 F.3d 190 (3d Cir. 2000).
look contrary Supreme Court decisions in the eye and either
distinguish them or point out their failures. Alternatively, courts may
have to accept that constitutional law has limitations and that they
must allow legislatures to set legal rules in areas the Constitution does
not cover. Therefore, this article will outline the evolution of the
right to nondisclosure of personal information and put Sterling to the
test to see whether it fits within the current constitutional framework.
Ultimately, this article will set forth some rough guidelines for
circumstances in which courts should find that disclosures by
government officials violate our constitutionally protected zone of
privacy.

I. SETTING THE SCENE: STERLING V. BOROUGH OF MINERSVILLE

On April 17, 1997, police officer Wilinsky spotted a car in a
parking lot near a beer distributor. The car’s lights were out, and
there were two young men in the car. The beer distributor had been
burglarized before, and the scene aroused Wilinsky’s suspicions.
Wilinsky called for backup, and police officer Hoban arrived on the
scene. When the police officers inspected the car and questioned the
car’s two young occupants, they discovered that 18 year-old Marcus
Wayman and his 17 year-old friend had been drinking alcohol. The
officers alleged that they found two condoms in the car and alleged
that Wayman and his friend admitted that they were gay and were
planning to engage in consensual sex. The officers arrested Wayman
and his friend for under-age drinking and took them to the police
station. At the station, Wilinsky lectured the two young men as to the
proscription of homosexuality set forth in the Bible and told
Wayman that if he did not tell his grandfather that he was gay,
Wilinsky would do so. After hearing Wilinsky’s threat, Wayman told
his friend that he was going to kill himself. Tragically, once he was
released from police custody and returned home, Wayman in fact
committed suicide.

Wayman’s mother, Madonna Sterling, brought suit against the
police on behalf of her son in federal court under section 1983 of the
Federal Civil Rights Act. Sterling sued officers Wilinsky and Hoban
“both as individuals and in their capacity as police officers,” the

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2 This recitation of the facts paraphrases the account given in Sterling, 232 F.3d at 192.
acting in their official capacities when they deprive that citizen of “any rights,
privileges, or immunities secured by the Constitution and laws.”
Borough of Minersville, and the Chief of Police of Minersville.⁴ “The complaint alleged that the officers and the Borough violated Wayman’s... Fourteenth Amendment rights to privacy and equal protection.”⁵ The United States District Court for the Eastern District of Pennsylvania allowed Sterling’s action to go forward, finding that if the facts alleged by the plaintiff were true, the defendants violated Wayman’s “clearly established right to privacy as protected by the Constitution.”⁶

To successfully sue a public official under section 1983, a plaintiff must show that the official’s actions were in violation of a constitutional right so clearly established that a reasonable officer would understand that his actions violated that right.⁷ While this standard does not prevent section 1983 actions where there is no precedent holding that the precise action in question is unlawful, the unlawfulness must be apparent “in light of pre-existing law.”⁸ Thus, the defendants in Sterling appealed the District Court’s decision arguing that there was no constitutional protection for the disclosure of sexual orientation, and that even if there were, it was not sufficiently established that the officers could have been aware of the illegality of their conduct.⁹

The Third Circuit Court of Appeals disagreed with this assertion and upheld the District Court’s opinion.¹⁰ The Court of Appeals found that it could “readily conclude that Wayman’s sexual orientation was an intimate aspect of his personality entitled to privacy protection” under the Constitution.¹¹ In other words, the court held that the right to privacy so clearly encompasses the right to keep one’s sexual orientation private that a reasonable police officer should have known that disclosure of this information would violate that right.¹²

The Third Circuit’s decision that Wayman had a constitutional

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⁴ Sterling, 232 F.3d at 193
⁵ Id. The complaint also alleged violations of the Fourth Amendment and the Constitution of the Commonwealth of Pennsylvania. Id. The Fourth Amendment claim was dismissed on a summary judgment motion by the defendants, and the claim under the Pennsylvania Constitution was not explored by the Third Circuit and will not be discussed in this paper. Id
⁶ Id. at 193.
¹⁰ Id. at 196.
¹¹ Id.
¹² Id. at 198.
right not to have his homosexuality disclosed is not as inevitable as the court's opinion suggests. To date, no other Circuit Court of Appeals has determined whether an official violates an individual’s right to privacy by disclosing that person’s sexual orientation. Furthermore, two fairly recent cases, dealing directly with homosexuality and the right to privacy, determined that there was no constitutional protection for homosexual activity or information about that activity.\textsuperscript{15} In \textit{Bowers v. Hardwick}, the Supreme Court upheld a Georgia statute forbidding sodomy.\textsuperscript{11} \textit{Bowers} held that the right to privacy did not protect homosexuals engaging in acts of consensual sodomy because the right to privacy protected only those liberties that are “deeply rooted in this Nation’s history and tradition.”\textsuperscript{16} More recently, the Fourth Circuit in \textit{Walls v. City of Petersburg} allowed a government questionnaire to ask prospective employees whether they had ever had sexual relations with a person of the same sex.\textsuperscript{16} \textit{Walls} held that because the Supreme Court had determined that homosexual conduct was not protected by the Constitution, the questionnaire did not ask for information that the plaintiff had a right to keep private.\textsuperscript{17} The \textit{Walls} court, thus, extended \textit{Bowers}’ refusal to grant protection to homosexual activity and held that information about homosexual activity is not protected by the right to privacy, either. However, neither of these cases directly discusses whether the Constitution grants homosexuals the right to keep their sexual orientation (as opposed to their sexual activities) private.

\textit{Sterling} addressed these two precedents, but determined that these cases did not decide whether the right to privacy extends to the confidentiality of one’s sexual orientation.\textsuperscript{18} While \textit{Sterling} commented that \textit{Bowers} “gives us pause,”\textsuperscript{19} the court distinguished the practice of homosexual activities from the forced disclosure of sexual orientation.\textsuperscript{20} The Third Circuit concluded that the right to privacy has two branches. One branch addresses government interference


\textsuperscript{14} \textit{Id.}\n
\textsuperscript{15} \textit{Id. at} 192-93 (citations omitted). Justice Burger made the argument even more vehemently, saying “[t]o hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching.” \textit{Id. at 197}

\textsuperscript{16} 895 F.2d 188 (4th Cir. 1990).

\textsuperscript{17} \textit{Id. at} 193

\textsuperscript{18} \textit{Sterling}, 232 F.3d at 194-95 n.3.

\textsuperscript{19} \textit{Id. at} 194.

\textsuperscript{20} \textit{Id. at} 195.
with private activities, the other prohibits disclosures of private information. According to the Third Circuit, although *Bowers* held that the former branch did not protect homosexual activity, the latter branch has a greater scope and restricts the disclosure of sexual orientation. *Sterling* also pointed to several prior Third Circuit decisions holding that the informational privacy branch covers a wide range of matters including medical and financial information. Ultimate, *Sterling* decided that precedent outlining informational privacy clearly establishes an individual's right to keep his sexual orientation private.

As will be discussed in more detail below, the Third Circuit correctly determined that modern privacy rights jurisprudence acknowledges two distinct functions of the right to privacy. First, it regulates and restricts governmental interference with certain activities and decisions. The classic example of this type of privacy protection is *Roe v. Wade*, wherein the Supreme Court held that the right to privacy limits the government's ability to interfere with a woman's decision to have an abortion. Second, several federal courts have held that the right to privacy limits the government's ability to gather and disclose information about its citizens. As demonstrated in the next section, the second function of the right to privacy is not as firmly settled as the first in Supreme Court jurisprudence. Rather, the right to non-disclosure of information is a somewhat uneasy outgrowth of the right to be free from unwarranted governmental intrusion into private activities and decisions.

Before delving into the evolution of the right to informational privacy, it is worthwhile to pause and question the distinction between activities and status information. Can the right to privacy really protect sexual orientation information when it does not protect homosexual activity? For example, if the police officer in *Sterling* threatened to tell the young men's parents that he had caught them preparing to engage in homosexual sodomy, would this change his liability under section 1983? It should be noted that sodomy is still

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21 Id. at 195-96.
23 See e.g., Gruenke v. Seip, 225 F.3d 290 (3d Cir. 2000) (holding that a high school swim coach infringed on a team member's right to "be free from disclosure of personal matters" when he required her to take a pregnancy test); United States v. Westinghouse Elec. Corp., 638 F.2d 570 (3d Cir. 1980) (holding that the right to privacy delineates the government's ability to disclose medical records); Plante v. Gonzalez, 575 F.2d 1119, 1132-37 (5th Cir. 1978) (holding that the right to privacy's subsidiary "right to confidentiality" could in some circumstances limit the government's ability to require financial disclosures).
illegal in many states, and it seems unlikely that the right to privacy would bar a police officer from disclosing that a particular individual was planning to commit a crime. Yet, disclosing that Wayman was planning to engage in consensual sodomy with another male was virtually tantamount to disclosing that Wayman was gay. The inevitable intertwining of information about status and information about activity makes the court’s attempt to separate them somewhat contrived.

The blur between status information and activity becomes evident where one attempts to characterize the harm caused by the disclosure of Wayman’s homosexuality. Sterling held that the officers inappropriately revealed an “intimate aspect of [Wayman’s] personality,” which Wayman had a right to keep confidential. However, the harm could be re-characterized as a limitation on Wayman’s ability to act and to make personal decisions. Specifically, the officers interfered with Wayman’s ability to decide if and when he would reveal his homosexuality to others. If Wayman had not chosen to end his life, the disclosure also could have affected Wayman’s future decisions about whether he would engage in homosexual activities. Here, again, the disclosure of status information and the restriction of activities are closely related. This connection between status and activity is important to keep in mind in an examination of the evolution of the informational privacy right.

II. THE EMERGENCE OF A RIGHT TO INFORMATIONAL PRIVACY

It is almost inescapable that the Constitution must ensure citizens some degree of privacy. The Constitution could not achieve the promise of its preamble to “secure the Blessings of Liberty to ourselves and our Posterity,” without creating a sphere of decisions and activities that the government cannot interfere with or restrict. Yet, the Supreme Court did not expressly recognize a constitutional “right to privacy” until 1965, in Griswold v. Connecticut. In Griswold, the Supreme Court held that to give full effect to the rights expressly enumerated in the Bill of Rights, the Constitution must recognize a right to privacy. As Justice Douglas famously explained, the “specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and

25 Sterling, 232 F.3d at 196.
26 381 U.S. 479 (1965).
27 Id. at 484-85.
substance." Without some right to privacy, citizens could not fully exercise their rights to free expression, to choice and to religion, or to security in their "persons, houses, papers, and effects." But even while it declared the existence of a right to privacy, the Supreme Court also established a limitation on its scope. The right to privacy only exists and functions where another constitutionally protected right requires a zone of privacy. Thus, the right to privacy, in a sense, is "dependent" upon other constitutionally protected rights.

