Can We Rely on the Alleged Constitutional Right to Informational Privacy to Secure Genetic Privacy in the Courtroom?

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In their articles, Professors Kaye and Marchant describe the various ways in which both civil and criminal courts have intruded upon genetic privacy. It is clear that, to a degree, the American public expects protection from such intrusions. In a 1993 poll, 85% of those surveyed stated that protecting the confidentiality of medical records is "absolutely essential" or "very important."[1] A 1996 *Time*/CNN poll found that 87% of the respondents wanted to be asked permission every time their medical records are accessed.[2] In short, there is a widespread expectation among American citizens that there will be some level of protection for the privacy of their medical information; and genetic data is certainly one of the most sensitive species of medical information.

In his article, Professor Kaye discusses the extent to which we can rely on the constitutional guarantee of the Fourth Amendment to secure that expectation. In this brief article, I would like to discuss a different, but related topic: Can we confidently rely on the alleged constitutional right to informational privacy as a source of additional protection for that expectation? My thesis is that the answer is no. It would be comforting if we could answer the question in the affirmative; at least in some cases the right could function as an evidentiary privilege shielding genetic information during litigation.[3] However, there are too many doubts about the alleged constitutional right to rely heavily on that right to protect genetic information. There are significant uncertainties about the reach of the alleged constitutional right, its strength, its scope, and even its very existence.

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[1] AMITAI ETZIONI, THE LIMITS OF PRIVACY 148 (1999).

[2] *Id.* at 158. *See also* Peter H.W. van der Goes, Jr., Comment, *Opportunity Lost: Why and How to Improve the HHS-Proposed Legislation Governing Law Enforcement Access to Medical Records*, 147 U. PA. L. REV. 1009, 1011 n.10 (1999).

[3] RICHARD C. TURKINGTON & ANITA L. ALLEN, PRIVACY LAW 150 (1999).

I. THE REACH OF THE ALLEGED CONSTITUTIONAL RIGHT

Even if this constitutional right exists, in most instances it will be enforceable only against government agencies and entities. Under the federal constitution, the supposed source of this right is the due process provision of the Fifth Amendment.[4] That provision is part of the Bill of Rights, intended as a limitation on government power. Consequently, the courts use the provision to restrict government action but not private activity.[5]

The question of the reach is so significant because, as Professor Kaye and I discovered while serving on the Legal Issues Working Group of the National Commission on the Future of DNA Evidence, the vast majority of genetic databases and tissue banks are in the private sector. As of 1998, it was estimated that there were more than 282 million specimens of human biological material stored in the United States, with samples from another 20 million individuals accumulating each year.[6] Most of those samples are in private custody.

In ten jurisdictions, the state constitution includes an express guarantee of a right to privacy,[7] and the courts in one such jurisdiction have ruled that the language of their state constitutional protection is so sweeping that it is enforceable against private individuals as well as

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[4] U.S. CONST. amend. V.