In a concurrence authored by Justice Goldberg, in which Justice Brennan and Justice Warren joined, the three justices stretched the right to privacy beyond the zones around the Bill of Rights. The concurrence asserted that the right to privacy was a part of the Fourteenth Amendment's protection of those liberties that are "so rooted in the traditions and conscience of our people as to be ranked as fundamental." The majority, however, rejected this approach to the right to privacy as arising more generally from the Fourteenth Amendment's promise of liberty.

Instead, the majority concluded that such an understanding of the right to privacy would leave the courts without a constitutional framework to guide their decisions and would force the courts to "sit as a super-legislature to determine the wisdom, need, and propriety of laws."

Griswold also created a second limitation on the right to privacy by linking it to a series of cases that protect family decisions, but do not expressly declare a separate right to privacy. In Griswold, the Supreme Court had to determine the constitutionality of a Connecticut law prohibiting the distribution of contraceptives. The Court held that decisions regarding contraception and conception fell into the same category of family activities and decisions that were constitutionally protected in prior decisions. For example, Griswold cited Pierce v. Society of Sisters, which invalidated an Oregon statute requiring all children to attend public rather than private school.

28 Id. at 484
29 U.S. CONST. amends. I, IV, V.
30 Griswold, 381 U.S. at 484.
31 Id. at 486.
33 Griswold, 381 U.S. at 481-82.
34 Id
35 See id. at 481.
36 Id.
37 Id.
38 Id. (citing Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925).
Society of Sisters concluded that this restriction on educational choices unreasonably interfered with the parents’ and guardians’ right “to direct the upbringing and education of children under their control.”

Another example in this series of pre-Griswold cases that created special protections for family and childbearing is Skinner v. Oklahoma, in which the Supreme Court struck down a law allowing the state to sterilize “habitual criminals.” Skinner concluded that the state had not offered adequate justification for such a serious intrusion on marriage and procreation. By tying its rejection of Connecticut’s ban on contraceptives to these decisions protecting the realm of the family, Griswold linked the right to privacy to other recognized rights. Since Griswold, the Supreme Court has accepted these earlier cases as part of the fabric of the right to privacy, but has for the most part limited the right’s application to the realm of family decisions and activities.

Although Griswold implicitly placed two limitations on the reach of the right to privacy, the Supreme Court has applied the limitation of application to family matters more consistently than the limitation that the asserted privacy right be tied to another express constitutional right. In Roe v. Wade, Justice Blackmun’s majority broadened the right to privacy’s role beyond the ‘penumbras and emanations’ of the Bill of Rights. Roe v. Wade held that the right to privacy put substantial limits on the government’s ability to interfere with a woman’s ability to have an abortion. The majority opinion does not cite any other constitutional provision to support a woman’s right to choose whether to carry a fetus to term. Instead, Justice Blackmun held that right to privacy was “founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action.” Thus, Roe enabled the right to privacy to protect matters that are not specifically addressed in the Bill of Rights, but nevertheless

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40 316 U.S. 535 (1942).
41 Id. at 541.
43 410 U.S. 113 (1973).
44 410 U.S. 113 (1973).
45 Id. at 164-65.
46 Id. at 153.
could be deemed "fundamental."\textsuperscript{47} Roe's logic recast the right to privacy as existing separately from the enumerated constitutional rights. However, because its specific aim was to allow a woman the right to have an abortion, Roe did not expand the right to privacy beyond the realm of family matters. Ultimately, the extent and scope of the right to privacy remains unresolved. While Griswold limited the right to the zones of privacy as existing around other constitutional rights,\textsuperscript{48} Roe attempted to make the right stronger and broader.\textsuperscript{49} Because both decisions deal with childbearing, however, they implicitly confirm that the right to privacy acts chiefly, if not solely, to protect family activities and decisions. Recent Supreme Court decisions demonstrate that the Court still views the right to privacy as a dependent right. \textit{Planned Parenthood of Southeastern Pennsylvania v. Casey} held that the Fourteenth Amendment generally, and, specifically, the right to privacy, act to protect "all fundamental rights ... from invasion by the States."\textsuperscript{50} Theoretically, Griswold and Roe could allow a wide range of claims based on the right to privacy if the Supreme Court was willing to accept a wide range of matters as "fundamental rights." However, cases since Roe strongly suggest that a violation of privacy claim is most likely to succeed if the violation also impinges upon the exercise of another constitutional right and the violation intrudes on family matters.\textsuperscript{51}

If a constitutional right to informational privacy exists, it needs principles that establish and limit its scope. Since the Supreme Court's right to privacy jurisprudence is intertwined with an effort to protect family decisions and activities, must the right to informational privacy reflect a similar tilt in its coverage? A good deal of highly personal information does not fall neatly into the sphere of family matters, nor does it necessarily implicate the exercise of another constitutional or fundamental right. For example, a person's medical history, finances, or criminal record might all be considered highly private, but they are not necessarily related to her family or childbearing decisions, nor does divulging such information necessarily impinge on a separate constitutional or fundamental right. However, because information and activity are difficult to

\textsuperscript{47} Id. at 152
\textsuperscript{48} Griswold, 381 U.S. at 484.
\textsuperscript{49} 410 U.S. at 153-54.
separate from one another, a situation in which some matters are covered by the right to informational privacy but are not covered by privacy rights as to family decisions and activities results in untenable inconsistencies.

The Supreme Court has squarely addressed the question of whether there is a right to informational privacy in three opinions written in 1976 and 1977. Unfortunately, the Supreme Court's answers in this trilogy of cases are not very clear, and in some ways they appear to be contradictory. Some courts have even found that the latter two cases overturned the first.\footnote{See infra notes 122-124 and accompanying text.} The Supreme Court's agenda in each of these cases was quite different, however, and through careful examination, their holdings are more reconcilable than they may appear.

The first case in the trilogy is \textit{Paul v. Davis}, which appeared to stand sharply against constitutional protections for private information.\footnote{424 U.S. 693 (1976).} In \textit{Paul}, two police chiefs assembled and distributed a flyer showing the pictures and names of "active" shoplifters.\footnote{\textit{Id.} at 694.} One of the people depicted on the flyer was Edward Davis, who had been arrested for shoplifting, but whose case the trial court had not resolved by the time the flyer was circulated.\footnote{\textit{Id.} at 696.} Davis brought a section 1983 suit against the two police chiefs for impermissibly depriving him of liberty under the Fourteenth Amendment. Davis argued his liberty had been limited because he felt uncomfortable going into stores out of fear that he would be viewed as a potential shoplifter.\footnote{\textit{Id.} at 697.} The Supreme Court held that Davis's claim could only succeed if one of two premises was correct: either 1) that the Due Process clause allows a citizen to sue a government official in federal court when the official commits a tort against the citizen, or 2) that when a government official inflicts a "stigma" on a citizen this harm is different enough from other torts that it can be the basis for a federal claim.\footnote{\textit{Id.} at 699.} \textit{Paul} ultimately found both premises unsupportable.

Justice Rehnquist, writing for the majority, rejected the first premise on federalism grounds. The majority concluded that the proper balance between federal and state courts would be violated if all tort claims against government officials could be heard in federal
court, regardless of whether they involved a constitutional claim.58 Further, Justice Rehnquist argued that the Fourteenth Amendment could not serve as “a font of tort law” allowing citizens to flood the federal courts with a multitude of civil claims.59 Instead, the Fourteenth Amendment only permits suit in federal court when citizens are deprived of constitutionally protected liberty or property rights. Therefore, to succeed, Davis would have to prove not only that the police officers violated his legal rights, but that they violated a constitutional right.

Turning to the second premise, the Court in Paul held that where a citizen is stigmatized by information that a governmental official released, this is not a violation of a constitutional right.60 The Court found that harm to reputation, or “mere defamation,” does not rise to the level of a constitutional violation.61 To reach this conclusion, however, the Court had some explaining to do. The Court had to confront five prior cases suggesting that stigma was a constitutionally recognized harm.62 The Court reviewed the facts and opinions of the five cases and concluded that the Court previously upheld actions only when there was some harm to the plaintiff’s liberty or property in addition to the stigmatization.63 For example, in a series of cases arising at the beginning of the Cold War, the Supreme Court upheld the federal claims of people who lost their employment or employment opportunities because a governmental body had publicly listed them as “disloyal” or “communists.”64 Paul stressed that it was the loss of employment that made these plaintiffs’ claims actionable in federal court; the harm to the plaintiffs’ reputations caused by the disclosure, by itself, could not have supported a constitutional claim.65 These citizens only had a constitutional claim because they had lost their employment or an employment opportunity without adequate procedural due process.66 Therefore, Paul held that these cases did not recognize a separate right to be free from government disclosures of embarrassing

58 Id. at 700.
59 Paul, 424 U.S. at 701.
60 Id. at 702.
61 Id. at 706.
62 Id. at 701-10.
63 Id.
64 Id at 701-07 (citing United States v. Lovett, 328 U.S. 303 (1946); Joint-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951); Wiemann v. Updegraff, 344 U.S. 183 (1952)).
65 See Paul, 424 U.S. at 701-07
66 See id.
information.\textsuperscript{67}

After holding that Davis had not been deprived of any procedural right guaranteed by the Fourteenth Amendment, the final section of the opinion makes clear that the officers' disclosures did not violate Davis's substantive privacy right. The Court in \textit{Paul} held that the right to privacy only protects "activities . . . relating to marriage, procreation, contraception, family relationships, and child rearing and education."\textsuperscript{68} Therefore, in \textit{Paul}, the right to informational privacy that Davis sought was precluded both because the right to privacy only regulates restrictions on conduct\textsuperscript{69} and because the subject matter of Davis's claim was not related to family matters. This holding thus erected a significant barrier to suits alleging constitutional violations of informational privacy.

The second case in the trilogy is \textit{Whalen v. Roe}, which appeared to soften the Supreme Court's approach to the right to informational privacy.\textsuperscript{70} In \textit{Whalen}, the Court was confronted with a New York statute that created a database of the names and addresses of people who had prescriptions for "Schedule II" drugs.\textsuperscript{71} Under the statute, Schedule II drugs were legal to prescribe, but had a high risk of illegal use.\textsuperscript{72} New York passed this statute to prevent pharmacists from repeatedly filling Schedule II drug prescriptions and to prevent doctors from over-prescribing Schedule II drugs.\textsuperscript{73} A few days before the statute was passed, a group of patients who regularly received

\textsuperscript{67} Some commentators feel that this reasoning was not entirely convincing. For example, Prof. Monaghan wrote, "[\textit{Paul's}] re-rationalization of the earlier cases is wholly startling to anyone familiar with those precedents." Henry Paul Monaghan, \textit{Of Liberty and Property}, 62 \textit{Cornell L. Rev.} 405, 424 (1977). \textit{See also} Heyward C. Hosch, \textit{The Interest in Limiting Disclosure of Personal Information: A Constitutional Analysis}, 36 \textit{Vand. L. Rev.} 139, 168 (1983) (finding that "[t]he Paul Court's refusal to overrule or to distinguish convincingly [the relevant prior cases] seriously weakens its assertion that injury to reputation alone does not present a federal claim for procedural due process protection under the Fourteenth Amendment."); Barbara E. Armacost, \textit{Race and Reputation: The Real Legacy of Paul v. Davis}, 85 \textit{Va. L. Rev.} 569, 622 (1999) (arguing that if \textit{Paul} "[had] been more honest in its treatment of precedent," it would have come to a different conclusion).