[5] Hinman v. Lincoln Towing Serv., Inc., 771 F.2d 189 (7th Cir. 1985); Arlosoroff v. Nat'l Collegiate Athletic Ass'n, 746 F.2d 1019 (4th Cir. 1984); Gomez v. N.D. Rural Dev. Corp., 704 F.2d 1056 (8th Cir. 1983); Kite v. Marshall, 661 F.2d 1027 (5th Cir. 1981); Warren v. Gov't Nat'l Mortgage Ass'n, 611 F.2d 1229 (8th Cir. 1980); Janusaitis v. Middlebury Volunteer Fire Dep't, 607 F.2d 17 (2d Cir. 1979); Greenya v. George Washington Univ., 512 F.2d 556 (D.C. Cir. 1975); Giannattasio v. Stamford Youth Hockey Ass'n, Inc., 621 F. Supp. 825 (D. Conn. 1985); Johnson v. Educ. Testing Serv., Inc., 615 F. Supp. 633 (D. Mass. 1984); Knauth v. N. Country Legal Servs., 575 F. Supp. 897 (N.D.N.Y. 1983); Miller v. Ind. Hosp., 562 F. Supp. 1259 (W.D. Pa. 1983); Duva v. World Boxing Ass'n, 548 F. Supp. 710 (D.N.J. 1982); Fike v. United Methodist Children's Home of Va., Inc., 547 F. Supp. 286 (E.D. Va. 1982); New Ways Ministry v. Nat'l 4-H Council, 545 F. Supp. 1274 (D.D.C. 1982); De Malherbe v. Int'l Union of Elevator Constructors, 476 F. Supp. 649 (N.D. Cal. 1979); Elliott v. Bloor, 425 F. Supp. 1140 (E.D. Pa. 1976); Niswonger v. Am. Aviation, Inc., 424 F. Supp. 1080 (E.D. Tenn. 1976); Sanford v. Howard Univ., 415 F. Supp. 23 (D.D.C. 1976); Annotation, *Supreme Court's View as to Applicability, to Conduct of Private Person or Entity, of Equal Protection and Due Process Clauses of the Fourteenth Amendment*, 42 L.Ed.2d 922 (1976); *see also* King v. Meese, 743 P.2d 889 (Cal. 1987); Oliver v. Bd. of Trustees, 227 Cal. Rptr. (Ct. App. 1986).

[6] 1 NATIONAL BIOETHICS ADVISORY COMMISSION, RESEARCH INVOLVING HUMAN BIOLOGICAL MATERIALS: ETHICAL ISSUES AND POLICY GUIDANCE 13 (1999).

[7] These states are Alaska, Arizona, California, Florida, Hawaii, Illinois, Louisiana, Montana, South Carolina, and Washington. DARIEN A. MCWHIRTER & JON D. BIBLE, PRIVACY AS A CONSTITUTIONAL RIGHT 174, 179 (1992); TURKINGTON & ALLEN, *supra* note 3, at 123-25 (listing the state constitutional provisions); Erik J. Belanoff et al., *E-Mail: Property Rights vs. Privacy Rights in the Workplace*, 45 PRAC. LAW. 29, 38 (1999); *see also* King v. State, 535 S.E.2d 492 (Ga. 2000).

government agents.[8] Most states lack such a guarantee, however, and again it is well-settled that the due process provision of the Fifth Amendment to the national constitution applies only against government action.[9]

If the private person or entity maintaining the database or tissue bank were unwilling to release the information to the government and the government resorted to compulsory process to obtain the data or sample, the use of compulsory process would undoubtedly constitute sufficient state action to trigger the alleged constitutional right.[10] Based on our service on the Legal Issues Working Group, though, our impression is that in many instances private entities, such as hospitals, cooperate with the authorities and surrender the requested data or samples even without the compulsion of a subpoena.[11] If the private person or entity willingly cooperated with the government, a party invoking the supposed constitutional right to informational privacy would be hard pressed to find the state action necessary to trigger the due process guarantee. The right, derived from that guarantee, simply would not reach the private entity's voluntary surrender of the data or sample to a government agency.

II. THE STRENGTH OF THE ALLEGED CONSTITUTIONAL RIGHT

Few constitutional rights are absolute in nature. The only truly absolute right may be the First Amendment freedom to believe.[12] Even in the jurisdictions recognizing a constitutional right to informational privacy, the courts uniformly classify the right as conditional or qualified. The federal courts have treated the right in that fashion,[13] and the state courts are in accord.[14] Thus, the right will yield to a sufficiently strong showing

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[8] Am. Acad. of Pediatrics v. Lungren, 940 P.2d 797 (Cal. 1997); Kraslawsky v. Upper Deck Co., 65 Cal. Rptr. 2d 297 (Ct. App. 1997).

[9] *See supra* note 5.

[10] There is obviously government action when a government proffers the genetic information in litigation. The proposed right to informational privacy is not, however, an exclusionary rule of evidence. Rather, it would serve as a limitation on government's ability to acquire information from private parties. Our hypothesis here is that the private party has voluntarily surrendered the information or sample to government authorities.