\textsuperscript{68} \textit{Paul}, 424 U.S. at 713.

\textsuperscript{69} \textit{Paul} re-emphasized the activity versus information distinction a few sentences later when it wrote that, "[Davis's] claim is based not upon any challenge to the State's ability to restrict his freedom of action in a sphere contended to be 'private,' but instead on a claim that the State may not publicize a record of an official act such as an arrest. None of our substantive privacy decisions hold this or anything like this, and we decline to enlarge them in this manner." \textit{Id.}

\textsuperscript{70} 429 U.S. 589 (1977).

\textsuperscript{71} \textit{Id.} at 591-93.

\textsuperscript{72} \textit{Id.} at 593.

\textsuperscript{73} \textit{Id.} at 592.
Schedule II drug prescriptions and two physician’s associations filed suit in federal court against the statute. The plaintiffs asserted that the statute invaded “a constitutionally protected ‘zone of privacy.’”

The *Whalen* opinion unanimously rejected the plaintiffs’ claim. The majority opinion and the two concurrences demonstrate that several members of the Supreme Court were hesitant to recognize a right to informational privacy. *Whalen* began its discussion of the right to privacy by noting that “[t]he cases sometimes characterized as protecting ‘privacy’ have in fact involved two different kinds of interests.” One is the individual interest in avoiding disclosure of personal matters, and the other is the interest in independence when making certain kinds of important decisions. This statement strongly suggests that the Court accepted a right to informational privacy. However, the Court’s description of precedent left some room to question whether the Court meant that privacy included these two different types of interests, or whether the Court was simply noting that some commentators group these two interests under a single heading. Because the Court spoke in the passive voice and only cited Professor Kurland for the proposition that these two interests have been viewed as subsidiary realms of privacy, the Court’s opinion is frustratingly vague.

*Whalen* tolerated this ambiguity because it held that whether or not the Constitution recognized a right to informational privacy, this statute certainly did not violate such a right. Because the New York statute included extensive measures to keep the information in the database from being disseminated to the public, the Court found that the statute did not violate “any right or liberty protected by the Fourteenth Amendment.” Later in the opinion, the Court distanced itself even further from creating a right to informational privacy by writing a “final word about issues we have not decided.” In this final section, *Whalen* emphasized that based on the facts of the case before it, “[w]e need not, and do not, decide any question which might be presented by the unwarranted disclosure of accumulated private data

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74 Id. at 595.
75 Id. at 598.
76 429 U.S. 589-99.
77 *Whalen*, at 599-60.
79 *Whalen*, 429 U.S. at 604.
– whether intentional or unintentional – or by a system that did not contain [adequate] security provisions.”

Thus, Whalen drew a distinction between information gathering and information disclosure. The New York statute provides for information gathering, and Whalen found that no substantive rights recognized by the Constitution place any special limits on this activity. Information gathering, therefore, was only subject to the same “rational basis” test governing most legislative actions. On the other hand, the Whalen Court was unsure whether information disclosures might at times be prohibited under the right to privacy, but declined to decide this issue.

Justice Brennan and Justice Stewart wrote concurring opinions in Whalen to give their separate views on whether a right to informational privacy exists and limits the government’s ability to disseminate information. Justice Brennan’s concurrence found that such a right does exist. He wrote that “[b]road dissemination by state officials of [information regarding prescriptions] would clearly implicate constitutionally protected privacy rights.” Justice Stewart disagreed and concluded that only a limited set of matters qualify for constitutional protection under the right to privacy. In his opinion, the right only protects marriage, privacy in the home, and the right to use contraceptives. Echoing Justice Rehnquist’s federalism argument in Paul, Justice Stewart asserted that state courts and state law are the proper forum for vindicating a person’s general right to privacy. These two concurring opinions again highlight the question of whether the right to privacy regulates information disclosure at all, and if so, whether it can include matters beyond the scope of family, contraception, and child-rearing.

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80 Id. at 605.
81 See id. at 597 (finding that the statute “is manifestly the product of an orderly and rational legislative decision”). The “rational basis” test requires that when a legislature imposes some additional burden on a group of people, as here the group of people who use Schedule II drugs, it must have a “rational basis” for doing so. See, e.g., Ry. Express Agency v. New York, 336 U.S. 106 (1949) (upholding a law which banned advertising trucks, but did not ban advertisements on the side of delivery vehicles because legislature could point to “some reasonable differentiation fairly related to the object of the regulation.”).
82 Whalen, 429 U.S. at 602. The Court states that in the course of creating, maintaining, and using the database, a variety of people will gain access to the information it contains. But it finds that these disclosures are not “meaningfully distinguishable from a host of other unpleasant invasions of privacy that are associated with many facets of health care,” and therefore are not actionable. Id.
83 Id. at 606.
84 Id. at 608-09.
85 Id. at 608.
The final case in the trilogy is *Nixon v. Administrator of General Services.* Given the unique and momentous factual circumstances of this case, any attempt to draw broad concepts from the Court's opinion must proceed cautiously. However, because several lower courts treat this case as an important gloss on *Paul* and *Whalen,* an analysis of *Nixon* is warranted. At issue in *Nixon* was the validity of the 1974 Presidential Recordings and Preservation Act (PRP Act), which directed the Administrator of General Services to promulgate rules governing the archiving and the public availability of materials generated by former President Richard Nixon. The materials included forty-two million pages of documents and over eight hundred tape recordings of conversations. In order to fulfill the goals of the PRP Act, archivists had to process and screen the materials and then return "those that [were] personal and private in nature" to Nixon. Nixon attacked the validity of the Act under a number of theories, one of which was that the Act violated his right to privacy.

The Supreme Court struck down Nixon's privacy claim, though two of the Justices who joined other portions of the majority opinion did not join the privacy section. The Court again acknowledged that "[o]ne element of privacy has been characterized as 'the individual interest in avoiding disclosure of personal matters.'" However, the Court found that Nixon's privacy interest had to be balanced against the public's interest in the archiving of Nixon's official documents. The Court also compared the PRP Act to the New York statute in *Whalen* and found that like the New York statute, the PRP Act contained numerous safeguards to prevent the disclosure of private information. Finally, the Court pointed out that Nixon only claimed that a small fraction of the total documents qualified as personal, while the vast majority related to the conduct and business of the

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87 *Id.* at 435.
88 *Id.* at 430.
89 *Id.* at 429.
90 *Id.* at 455.
91 *Nixon,* 433 U.S. 425 (1977). The Justices who joined the majority were Justice Brennan (who authored the opinion), Justice Stewart, Justice Marshall, Justice Stevens, and Justice White. Justice Powell and Justice Blackmun joined the court's opinion for some sections, but not for its discussion of privacy. Chief Justice Burger and Justice Rehnquist dissented. *Id.*
92 *Nixon,* 433 U.S. at 457 (citing *Whalen v. Roe,* 429 U.S. 589, 599 (1977)).
93 *Nixon,* 433 U.S. at 458.
94 *Id.* at 458-59.
Presidency. The combination of all of these factors – the public’s interest in the documents, the procedural safeguards protecting Nixon’s privacy, and the relatively small number of documents in question – outweighed any privacy interest that the PRP Act might violate. Thus, while Nixon is the Supreme Court’s clearest acceptance of a right to informational privacy under a balancing of interests approach, the Court nevertheless found that Nixon’s privacy claim was “without merit.”

Interestingly, Justice Rehnquist, who strongly opposed a right to informational privacy in Paul, wrote a vehement dissent in Nixon. While the main thrust of Justice Rehnquist’s dissent was an attack on the majority’s failure to uphold the constitutional separation of powers between the legislative and executive branch, he devoted a lengthy footnote to the issue of privacy. He noted that, “[t]he concept of ‘privacy’ can be a coat of many colors, and quite differing kinds of rights to ‘privacy’ had been recognized in the law.” In this case, he concluded that the PRP Act violated a right to privacy created by the President’s executive privilege. In a way, this was a complete reversal of the majority’s view on which materials the PRP Act can regulate. Under the majority approach, the PRP Act was unassailable insofar as it commanded screening and disclosure of documents that were created in the course of Nixon’s actions as President. The majority found that only a small fraction of the documents that contained personal, non-presidential matters raised any privacy concerns. Justice Rehnquist, on the other hand, focused on the privacy right created by executive privilege and the separation of powers. Under this approach, the PRP Act violated Nixon’s privacy rights when it regulated materials generated by Nixon acting as President, but protection of materials generated by Nixon in his personal capacity would be less certain.

In this trilogy of cases – Paul, Whalen, and Nixon – the Supreme Court takes three different approaches to the possibility of a right to informational privacy. Paul appears to reject the possibility outright

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95 Id. at 459.
96 Id. at 465
97 Id.
98 Nixon, 433 U.S. at 545-61.
99 Id. at 545.
100 Id. at 445 n.1.
102 See id. at 459.
103 Id. at 428.
104 Id. at 545.
by limiting the right to privacy to activities relating to family matters.\(^{105}\) *Whalen* seems to back away from *Paul* and suggests that such a right exists.\(^{106}\) However, *Whalen* holds that when the government gathers information, as opposed to disseminating it, the right is not violated.\(^{107}\) Finally, *Nixon* holds that even the limited amount of information disclosure involved when a government gathers or screens information can implicate privacy interests.\(^{108}\) *Nixon* takes a balancing of interests approach to informational privacy rights and weighs the extent of the harms to the individual against the public’s interest in the information.\(^{109}\) The challenge, therefore, is to determine whether these three holdings can be woven together into a cohesive doctrine, or whether at least one of them must be deemed a mistake or an anomaly.

III. PRIVACY AS A COAT OF MANY COLORS: VARIOUS UNDERSTANDINGS OF THE TRILOGY

Since deciding *Paul*, *Whalen*, and *Nixon*, the Supreme Court has never discussed them together in a subsequent decision and has left the development of the right to informational privacy up to the lower federal courts.\(^{110}\) In response, the lower courts employ several different strategies to reconcile the three opinions. One strain of subsequent lower court opinions embraces and builds on *Nixon*’s balancing of interests approach. A central decision in this line of cases is *United States v. Westinghouse Electric Corp*.\(^{111}\) In *Westinghouse*, an employer challenged an investigation by the National Institute for Occupational Safety and Health (NIOSH) into the medical records of its employees.\(^{112}\) The Third Circuit Court of Appeals held that a right to informational privacy does exist under the Constitution, but that the employees’ privacy interests were not violated by NIOSH’s investigation.\(^{113}\) *Westinghouse* reached this conclusion by creating a slightly more detailed version of *Nixon*’s balancing test.\(^{114}\)

\(^{105}\) *Paul*, 424 U.S. at 713.

\(^{106}\) *Whalen*, 429 U.S. at 599-600.

\(^{107}\) *Id*. at 606.

\(^{108}\) *Nixon*, 433 U.S. at 463.

\(^{109}\) *Id*. at 465.