[11] There is authority that a hospital may consent to permit a warrantless search and seizure. *See* People v. Dolan, 408 N.Y.S.2d 249, 252 (Sup. Ct. 1978). Some cases assert that as "an independent private citizen," the entity may turn [the sample] over to the police." State v. Enoch, 536 P.2d 460, 461 (Or. 1975).

[12] Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940); McBride v. Shawnee County, Kansas Court Servs., 71 F. Supp. 2d 1098, 1100 (D. Kan. 1999); Steven R. Smith, *Constitutional Privacy in Psychotherapy*, 49 GEO. WASH. L. REV. 1, 34 (1980).

[13] TURKINGTON & ALLEN, *supra* note 3, at 153 (collecting cases); *In re* Crawford, 194 F.3d 954, 958 (9th Cir. 1999), *cert. denied sub nom.*, Ferm v. United States Trustee, 528 U.S. 1189 (2000).

[14] Jeffrey H. v. Imai, Tadlock & Kenney, 101 Cal. Rptr. 2d 916 (Ct. App. 2000); Hooser v. Superior Court, 101 Cal. Rptr. 2d 341 (Ct. App. 2000); Johnson v. Superior Court, 95

of a countervailing government interest. In the published opinions, in the vast majority of cases the right has yielded.[15]

In practice, the right has proven to be relatively weak. Concededly, in a few cases, the right has trumped the competing government interest. For example, in *In re Doe*,[16] the Court of Appeals for the Second Circuit concluded that New York City's Commission on Human Rights may have violated the right by issuing a press release identifying the plaintiff as HIV positive. In another case, *Powell v. Shriver*,[17] the same court found a violation of the right in a gratuitous disclosure to prison inmates that a prisoner was an HIV positive transsexual. However, these cases are not only the exception rather than the rule; more importantly, they are extreme on their facts. The common denominator in these cases is that government revealed a private fact that in the social context, could easily trigger a sharp negative reaction and stigma. In the more mundane cases involving less inflammatory facts, the courts typically deny any relief. A recent Ninth Circuit decision, applying the right to medical tests for pregnancy and the allele for sickle cell anemia,[18] may indicate that some courts are ready to enforce the right more vigorously;[19] but by and large, the courts are lukewarm in their support for and enforcement of this supposed constitutional right.

III. THE SCOPE OF THE ALLEGED CONSTITUTIONAL RIGHT

The courts' seeming lack of enthusiasm for this right may be attributable in part to the grave doubts about the scope of the right. Even in the jurisdictions recognizing the right, its scope is ill-defined.

Perhaps the most common descriptions of the right's scope are statements that the right is limited to "intimate"[20] or "personal"[21] facts. If

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Cal. Rptr. 2d 864 (Ct. App. 2000).

[15] TURKINGTON & ALLEN, *supra* note 3, at 152-53; Seth F. Kreimer, *Sunlight, Secrets, and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, 140 U. PA. L. REV. 1, 145-47 (1991). *See* Falvo v. Owasso Indep. Sch. Dist. No. I-011, 220 F.2d 1200, 1204-05 (10th Cir.) (collecting cases), *amended*, 2000 U.S. App. LEXIS 24896 (10th Cir. 2000).

[16] 15 F.3d 264 (2d Cir. 1994).

[17] 175 F.3d 107 (2d Cir. 1999).

[18] Norman-Bloodsaw v. Lawrence Berkeley Lab., 135 F.3d 1260 (9th Cir. 1998).

[19] It may be a mistake to read too much into the *Norman-Bloodsaw* decision, however. That case also involved medical testing for syphilis, another condition that has a social stigma attached to it. In short, the complete set of medical tests challenged in the Ninth Circuit case could have yielded the same type of information as was involved in the Second Circuit opinions.

[20] Scheetz v. The Morning Call, Inc., 946 F.2d 202 (3d Cir. 1991).

[21] Paul P. v. Farmer, 92 F. Supp. 2d 410 (D.N.J. 2000), *aff'd*, 227 F.3d 98 (3d Cir. 2000).

the courts confine the right to truly "intimate" facts, the right may be so limited that it has little impact. For its part, the term "personal" is vague in the extreme. The term could be employed in the same narrow sense as "intimate." Or the term could be used in an expansive sense, covering virtually any information related to the person. Hence, the use of the "personal" formulation of the scope of the right may not only be controversial; it may also generate tremendous uncertainty about the scope.

Some courts have already voiced precisely that criticism. The question of the precise parameters of the right "has been infrequently examined."[22] There are frequent judicial complaints that the "contours"[23] of the right are "murky"[24] and "unclear."[25] As we shall see, the Supreme Court's 1977 decision in *Whalen v. Roe*[26] is the precedent most frequently cited as announcing the existence of this constitutional right. Although *Whalen* was decided almost a quarter century ago, to date the courts have failed to clarify the scope of the alleged right. If genetic privacy is a significant concern, it would be unwise to turn to such an amorphous right as the basis for safeguarding the confidentiality of genetic information.

IV. THE VERY EXISTENCE OF THE ALLEGED CONSTITUTIONAL RIGHT

As previously stated, some of the courts' misgivings about this right may be traceable to the poorly defined scope of the right. Even more fundamentally, there are serious doubts whether the right exists at all.

On the one hand, in some states with explicit constitutional guarantees of a right to privacy, it is well-settled that the guarantee includes a right to informational privacy. For instance, in both California[27] and Montana,[28] the state supreme courts have authoritatively construed their constitutions as creating a distinct right to informational privacy.

On the other hand, the picture is much different in federal court. Admittedly, the majority of federal courts that have passed on the question assume the existence of the right.[29] Some federal decisions go as far as

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[22] Wasson v. Sonoma County Jr. College Dist., 4 F. Supp. 2d 893, 907 (N.D. Cal. 1997).

[23] *Scheetz*, 946 F.2d at 206.

[24] *Id.*

[25] *Wasson*, 4 F. Supp. 2d at 907. *See also Paul P.*, 92 F. Supp. 2d at 415 (noting "the boundaries of that right are less clear"); Smith, *supra* note 12, at 22.

[26] 429 U.S. 589 (1977).

[27] Hill v. Nat'l Collegiate Athletic Ass'n, 865 P.2d 633, 654 (Cal. 1994).

[28] State v. Nelson, 941 P.2d 441 (Mont. 1997).

[29] TURKINGTON & ALLEN, *supra* note 3, at 150. *E.g.*, Powell v. Schriver, 175 F.3d 107 (2d Cir. 1999); Norman-Bloodsaw v. Lawrence Berkeley Lab., 135 F.3d 1260, 1260 (9th Cir. 1998); *In re* Doe, 15 F.3d 264 (2d Cir. 1994).

declaring that the right is "relatively well-established."[30] There are a number of quite recent federal decisions mentioning and applying the right.[31] One such decision contains a broad reference to a person's "reasonable expectation of privacy with respect to information regarding his medical condition."[32]

If we closely scrutinize the relevant Supreme Court precedents, however, it becomes clear that even the threshold issue of the existence of the right has not yet been settled. The proponents of the right usually point to the Supreme Court's 1977 decision in *Whalen v. Roe*[33] and characterize *Whalen* as squarely holding that the substantive due process guarantee secures a constitutional right to informational privacy. The catalyst for *Whalen* was New York's adoption of legislation requiring physicians to file copies of prescriptions for certain types of dangerous drugs with the state Department of Health. The data, including the patient's name, were entered into a computerized database. The prescription forms were retained, stored in a vault, and then destroyed after five years. Access to the data was restricted, and there were statutory penalties for unauthorized disclosure of the patient's identity. A group of patients and physicians filed suit to challenge the constitutionality of the statutory scheme. A three-judge federal District Court upheld the challenge. The district court wrote that "the doctor-patient relationship intrudes on one of the zones of privacy accorded constitutional protection" and that the statute's patient-identification requirement invaded that zone "with a needlessly broad sweep."[34] The Supreme Court unanimously reversed and ruled that the legislation was constitutional.