\(^{110}\) The discussion in this part does not attempt to include all federal court decisions that have construed *Paul*, *Whalen*, and *Roe*, rather, it presents several cases that represent the range of arguments federal courts have made.

\(^{111}\) 638 F.2d 570 (3d Cir. 1980).

\(^{112}\) *Id*. at 572-73.

\(^{113}\) *Id*. at 581.

\(^{114}\) *Id*. at 578.
Westinghouse did not engage in a very searching analysis of Supreme Court precedent to conclude that Whalen accepts a right to informational privacy and that the subject matter of medical records was “well within the ambit of materials entitled to privacy protection.”\textsuperscript{115} The Westinghouse court read Paul to hold that the right to privacy was limited to matters concerning “marriage, procreation, contraception, family relationships, and child rearing and education” where the government sought to restrict citizen’s freedom to make decisions.\textsuperscript{116} However, Westinghouse did not see Paul as a limitation on the right to informational privacy because it viewed Paul as limited to restrictions of activity.\textsuperscript{117} In addition, Westinghouse did not explicitly address the distinction Whalen drew between information gathering and information dissemination, and instead treated both as governmental intrusions on the right to informational privacy.\textsuperscript{118} Ultimately, Westinghouse created a multi-factor test to determine whether NIOSH impermissibly violated the right to informational privacy.\textsuperscript{119} The factors include: the type of information that is being gathered; the harm that would be caused by a disclosure of the information; the adequacy of safeguards guarding against disclosure; and the public interest in the information.\textsuperscript{120} Westinghouse thereby glossed over a number of the tensions and problems that Whalen and Paul present and adopted a balancing approach not unlike the one used in Nixon.\textsuperscript{121}

Another line of lower court cases took the position that Whalen and Nixon overruled or sharply limited Paul. For example, the Tenth Circuit Court of Appeals in Slayton v. Willingham held that a lower court erred in relying on Paul to dismiss the plaintiff’s suit against several police officers who disclosed photographs “of a highly sensitive, personal, and private nature.”\textsuperscript{122} Slayton recognized that Paul sought to preclude actions by citizens against public officials who disclose embarrassing, private information. But Slayton decided that

\textsuperscript{115} Id. at 577.
\textsuperscript{116} Id.
\textsuperscript{117} Westinghouse, 638 F.2d at 577.
\textsuperscript{118} Id. at 578.
\textsuperscript{119} Id. at 578-99.
\textsuperscript{120} Id. at 578.
\textsuperscript{121} Other circuits have embraced the Westinghouse balancing approach, and have agreed with its holding that Whalen established a right to informational privacy. See e.g., Barry v. City of New York, 712 F.2d 1554, 1559 (2d Cir. 1983); National Treasury Employee’s Union v. United States Dept. of Treasury, 25 F.3d 237, 242 (5th Cir. 1994).
\textsuperscript{122} 726 F.2d 631, 635 (10th Cir. 1994).
Paul was no longer controlling because Whalen and Nixon had explicitly recognized a right to non-disclosure of personal matters. Slayton then remanded the case to the lower court to determine whether the plaintiff's interest in the photographs outweighed the public's need for their disclosure.

Some scholars argue for a sharp limitation of Paul in light of Whalen and Nixon. These commentators stress that the information published by the police officers in Paul was already publicly available because all arrest records are public under Kentucky law. Thus, Paul merely held that "the Constitution does not protect information on the public record against disclosure by the government." They argue that once the cloud of doubt created by Paul is lifted, Whalen and Nixon clearly establish a right to informational privacy.

Finally, at least one circuit has decided that in light of Paul there is no right to informational privacy. In J.P. v. DeSanti, the Sixth Circuit Court of Appeals dismissed the informational privacy claim asserted in a class action suit against a juvenile court for its practice of compiling and disclosing information about juvenile offenders. In the Juvenile Court of Cuyahoga, Ohio, probation officers compiled a social history of each juvenile offender and then made those histories available to the judge and a host of social service agencies. DeSanti found that neither Whalen nor Nixon created a right to informational privacy, especially when the information at issue was outside the traditional scope of the right to privacy. While the DeSanti court admitted that Whalen and Nixon may have opened the door to a right to informational privacy, it stressed that "absent a clear indication from the Supreme Court" it would not create a new constitutional

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124 Id. at 635-36.
123 Falby, supra note 79 at 222. See also Richard C. Turkington, The Legacy of the Warren and Brandeis Article: The Emerging Unencumbered Constitutional Right to Informational Privacy, 10 N. Ill. U. L. Rev. 479, 500 (1990) (arguing that "[t]he central feature of Paul that makes it not controlling or relevant to cases involving governmental invasions of informational privacy" is that the information at issue had appeared in a public record).
126 Id.
127 Id.
128 Falby, supra note 79 at 234.
129 653 F.2d 1080 (6th Cir. 1981).
130 Id. at 1081-82.
131 Id. at 1089.
right. Instead, DeSanti concluded that Paul applied to the facts before it and that "the Constitution does not encompass a general right to nondisclosure of private information." 135

The First Circuit approached the trilogy with similar caution in Borucki v. Ryan. 134 In Borucki, the plaintiff sued a district attorney for allegedly discussing with the press the contents of the plaintiff’s court ordered psychiatric report. 135 The plaintiff brought suit under section 1983 arguing that the district attorney’s disclosures had clearly violated the plaintiff’s right to privacy. 136 At the trial level, the plaintiff prevailed because the district court concluded that the psychiatric report was protected by “the confidentiality branch of the constitutional right of privacy” established by Whalen and Nixon. 137 The First Circuit Court of Appeals, however, determined that while Whalen suggested that a right to confidentiality exists, it did not clearly define the limits of that right. 138 Specifically, Whalen did not discuss whether the right covers information that is not part of the family realm protected by the decision-making branch of the right to privacy. 139 Borucki also pointed out that Paul limited the ability of plaintiffs to sue for information disclosures where the disclosures only caused reputational harm. Next, Borucki turned to Nixon and questioned whether the right to informational privacy acknowledged in Nixon was merely a subset of the Fourth Amendment’s prohibition on unreasonable searches and seizures. 140 In the end, this analysis of Paul, Whalen and Nixon led the First Circuit to conclude that the right to informational privacy is still on shaky ground. 141 The First Circuit dismissed the plaintiff’s section 1983 suit because the district attorney’s alleged disclosures did not violate any “clearly established constitutional right.” 142

In sum, there are currently at least three strategies that courts and commentators employ to deal with the tensions created by Paul.

132 Id.
133 Id. at 1090
134 827 F.2d 836 (1st Cir. 1987).
135 Id. at 837.
136 To prevail in a section 1983 action, the plaintiff must show that the government official violated a clearly establish constitutional right. See supra note 8 and accompanying text.
138 Borucki, 827 F.2d at 840-41.
139 Id. at 841-42
140 Id. at 844
141 Id. at 844-45.
142 Id. at 849.
Whalen, and Nixon. First, some courts have extracted general statements from the three cases and established their own versions of a multi-factor balancing test.\(^{143}\) These courts generally do not discuss or acknowledge any limits that Paul might place on their approach.

Second, some courts decide that Whalen and Nixon cabin Paul's applicability to the right to informational privacy. This second group generally also applies a balancing of harms test to the information disclosure at issue. However, because the Supreme Court has not in any way sought to limit Paul, and continues to cite its admonition against turning the Fourteenth Amendment into a “font of tort law,”\(^{144}\) this second approach too readily dismisses Paul's message. Neither of the balancing approaches makes adequate allowance for the sharp limitation on section 1983 suits Paul suggests.

Finally, some courts take an approach that gives Paul considerably more weight. These lower federal courts are uncertain as to whether and to what extent Whalen and Nixon establish a new branch of the right to privacy. While this third approach gives Paul its due deference, its uncertainty results in little clarity as to when the Constitution permits the government to disclose personal information. After Borucki, for example, it is unclear whether the government in the First Circuit can disclose the names of women who have received abortions. Borucki found that Paul allowed some types of disclosures, but did not determine whether the right to informational privacy might prohibit disclosures relating to one of the more traditional realms of privacy. While the third approach more thoroughly exposes the limitations that the Supreme Court has placed on the right to informational privacy, it does not give any clear guidelines as to when such a right could prohibit government disclosures. In the end, none of the approaches that the lower federal courts have taken is entirely satisfying.

### IV. A New Understanding of the Right to Informational Privacy

An effective analysis of these three cases must respect all three decisions of the Supreme Court and should offer some guidelines as to what information the Constitution does and does not protect. A good reconciliation also must consider the conflicting issues that the three cases raise. First, is there a way in which the information disclosure in Paul is fundamentally different from the disclosures at

\(^{143}\) See Westinghouse, 638 F.2d at 578-99.

\(^{144}\) See infra notes 171-172 and accompanying text.
issue in *Whalen* and *Nixon*, such that *Paul* can be seen as motivated by
different concerns or as addressing a different kind of disclosure than
the other two cases? Second, if *Whalen* and *Nixon* do establish a right
to informational privacy, where in the Constitution is this right
grounded? Third, once a constitutional foundation is established,
what limiting principles are implied by this foundation?

A key difference between *Paul* and the other two cases is that in
*Paul*, public officials made the information disclosure, while in
*Whalen* and *Nixon*, the information disclosure resulted from
legislative action. In *Paul*, the Court assessed the actions of two
police chiefs who decided to assemble and disseminate the flyers
depicting shoplifters. In *Whalen* and *Nixon*, the Court had to
examine the constitutionality of laws that dictated the gathering,
screening, and possible disclosure of information. This difference
may explain why the Court concluded that it could address the
governmental action in *Whalen* and *Nixon*, while it decided that the
governmental action in *Paul* was not governed by the Constitution
and should be evaluated by a state court.

Reviewing legislation is somewhat more comfortably within the
realm of the federal court's competence than a tort action by one
individual against another. The Supreme Court always has the
competence "to say what the law is," to determine whether a
legislative act violates any of the limits set by the Constitution.
However, when a federal court rules on an infringement of one
individual's rights by another individual, there is a greater risk that
the federal court will tread on territory that traditionally belongs to
the state courts. Thus, the difference in the Supreme Court's attitude
toward the right to privacy in the latter two cases may be best
understood as based on a change in its sense of authority in the
context of legislative action.

Professor Fallon points out that the Supreme Court has a
tendency to shy away from ruling on the constitutionality of a
government official's actions under the Fourteenth Amendment.
According to Fallon, the Supreme Court tends not to exercise
jurisdiction over a federal claim against government officials when
the claim meets four conditions. First, the suit must involve conduct

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146 *Whalen*, 429 U.S. at 595-600; *Nixon*, 433 U.S. at 433-45.
147 *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).
149 Id. at 346-48.
which also gives rise to a state law claim.\textsuperscript{150} Second, the official’s conduct must be “random and unauthorized” by state law.\textsuperscript{151} Third, the claim must be for a violation of the Fourteenth Amendment in which no additional constitutional provision is implicated, so that there is no additional source of precedent that could provide the Court with standards to evaluate the official’s conduct.\textsuperscript{152} Fourth, the plaintiff must not be requesting prospective relief.\textsuperscript{153} Although the Supreme Court has never expressly announced such a four-factor test, a number of recent cases appear to have followed this approach.\textsuperscript{154}

In \textit{Paul}, Davis’s claim against the police officers meets all of the criteria outlined above. As his opinion stresses, Justice Rehnquist believed Davis could have resorted to state law to vindicate his rights against the police officers.\textsuperscript{155} Justice Rehnquist wrote that “respondent’s complaint would appear to state a classical claim for defamation actionable in the courts of virtually every State.”\textsuperscript{156} Further, the police officers were not acting pursuant to any laws or regulations that required them to distribute flyers about potential shoplifters.\textsuperscript{157} Finally, Davis’s federal claim was based solely on the Fourteenth Amendment; there was no other constitutional provision which could help the Supreme Court evaluate the official’s conduct.\textsuperscript{158} In addition, Davis did not ask the Court for prospective relief; rather, he asked for a retrospective damage award.\textsuperscript{159}

Although the Court’s reluctance to hear a tort claim against a public official is not unusual, its ultimate holding is particularly harsh. In the cases Fallon examined, he found that where a plaintiff’s case meets the four factors outlined above, the Supreme Court appears to abstain from hearing the plaintiff’s otherwise valid

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\textsuperscript{150} Id. at 346-47.
\textsuperscript{151} Id. at 347.
\textsuperscript{152} Id. at 347-48.
\textsuperscript{153} Id. at 348.
\textsuperscript{154} See, e.g., Collins v. City of Harker Heights, 503 U.S. 115 (1992) (finding that suit could not be brought under the Fourteenth Amendment’s Due Process Clause by a municipal employee who was killed on the job because the court had insufficient guideposts to make the decision and because state law governed the tort at issue); Parratt v. Taylor, 451 U.S. 527 (1981) (holding that plaintiff did not have a Fourteenth Amendment claim in part because state law provided an adequate remedy). See also Fallon, supra note 148 at 350-52.
\textsuperscript{156} Id. at 697.
\textsuperscript{157} Id. at 694-95.
\textsuperscript{158} Id. at 698.
\textsuperscript{159} Id. at 696.
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claim.\textsuperscript{160} Fallon’s paradigmatic example of the Court’s abstention approach is \textit{Parratt v. Taylor},\textsuperscript{161} wherein the Supreme Court appears to hold that federal courts should decline to hear a plaintiff’s federal due process claim against a state official, unless he can show that the state law’s remedial scheme is inadequate.\textsuperscript{162} In contrast, \textit{Paul} determined that Davis did not have a constitutional claim at all and thereby created a permanent, inflexible bar to access to federal courts for cases solely alleging reputational harm by a government official.\textsuperscript{163} Justice Rehnquist’s determination that Davis’s claim belonged in a state court had an extra bite in \textit{Paul}. In \textit{Parratt}, the Court left open the possibility that a plaintiff could still air his complaint in federal court if he could show the state court was an inadequate forum.\textsuperscript{164} In \textit{Paul}, the Court shut the door to claims of reputational harm completely, even absent an opportunity for the plaintiff to argue that state law and the state courts cannot give him the relief he seeks.\textsuperscript{165}

There are at least three reasons why the Supreme Court may be reluctant to allow Fourteenth Amendment claims against public officials.\textsuperscript{166} First, the Supreme Court could be concerned that allowing a federal suit whenever a person’s liberty or property has been harmed will flood the federal court dockets with too many cases. Second, when a suit is based solely on the Fourteenth Amendment’s general protection of life and liberty, a federal court is left with few guideposts by which it can determine the contours of the right at issue. Without some additional guidance from precedent surrounding another constitutional provision, a federal court may have to engage in extensive creation of federal common law – a practice with which federal courts are not comfortable.\textsuperscript{167} Finally, the Supreme Court could be worried about giving the federal courts more power than the Constitution’s grant of jurisdiction to the federal courts envisioned.

Justice Rehnquist’s arguments in \textit{Paul} echo all three of these

\textsuperscript{160} See \textit{supra} note 148 at 350-52.
\textsuperscript{161} 451 U.S. 527 (1981).
\textsuperscript{162} See \textit{supra} note 148 at 312.
\textsuperscript{163} \textit{Paul}, 424 U.S. at 701.
\textsuperscript{165} \textit{Paul}, 424 U.S. at 711.
\textsuperscript{166} Id. at 348-50.
\textsuperscript{167} See, e.g., Bowers v. Hardwick, 478 U.S. 186, 194 (1986) (finding that “[the Supreme Court] is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution”).
concerns. At the outset of the opinion, Justice Rehnquist appeared to chide Davis for pursuing his claim in federal rather than state court.\textsuperscript{168} Next, \textit{Paul} warned that actions like this one threaten to turn the Due Process Clause into a “font of tort law,” which will fill the federal courts with claims that lack any genuine connection to the Constitution.\textsuperscript{169} The worry that the Constitution’s framework does not offer adequate standards by which to decide a claim like Davis’s also explains why \textit{Paul} decided that it will only recognize informational privacy claims when the information disclosure harms a recognized property or liberty right in addition to causing reputational harm.\textsuperscript{170} For example, if Davis had also alleged that the officer’s flyers made it impossible for him to get unbiased jurors in his trial for shoplifting, the Supreme Court would have had a body of law under the Fifth Amendment by which to evaluate the harm and fashion a remedy. The reputational harm Davis claimed was, by itself, too remote from the rights and liberties expressly included in the Constitution, and too difficult for the Supreme Court to gauge and to remedy. Further, the \textit{Paul} opinion is heavily laden with concerns of federalism, noting that allowing a broad range of suits to come into federal court under the Fourteenth Amendment would upset the traditional balance between state and federal courts.\textsuperscript{171} In the absence of anything to support Davis’s claim other than a broad reading of the Fourteenth Amendment, the Court in \textit{Paul} seems to feel compelled to reject Davis’s section 1983 suit.

Recent Supreme Court decisions demonstrate that \textit{Paul}’s reasoning and motivations still drive Supreme Court decisions. Under the leadership of Chief Justice Rehnquist, the Supreme Court frequently recites \textit{Paul}’s admonition that the Fourteenth Amendment should not serve as a “font of tort law.”\textsuperscript{172} In 1999, the Court in \textit{Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank} struck down the federal Patent Remedy Act, concluding that the Fourteenth Amendment could not support private suits against state agencies for patent infringement.\textsuperscript{173} \textit{Florida Prepaid} cited \textit{Paul} to support its argument that the Fourteenth Amendment’s ability to govern intrusions on property and liberty is limited and does not

\textsuperscript{168} See \textit{Paul}, 424 U.S. at 697

\textsuperscript{169} See id. at 701.

\textsuperscript{170} Id. at 711-12.

\textsuperscript{171} Id. at 700.


\textsuperscript{173} 527 U.S. 627 (1999).
swallow all of the rights traditionally dealt with by state tort law.\textsuperscript{174} Contrary to the opinions of those federal courts and commentators who construe \textit{Paul} as a very limited holding, the current Supreme Court treats \textit{Paul}'s broader principles as alive and well.\textsuperscript{175}

If \textit{Paul} is a part of the line of cases disfavoring Fourteenth Amendment claims against government officials, this also explains the dramatic shift in the Court's attitude toward informational privacy claims in \textit{Whalen} and \textit{Nixon}. In cases in which the Supreme Court's task is to evaluate legislative action, the Court becomes much more hospitable to the possibility of a right to informational privacy. The Supreme Court confirmed that it believes its task to be quite different in evaluating legislative action in both \textit{Whalen} and \textit{Nixon}. The Court did not discuss \textit{Paul} in either opinion and only cited \textit{Paul} once in passing in \textit{Whalen}.\textsuperscript{176} In these cases, that is, in the context of evaluating legislation, the Court did not risk creating a "font of tort law," or duplicating existing state law actions.

Perhaps the clearest indication that the Supreme Court tailored its holdings in \textit{Nixon} and \textit{Whalen} to apply specifically to legislative action is the methodology the Court used to reach its conclusions.\textsuperscript{177} The balancing approach employed in \textit{Nixon} is more appropriate to judge legislative actions than actions by individuals. When the Supreme Court sets guidelines for how individual government actors must behave to comply with the Constitution, it often prefers to set rigid rules that individuals can understand and follow. A good example of this is \textit{Miranda v. Arizona}, which sets out specific language that law enforcement officers must say to assure the validity of a criminal's confession.\textsuperscript{178} The rule that a section 1983 action can only be brought for violations of "clearly established" constitutional rights also demonstrates the federal courts' desire to set firm, easily recognizable boundaries for individual actors.\textsuperscript{179} Legislatures do not need this kind of protection because they can accommodate a hazy standard more easily, and because legislators are not individually

\textsuperscript{174} \textit{Id.} at 674.

\textsuperscript{175} \textit{Id.}

\textsuperscript{176} \textit{Whalen} cites \textit{Paul} in a footnote for the proposition that the right to privacy protects "matters relating to marriage, procreation, contraception, family relationships, and child rearing and education." \textit{Whalen v. Roe}, 429 U.S. 589, 599 n.26 (1977).

\textsuperscript{177} \textit{Nixon}, 433 U.S. at 456-60; \textit{Whalen}, 429 U.S. at 602-03.

\textsuperscript{178} 384 U.S. 436 (1966).

\textsuperscript{179} \textit{Harlow v. Fitzgerald}, 457 U.S. 800, 818 (1982) (holding that government officials are not liable for actions they undertake in their official capacity unless they "violate clearly established statutory or constitutional rights").
liable if their laws violate the Constitution. Therefore the Supreme Court can more comfortably apply a vague, less predictable balancing approach in *Whalen* and *Nixon*.

If the difference between actions by government officials and actions by legislatures explains the shift from *Paul* to *Whalen* and *Nixon*, then the extent of the right to informational privacy depends on who or what caused the disclosure. The Supreme Court in *Whalen* and *Nixon* recognized that public disclosures instigated by legislative action might violate an individual's right to privacy at times.\(^\text{180}\) However, when the disclosure is made by a government official without legislative prerogative, it is not likely to be actionable under a constitutional right to informational privacy. To prevail in a suit against a government official, *Paul* mandates that the plaintiff show more than just harm to reputation; there must be some additional harm to the plaintiff's liberty or property for the claim to stand.\(^\text{181}\) In other words, the right to informational privacy exists, but it is more applicable to legislative action than actions by individual government actors.

Given the Supreme Court's wariness toward Fourteenth Amendment claims against public officials, it seems curious that the lower federal courts have not approached right to informational privacy claims against federal officials with similar skepticism. As discussed above, a majority of the lower federal courts adopt some version of a balancing of interests test when confronted by an informational privacy claim, regardless of whether the claim is asserted against a statute or against individual officials. The balancing approach is more subjective than *Paul's* narrow, rigid approach, so it is more difficult for public officials to assess the constitutionality of their conduct. As a result, they are more likely to be held to have violated the Constitution. Thus, there must be some other policy goals driving that lower courts conclude outweigh the preference for a more clear-cut and hands-off rule.

There are three possible explanations for the lower courts' preference for a broader, more subjective approach to evaluating the actions of public officials. First, the federal courts may want to make the right to informational privacy more readily available than a strict reading of *Paul* would allow. Several lower courts hold that information on a variety of matters is so sensitive that the Constitution ought to limit all types government disclosures.\(^\text{182}\) A

\(^{180}\) See *Nixon*, 433 U.S. at 465; *Whalen*, 429 U.S. at 606.

\(^{181}\) *Paul*, 424 U.S. at 711-12.

\(^{182}\) See, e.g., United States v. Westinghouse Elec. Corp., 638 F.2d 570, 577 (3d Cir.)
more faithful adherence to Paul also could foreclose federal court sanctions in a variety of cases where the plaintiff suffers severe reputational or emotional harm, and the lower federal courts may conclude that such a result is unjust. In other words, the federal courts may be acting out of a sense that some disclosure cases so offend our general notions of liberty that justice could not be served by a hands-off approach.

Second, lower courts may feel that the uncertainty inherent in a more vague and more subjective standard is desirable in this area. If government officials are uncertain as to when a disclosure could lead to the severe penalties possible in a section 1983 suit, they may become overly cautious and make fewer disclosures. The lower courts could be making a policy decision that disclosure of personal information can be harmful and undesirable even in the gray areas where it may not be illegal. Thus, the courts have chosen a rule that will encourage officials to err on the side of caution. The federal courts may be motivated by a preference for excessive protection of privacy and disfavor toward information disclosures and may reason that an uncertain standard achieves this desirable tilt.

Third, the federal courts may dislike Paul's approach because they distrust the state courts' ability to properly protect an individual's interest in keeping certain matters private. This distrust could come either from doubts that state courts will be able to evaluate state official's actions impartially, or from doubts about the ability of state law to punish all the information disclosures federal courts see as wrongful. In most instances, for example, the truthfulness of the information disclosed is a defense to a state law suit for defamation. The alternative state tort action of publication of private fact is not recognized by all states. Denying a plaintiff a federal right to an informational privacy claim against a public

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180 See Steven P. Crole, The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law, 62 U. Chi. L. Rev. 689 (1995) (questioning whether elected state judges can be as impartial and just as life tenured federal judges). See also Burt Neuborne, The Myth of Party, 90 Harv. L. Rev. 1105 (1977) (arguing that federal judges generally are better adjudicators because federal judgeships are better paid, more prestigious, and provide life tenure).


official might in some cases leave the plaintiff without a remedy for the harm. Federal courts may not want to force plaintiffs to take their chances in a potentially inadequate alternate forum.

Unfortunately, these policy choices are not for the lower federal courts to make where the Supreme Court has held otherwise. Paul suggests that the Supreme Court would prefer a more systematic rejection of informational privacy claims than the approach taken by several of the circuits. The lower courts’ balancing approach is unlikely to maintain the division of labor between the state and federal courts that Paul demands and risks eventually being overturned by the Supreme Court. If the lower courts are genuinely dissatisfied with Paul, they must, at a minimum, point to a specific basis for the informational right to privacy in the Constitution, especially when the only harm alleged by the plaintiff is reputational harm.

Now that this analysis has brought into focus the importance of who is alleged to have violated the informational right to privacy, the final twist is to determine what kinds of information the right protects. When Griswold first outlined the right to privacy, it held that the right to privacy is a dependent right. Under this approach, the Constitution only insists on privacy when it is necessary to the full exercise of other rights in the Bill of Rights. As Griswold stated, the right to privacy stems from the “penumbras” of the express rights and creates “zones of privacy” around those rights. In Roe v. Wade, the Supreme Court cut the right to privacy loose from the Bill of Rights and determined that privacy is not limited to acting as a partner to the enumerated rights. After Griswold and Roe, a citizen can bring a right to privacy claim against the government because the government’s actions intrude on either the citizen’s ability to exercise an enumerated right or on her ability to exercise a “fundamental” right which is “implicit in the concept of ordered liberty.” The coverage of the right to privacy, therefore, has expanded over time and the exact borders of the right are difficult to draw.

While Roe determined that the right to privacy is broader than the penumbras of the Bill of Rights, its decision to extend its zone of protection beyond the rights and activities enumerated in the Constitution is somewhat risky. If courts are free to find that the

185 See supra notes 26-29 and accompanying text
186 Griswold v. Connecticut, 381 U.S. 479, 484 (1965)
187 See supra note 27 and accompanying text.
Fourteenth Amendment covers all "fundamental" rights, they may make the same mistake that the Supreme Court infamously made in \textit{Lochner v. New York}. 190 In \textit{Lochner}, the Court found that the Fourteenth Amendment's liberty protections created limits on the government's ability to restrict unenumerated rights such as the right to contract freely. 191 \textit{Lochner}, however, was soon overturned and became an example of how not to engage in Fourteenth Amendment interpretation. 192 Since \textit{Lochner}, the Supreme Court has rightfully been cautious about creating new fundamental rights, especially where those rights are not grounded in the text of the Constitution. Justice Rehnquist's decision in \textit{Paul} reflects this reluctance, in that he declined to find that the Fourteenth Amendment protected Davis's interest in his reputation. 193 Further, although \textit{Roe} opened the door to an expansion of the right to privacy, to date, the Supreme Court has never applied the right outside the realm of childbearing, child rearing, and similar family decisions. 194 Thus, the right to privacy remains strongest when it is enabling an enumerated right. Applications of the right outside this sphere are difficult to achieve.

Turning more specifically to the right to informational privacy, it is important to note that in most cases the right to informational privacy is indistinguishable from the more established branch of the right to privacy that protects an individual’s right to make choices. As discussed in the previous section, several appellate courts divide the right to privacy into two branches: a right to privacy in decision-making and a right to informational privacy. 195 However, these two branches are not as distinct as the courts suggest, and their intertwining makes it difficult for the courts to treat them separately. The facts of \textit{Whalen} are a good example of the overlap between the two branches. In \textit{Whalen}, the plaintiffs complained that the database discouraged people who might need Schedule II drugs from getting prescriptions out of fear that they would be stigmatized as "drug addicts." 196 The plaintiffs in \textit{Whalen} alleged that this was both an invasion of informational privacy and an unconstitutional restriction on their ability to make private choices about whether to pursue

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190 198 U.S. 45 (1905).
191 \textit{Id.} at 56.
192 \textit{Griswold}, 381 U.S. at 481-82. In \textit{Griswold}, the Supreme Court expressly declined to take a \textit{Lochner}-like approach to the right to privacy.
193 \textit{Paul}, 424 U.S. at 713.
194 \textit{See supra} note 43 and accompanying text.
\end{footnotesize}
treatment involving Schedule II drugs.\textsuperscript{187} Similarly, if the government reveals that a citizen is a potential shoplifter, this will affect her decision to go into stores or to wander around in a shopping mall. However, unlike the decision to have an abortion, neither the decision to go shopping nor the decision to take Schedule II drugs is currently constitutionally protected.

This connection between the two branches of the right to privacy is also evident in addressing the question of why certain information disclosures are deemed harmful. There may be some disclosures that are harmful because they cause severe embarrassment or humiliation. For example, if police officers distribute naked pictures of a woman whom they photographed in connection with an investigation, there is something inherently abhorrent about this disclosure.\textsuperscript{188} However, for many other kinds of disclosures, the real harm is their effect on a person’s ability to conduct personal aspects of his life. For example, if the IRS discloses that a certain taxpayer makes large financial contributions to the National Rifle Association (NRA), the citizen may find that his personal life is affected in a number of ways by this disclosure, although there is nothing inherently embarrassing or shocking about making financial contributions to the NRA. In this second type of disclosure, the harm arises more from the impacts on the citizen’s ability to make decisions or his ability to conduct his private life, which is jeopardized by the disclosure. Again, the interplay between the two branches of the right to privacy is apparent.

Because the line between invasions of informational privacy and invasions of privacy in decision-making is often difficult, if not impossible, to draw, courts should be very cautious about giving the former a greater scope than the latter. If courts expand the coverage of the right to informational privacy, they may concurrently expand the scope of the right to privacy in decision-making. As will be discussed below, \textit{Sterling} inadvertently and impermissibly expanded the right to privacy in decision-making when it allowed a claim for the disclosure of Wayman’s homosexuality. Because the Supreme Court has time and again stated that the right to privacy in decision-making generally only relates to “marriage, procreation,

\begin{footnotesize}
\textsuperscript{187} \textit{Whalen}, 429 U.S. at 600.

\textsuperscript{188} Sadly, these are the facts of an actual case. In \textit{York v. Story}, a woman successfully sued three police officers for distributing photographs of her in the nude. 324 F.2d 450 (9th Cir. 1963). The Ninth Circuit’s decision to allow suit under the Fourteenth Amendment for the officers’ actions is notable since it pre-dates \textit{Griswold}’s announcement of the right to privacy under the Fourteenth Amendment.
\end{footnotesize}
contraception, family relationships, and child rearing and education, a court stands on unstable ground when it expands the right to informational privacy beyond these limits.

Limiting the right to informational privacy to only protecting constitutional rights and the narrow additional realm of fundamental family rights may strengthen citizens' ability to bring a section 1983 suit against a government official for information disclosures. Under the Paul approach, if an informational privacy claim is based solely on the Fourteenth Amendment's general protection of liberty, it is likely to be dismissed. However, if the right to informational privacy remains linked to other rights guaranteed by the Constitution or is deemed to be "fundamental," the Supreme Court ought to be more willing to allow such claims to go forward.

For example, under this understanding of the right to privacy, if a state agency published the name of a citizen it knew to be a Ku Klux Klan (KKK) member in a newspaper, this should be grounds for a claim that the agency has violated the KKK member's right to informational privacy. Through the information disclosure, the agency may have harmed the KKK member's ability to associate, which is protected by the First Amendment. When a state agency publishes the names of citizens who owe more than $10,000 in child support, however, there should be no right to informational privacy claim available to the citizens whose failure to pay child support is exposed. While the danger of reputational harm and of limitation on activities is high in both cases, under Paul's logic, only the disclosure which threatens citizen's ability to exercise a constitutional or fundamental liberty deserves a remedy under the Fourteenth Amendment.

Addressing the right to informational privacy as an auxiliary to other recognized rights assuages several of the Supreme Court's concerns about a broad reading of the Fourteenth Amendment. A dependent understanding of the right will encourage courts to use existing precedents surrounding the primary right being protected to guide their decisions. They will not be left without a constitutional framework to sculpt their decisions. Second, a dependent reading of the right to informational privacy will limit the number of suits in

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201 Id. at 712.
which the federal courts could displace the traditional state court role of overseeing libel or defamation claims. As a result, a narrow, dependent informational privacy right will be more likely to find a sympathetic and well-equipped federal forum than a broader, more independent right.

Thus, after Paul, Whalen, and Nixon, right to informational privacy claims should be governed by two central inquiries. First, the court should look to whether the legislature or an individual government official caused the potentially infringing information disclosure. Second, the court should analyze whether the information disclosure impairs one of the other rights guaranteed by the Constitution. These two inquiries create four possible scenarios warranting different degrees of constitutional protection.

The first and most protected scenario is legislation disclosing information that impairs a constitutionally guaranteed right. For example, in Nixon, former President Nixon argued that the government violated his right to privacy in connection with his Fourth Amendment right to freedom from improper searches and seizures. However, even disclosures that fall into this most protected category may be justified when the public’s need for the information is great. The tape recordings of former President Nixon’s conversations are a prime example of information that should be disclosed to meet such an overriding public need.

The second scenario is that in which a government official discloses information related to the exercise of another constitutional right. Such a scenario should also receive considerable constitutional protection because Paul’s concerns would no longer apply. While none of the cases in the Supreme Court’s trilogy address this scenario, an information disclosure which impairs a citizen’s right to exercise another fundamental or constitutional right has an adequate federal legal framework for a federal court to decide the claim. A suit against a public official for impairing the exercise of a constitutional right could rely on the same body of precedent as a suit fitting the first scenario.

Under this two-pronged analysis, the remaining two scenarios receive little or no Constitutional protection. The least protected scenario is disclosure by a government official of information that does not impair a fundamental or constitutional right. For example, a court ought to abstain from addressing claims where a plaintiff sues a state hospital worker for disclosing the plaintiff’s psychiatric profile.

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Nixon, 433 U.S. at 461.
to a newspaper reporter. Because the Supreme Court has not recognized any fundamental right to receive or engage in psychiatric treatment, the right to informational privacy should not protect this kind of information. Instead, the plaintiff should file a tort claim against the hospital worker in state court. However, if the plaintiff can make a strong showing that there is no state law remedy for the harm she suffered, Paul may leave open the possibility that the federal court could hear her claim, in that the availability of a defamation claim to the plaintiff was a driving force in Paul. Where the state offers no alternate state law claim, the federal court might be able to offer an alternate venue; however, this issue is unresolved. Arguably, the Supreme Court’s fear of deciding a claim in the absence of an adequate legal framework would be even greater when neither constitutional law nor state law offers any guidance on how a remedy for the alleged harm should be formulated. As will be discussed in more detail below, there may be some information disclosures for which neither federal nor state courts should offer a remedy.

Finally, when a legislature passes an information disclosure law and the information at issue is not in the realm of a constitutionally protected right, Whalen holds that the usual “rational basis” test applies. For example, if a state legislature passes a law requiring all alcoholics to place a red sticker on their driver’s license, the court would have to decide whether the state had a rational basis for this law. Under Minnesota v. Clover Leaf Creamery, the state legislature would have to show that it had a legitimate policy objective in requiring the stickers, and that the legislature reasonably expected the law to achieve such a policy. A rational legislative act satisfies the Fourteenth Amendment’s due process requirements when the information disclosure caused by the act does not impair any constitutional or fundamental rights. Thus, inquiries into “who” and “what” are important elements of every federal court analysis of a potential violation of the right to informational privacy.

V. THE DESIRABILITY OF A NARROW CONSTITUTIONAL RIGHT TO INFORMATIONAL PRIVACY

If the framework suggested in Part IV is a proper understanding of the Supreme Court’s approach to the right to informational privacy, what are the practical consequences of this analysis? As

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203 See supra note 81 and accompanying text.
alleged to above, one of the most striking implications of the approach outlined in this article is that federal law will not remedy a number of information disclosures that citizens may find highly offensive and intrusive. For example, if the police distribute naked pictures of a rape victim, the woman may not be able to bring a suit for unconstitutional information disclosure. So long as the release of the pictures does not impair any of her other constitutional or fundamental rights, the police officer’s actions would not trigger an informational privacy claim. Instead, the woman would have to file a claim against the police officers in state court under a state tort law theory. A more constrained right to informational privacy would place more responsibility on state courts and state laws to remedy improper disclosures of personal information.265

If state courts are central to the protection of private information, there will be some unevenness across the country as to what types of information disclosure are impermissible. Yet, two common law tort actions, which prohibit information disclosures are available under most states’ laws: defamation actions and publication of private fact actions. While an in-depth analysis is beyond the scope of this article, a cursory sketch of these two tort claims demonstrates the extent to which they may or may not serve as a way to protect private information.

A defamation claim is generally available where a defendant makes a false statement to a third party which injures the plaintiff’s reputation.266 The Restatement (Second) of Torts defines a defamatory statement as “tend[ing] so to harm the reputation of another so as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.”267 Although disclosures of truthful information often are more harmful and more invasive than false disclosures, a party can defend against a defamation claim if the information disclosed to a third party was truthful.268 In addition, the Supreme Court has held that some defamation claims are barred by the First Amendment. In New York Times v. Sullivan, the Court held that under certain circumstances a claim for defamation could only succeed when the defendant acted

265 Under the Federal Employees Liability Reform and Tort compensation Act of 1988, Pub. L. N. 100-694, 102 Stat. 4563 (1988), amended by 28 U.S.C. § 2679(d), suits against federal officers under state law are to be removed to federal court. However, state law will still govern the outcome of the case.
266 See BLACK'S LAW DICTIONARY 173 (Pocket Edition 1996).
267 RESTATEMENT (SECOND) OF TORTS § 559 (1977)
268 See id. at § 581A.
with "actual malice." Thus, a defamation claim would not remedy the harm caused by a variety of possible governmental disclosures.

Alternatively, a plaintiff could pursue a publication of private fact claim against a public official who discloses truthful personal information. According to the Restatement (Second) of Torts, a plaintiff can file such a claim if the disclosure is "highly offensive to a reasonable person" and "not of legitimate concern to the public." The truthfulness of the disclosure is not a defense under the publication of private fact claim. However, this claim carries a different set of limitations. First, it only reaches disclosures of "highly offensive" matters. Disclosures regarding an individual's behavior, tastes, and values rarely would qualify as highly offensive information. Second, the disclosure must be to a fairly wide audience; disclosure to one other person or a small group of people generally will not support a publication of private fact claim. Unfortunately, disclosures of private information can be quite harmful even when they are to just one person such as a parent, spouse, or employer. Finally, only thirty-six states recognize the tort of publication of private facts. For all these reasons, the publication of private fact claim will leave some harmful government disclosures unremedied.

The gaps in these two information disclosure torts are apparent when applied to one of the examples addressed herein. If police officers tell a rape victim to remove her clothes, take pictures of her, and then show the photographs around the police station, it is possible that neither of the two state law claims will apply to the police officer's actions. The officers could defend against a defamation claim because the content of their disclosure was truthful, and it may not have affected the woman's reputation in a sufficiently defamatory way. A publication of private fact claim might fail because the disclosure was only to a small group of fellow police officers. Even though the woman may feel tremendous humiliation and outrage as a result of the disclosure, neither of the two central state law claims relating to information disclosures would provide a remedy.

A final state law alternative might be for a citizen to file a claim

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210 RESTATEMENT (SECOND) OF TORTS § 652D.
211 See Trubow, supra note 185 at 537 (1990).
212 Id.
for intentional infliction of emotional distress. This tort claim is relatively new, and many judges express reluctance as to such a claim.\textsuperscript{214} While the precise formulation of the tort varies between states, plaintiffs generally must show that the defendant’s information disclosure was extreme and outrageous, and that it was made intentionally or recklessly.\textsuperscript{215} This standard is not easy to meet; however, police officers passing around pictures of a naked rape victim may amount to such “outrageous” conduct so as to support an intentional infliction of emotional distress claim. As this high harm requirement and the limitations on defamation and publication of private fact torts demonstrate, the states’ common law generally does not welcome suits for non-physical harms such as reputational or emotional harm.

Despite the problems in state law doctrine, the Fourteenth Amendment is an even more problematic and less desirable way to protect personal information. First, a more expansive understanding of the right to informational privacy under the Fourteenth Amendment runs counter to the Constitution’s overall structure and policy choices. Nowhere does the text of the Constitution expressly discuss the right to privacy. Instead, the Constitution establishes a preference for expression and openness. The First Amendment and its case law stress the importance of minimizing the barriers to the free flow of information. Justice Brandeis described the essential role that free speech and the free flow of information play in the constitutional structure as follows:

[America’s founders] 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; that without free speech and assembly discussion would be futile; . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government . . . Moreover, even imminent danger cannot justify resort to prohibition of these functions essential to effective democracy, unless the evil apprehended is relatively serious . . . The fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression. There must be the probability of serious injury to the state.\textsuperscript{216}

In other words, the system tolerates a certain degree of harm to

\textsuperscript{214} Id. at 324; FRANKLIN & RABIN, supra note 188 at 820.
\textsuperscript{216} Whitney v. California, 274 U.S. 357, 375-78 (1927) (Brandeis, J., concurring).
encourage the dissemination and discussion of information. Therefore, the First Amendment frequently protects defendants who disclose confidential or harmful matters.217 A broad constitutional right to informational privacy would squarely oppose these First Amendment goals.

Allowing citizens to sue for the disclosure of information in some instances could lend an air of shame to matters that should not be viewed as embarrassing or wrongful. For example, society should never view a person’s race, gender, or sexual orientation as disgraceful or shameful. However, if the law permits a plaintiff to sue when this kind of truthful information is disclosed, implicitly the law accepts that such information is “harmful.” The law should thus be cautious about the lessons it teaches society, and should only permit disclosure claims where the information at issue is appropriately considered an embarrassment to the plaintiff.

Also counseling against a broad, flexible constitutional right to informational privacy is the desirability of protecting public officials from suit. Most government officials rarely have the luxury of receiving legal advice in the course of making decisions. A broad right with unclear limits presents a real danger to public officials because they may become overly cautious or confused in their efforts to meet the law’s requirements. Police officers, for example, often collect all sorts of private information about criminal suspects, and they face serious burdens discharging their responsibilities if they cannot determine when disclosures are appropriate. They may wish to use the information they have gathered when questioning witnesses; they may include it in reports they file; and they may need to divulge the information to district attorneys or to juries. Although qualified immunity may protect them some of the time,218 their immunity is not absolute. Further, a police officer can only assert his immunity after the plaintiff files a claim. The officer may have to spend a significant amount of time and money on an attorney before the judge decides that immunity bars a given suit. These burdens could discourage public officials from aggressively pursuing their

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217 See, e.g., Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978) (Virginia statute prohibiting disclosure of information was unconstitutional as applied to the defendant’s disclosure regarding an investigation of a state court judge); Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977) (holding that the press may photograph and name a juvenile accused of second degree murder); Butterworth v. Smith, 494 U.S. 624 (1990) (invalidating a Florida law which prohibited grand jury witnesses from ever publicly disclosing their own testimony).

218 See supra notes 7-8 and accompanying text regarding government officials’ immunity.
duties and may deter some from becoming public officials at all. A broad, uncertain right carries a significant social cost because it dampens the vigor with which government officials will pursue their duties.

Finally, because society's access to and dependence on a vast array of information has changed dramatically in the last few decades, this area is better suited to regulation by legislation than by a constitutional doctrine. The difficult decisions in navigating between openness and privacy in disclosure should not be decided by nine individuals on the Supreme Court. These issues should be debated and decided in a more public and more democratic forum. Professor Glendon has made a similar critique regarding the American approach to abortion, which is another controversial area under the right to privacy. She points out that because the laws governing abortion are chiefly shaped by Supreme Court decisions, America may have lost the opportunity to deal creatively and holistically with the disputes surrounding abortion.\footnote{Mary Ann Glendon, Abortion and Divorce in Western Law, 24-25 (Harvard University Press 1987).} She writes:

[In the United States, our] basic approach to, and our regulation of, abortion was established by the United States Supreme Court in a series of cases that rendered the abortion legislation of all states wholly or partly unconstitutional and severely limited the scope of future legislation... Nowhere have the courts gone so far as has the United States Supreme Court in precluding further statutory development.

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[Argument]ments that the Supreme Court should have left the abortion questions to the state legislatures seem to rest ultimately on some notion that such deference would have been desirable, because the legislative process, however imperfect, is a major way in which we as a society try to imagine the right way to live. The Supreme Court's abortion decisions have thus been doubly disappointing to the majority of Americans. Not only did the court get the story wrong, but it foreclosed the possibility of working out a better story.\footnote{Id. at 25, 62.}

Similarly, the complexities surrounding informational privacy are more appropriately resolved by legislatures. Notions of privacy and the availability of information have undergone dramatic changes in the past few decades. As a result, society must make decisions about privacy in matters that will rarely fit comfortably with the right
to privacy’s fundamental rights analysis, which focuses chiefly on centuries-old societal beliefs. For example, how much privacy protection should be afforded to DNA sequences? When can a police officer disclose genetic information?

Questions like these should be answered by forward-looking legislators, not by backward-looking judges. Legislatures are better equipped to deal creatively and specifically with these new and complex questions in the area of informational privacy. If errors are made in legislation, such laws can be repealed or revised. In contrast, constitutional law seeks to set permanent boundaries and limits, which often do not leave adequate flexibility and can be undesirable in an area where circumstances are in flux. Therefore, the Constitution’s role in outlining citizens’ right to informational privacy should be narrow and should protect only those areas around which we are willing to erect permanent walls.

Ultimately, these reasons for maintaining the right to informational privacy call for an aggressive reading of Paul’s bar on federal claims for information disclosure. A federal court should dismiss a right to privacy claim whenever it is not rooted in another fundamental or constitutional right, even if there is no state law alternative available to the plaintiff. If citizens feel that this leaves them with inadequate protection in some areas, they should call on the legislatures to create laws prohibiting the unwanted disclosures. In the end, concerns about free speech, fear of overburdening public officials, and a desire for public participation in shaping informational privacy outweigh the advantages of creating a broad constitutional right to informational privacy. Admittedly, this will mean that some disclosures that offend our sense of justice will not result in ready access to a legal remedy. Yet shoehorning all of our current fears about information disclosures into a constitutional tort claim under the Fourteenth Amendment is not an appropriate or desirable long-term response.

VI. DID STERLING V. BOROUGH OF MINERSVILLE GET IT RIGHT?

How would this proposed understanding of the constitutional right to informational privacy affect the analysis of Madonna Sterling’s section 1983 claim on her son’s behalf? Recall that Wayman’s homosexuality was disclosed by police officers who were not acting pursuant to any specific legislation.221 Following the

221 Sterling, 232 F.3d at 193.
analysis set forth in Part V, Sterling's claim must be evaluated according to the tough standards Paul imposed on claims against disclosures by government officials. Since the information was revealed by individual government actors, Paul requires dismissal of this claim if the only constitutional provision giving rise to the section 1983 suit is the Fourteenth Amendment's general protection of liberty. The argument in favor of dismissal is even stronger under Paul if a state law remedy was available to remedy the harm. Both of these conditions were met in Sterling.

Sterling's suit against the police officers rested solely on a broad interpretation of the Fourteenth Amendment's guarantee of liberty. The disclosure of an individual's homosexuality is not protected by any provision of the Constitution other than the Fourteenth Amendment's general protection of liberty. In Bowers, the Supreme Court held that homosexual conduct is protected neither by the enumerated rights in the text of the Constitution, nor by any other recognized fundamental right.\(^{222}\) The narrow, dependent interpretation of the constitutional right to informational privacy advocated in Parts IV and V only exists as an auxiliary to either express constitutional or other recognized fundamental rights. Thus, information regarding an individual's homosexuality is not constitutionally protected.

In Sterling, the Third Circuit Court of Appeals attempted to circumvent Bowers by distinguishing the coverage of the right to privacy in decision-making from the right to informational privacy.\(^{223}\) However, as discussed above, this is not a convincing distinction. In effect, the court stretched one branch of the right to privacy to reach what the Supreme Court forbade the other branch from reaching. But information about homosexual orientation is not severable from homosexual activity. Bizarre problems result from the Third Circuit's maneuver. Imagine that the police officer threatened to tell Wayman's grandfather that Wayman was planning to engage in sodomy — would this be permissible because it was a restriction on homosexual activity? Or imagine that Wayman had been arrested and tried in a state where sodomy is a crime — would such a trial violate Wayman's right to keep his homosexuality private? Restrictions on homosexual activity and disclosure of homosexual

\(^{222}\) See Bowers v. Hardwick, 478 U.S. 186, 195 (holding that the right to engage in homosexual sodomy “finds no . . . support in the text of the Constitution, and it does not qualify for the prevailing principles for construing the Fourteenth Amendment.”).
\(^{223}\) Sterling, 232 F.3d at 194-95.
orientation are not as different as the Third Circuit argues. Therefore, it is difficult to see how there could be an acceptable constitutional basis for a right to keep one's status as a homosexual private when *Bowers* held that there is no constitutional basis for keeping one's homosexual activities private. When the scope of informational privacy is properly limited to the same narrow scope as the right to privacy in decision-making, Sterling's claim is, unfortunately, left without an adequate constitutional basis to remain in federal court.

A state law alternative likely existed for Sterling. Sterling could have sued the police officers in state court for intentional infliction of emotional distress.\footnote{Sterling} Under Pennsylvania law, a plaintiff can bring such an action when the defendant's conduct is outrageous, intentional or reckless, and causes severe emotional distress.\footnote{Hoy v. Angelone} The police officer's lecture on the ills of homosexuality and the threat of disclosure to Wayman's grandfather were intentional, unnecessary, and wholly inappropriate. If Wayman was not willing or ready to disclose his homosexuality to members of his family, the police officer should have known that his threat would cause considerable distress to the young man. The impact of the threat certainly was even more dramatic in the context of an arrest and detention at the police station. Further, it is hard to imagine stronger evidence of severe emotional distress than Wayman's decision to commit suicide. While Sterling might have had some difficulty showing that the officers' conduct was sufficiently "outrageous" to prevail in an action for infliction of emotional distress, she surely could have made a strong showing on such a claim.

Under the logic urged both by *Paul* and this article, the court in *Sterling* should have dismissed the plaintiff's section 1983 claim for invasion of her son's right to informational privacy. Since no constitutional or fundamental right was violated by the disclosure, the Third Circuit should have dismissed Sterling's claim for having an inadequate constitutional basis. The court should not have applied a balancing of interests approach, because such an approach should only apply to legislative acts. This outcome may seem harsh, since

\footnote{Sterling} also might have been able to bring a "publication of private fact" claim against the police officers. However, while Pennsylvania law permits liability for "publicity given to private life," the disclosure must be broad enough that the information is likely to become public knowledge. See *Harris v. Easton Pub. Co.*, 483 A.2d 1377 (Pa. Super. 1984). In this case, the officer had only threatened to disclose Wayman's homosexuality to one other person, so the standard for this tort would have been hard for Sterling to meet.

\footnote{Hoy v. Angelone}
Wayman clearly suffered greatly from the police officer’s threatened disclosures.

Yet the real barrier to recognizing more constitutional protections for homosexuals is the Supreme Court’s somewhat unsatisfying holding in Bowers that homosexual activities do not fall in the same realm of fundamental rights as a person’s decisions regarding childbearing, contraception, and abortion. Ironically, if Bowers had held that homosexual activities are protected by the decision making branch of the right to privacy, the Third Circuit’s impulse to protect information about sexual orientation might have been weaker. If Bowers had eliminated state laws against homosexual sodomy, a gay person’s need to protect homosexuality would be decreased, and society’s acceptance of homosexuality might be heightened. In the end, if federal courts wish to create greater protections for homosexuals, they must encourage the Supreme Court to re-evaluate and overrule Bowers. The lower courts should not try to create a strange, untenable loophole for information about sexual orientation.

VII. CONCLUSION

The Supreme Court in Paul, Whalen, and Nixon seems to accept that a right to informational privacy exists in some form under the Constitution. Those opinions, however, leave the right ill-defined and send conflicting messages about how the lower courts should treat this branch of the right to privacy. Not surprisingly, the lower federal courts have come up with a variety of interpretations of the meaning of Paul, Whalen, and Nixon. Careful analysis reveals that the predominant approach adopted by the lower federal courts does not seem to be a complete nor persuasive interpretation of the three cases. In particular, the lower federal courts have dealt with Paul too dismissively.

Therefore, this article suggests a more thorough and honest interpretation of the three cases. This analysis focuses chiefly on the current Supreme Court’s reluctance to allow claims against government officials because state courts may offer a more appropriate venue and remedy. While there are various reactions to this hands-off approach, it does appear to be the most successful way to understand Paul and the series of cases that cite its admonition that the Fourteenth Amendment shall not be a “font of tort law.” This approach also is in accord with the Rehnquist Court’s revival of federalism and its reluctance to recognize new “fundamental” rights.

The overall framework of the Constitution also supports the
conclusion that the constitutional right to informational privacy should be narrow and adequately anchored in recognized constitutional and fundamental rights. While some lower federal courts have construed the right to informational privacy broadly through flexible balancing analyses, such unlimited interpretations of the right do more to undermine than expand it. A broad reading improperly severs the informational privacy right from its sister right to privacy in decision-making. Since these two subsidiaries of the right to privacy are rarely distinct, courts should not give a substantially broader reach to one than to the other. Constitutional law’s long-standing emphasis on freedom of expression also makes it difficult to incorporate a broad right to informational privacy into the constitutional structure. Thus, to assure the legitimacy of the right to informational privacy, it should only apply to matters traditionally associated with the over-arching constitutional right to privacy.

Finally, two additional policy arguments demonstrate that federal courts should refrain from expanding the right to informational privacy. First, the right should not create too high a burden on public officials. Officials should not have to engage in a complicated balancing analysis whenever they wish to disclose information to the public. Instead, officials should be assured that section 1983 suits are available only for disclosures of an easily recognizable set of information. Second, and most importantly, the Supreme Court should not become the sole forum for shaping privacy policy. Legislatures, with their greater flexibility and political accountability should take primary responsibility for regulating the flow of information. While it may seem dangerous to leave the right to informational privacy in the hands of legislatures, it is even more damaging to allow it to be sculpted by nine individuals who may be out of touch with modern innovations and public opinion.