Although the *Whalen* Court sustained the constitutionality of the legislation, there are passages in *Whalen*, which appear to posit a constitutional right to informational privacy. In one passage in particular, Justice Stevens' lead opinion seems to indicate that the prior Supreme Court decisions recognize at least two different kinds of protected privacy interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.[35]

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[30] *Paul P.*, 92 F. Supp. 2d at 415. *See also* Paul Schwartz, *Internet Privacy and the State*, 32 CONN. L. REV. 815 (2000).

[31] *E.g.*, Sterling v. Minersville, 232 F.3d 190 (3d Cir. 2000) (involving an officer's threat to disclose an arrestee's suspected sexual orientation).

[32] Morales v. Daley, 116 F. Supp. 2d 801, 817 (S.D. Tex. 2000).

[33] 429 U.S. 589 (1977).

[34] *Id.* at 596.

[35] *Id.* at 599-600.

However, a careful reading of the opinion indicates that in that passage, Justice Stevens was merely restating the plaintiffs' argument without adopting the argument. He was willing to assume *arguendo* the existence of the right but, even on that assumption, concluded that the statutory scheme was constitutionally valid. In Part I of his opinion, the justice stated that "the patient-identification requirement was a reasonable exercise of New York's broad police powers."[36] He found "nothing unreasonable" in the statutory scheme.[37] He characterized the legislation as a "rational legislative decision."[38] This portion of his opinion thus applied the lax "rational basis" test to assess the constitutionality of the statute.[39] There is no suggestion in this part of the opinion that the statute implicated a fundamental constitutional right. If it had, Justice Stevens presumably would have invoked a more demanding standard than the rational basis test.[40] It is true that Part II of Justice Stevens' opinion includes the reference to the "two different kinds of [protected privacy] interests."[41] However, the same part of the justice's opinion explicitly rejected the contention that the record-keeping system violated a constitutionally protected "zone of privacy."[42]

The concurring opinions strengthen the case for a limited reading of Justice Stevens' lead opinion. Justice Brennan filed one concurrence.[43] Like the other justices, he voted to uphold the New York legislation. However, in explaining his vote, he stressed that "[t]he information disclosed by the physician under this program is made available only to a small number of public health officials with a legitimate interest in the information."[44] On the specific facts of the case, the intrusion on privacy

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[36] *Id.* at 598.

[37] *Id.* at 597.

[38] *Id.*

[39] Justice Stevens cautioned against applying too demanding a standard. He cited *Lochner v. New York*, 198 U.S. 45 (1905), the notorious decision which represented the zenith of the pre-New Deal Supreme Court's willingness to second-guess the wisdom of economic and social reform legislation. Whalen v. Roe, 429 U.S. 589, 596 (1977); *see also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1332-82 (3d ed. 2000). The justice stated that "[t]he holding in *Lochner* has been implicitly rejected many times." *Whalen*, 429 U.S. at 597. He added that "we have frequently recognized that individual States have broad latitude in experimenting with possible solutions to problems of vital local concern." *Id.*

[40] *E.g.*, Roe v. Wade, 410 U.S. 113, 155 (1973) ("When certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a compelling state interest . . . .").

[41] *Whalen*, 429 U.S. at 599.

[42] *Id.* at 598-604.

[43] *Id.* at 606 (Brennan, J., concurring).

[44] *Id.*

was "limited."[45] However, in dictum the justice remarked that different facts might have made out a prima facie case of a constitutional violation: "Broad dissemination by state officials of such information . . . would clearly implicate constitutionally protected privacy rights, and would presumably be justified only by compelling state interests."[46] Justice Brennan's remark implicitly acknowledged that Justice Stevens had applied the minimalist rational basis test rather than a compelling interest standard.

For his part, in his concurrence[47] Justice Stewart not only voted to sustain the challenged legislation; he also attacked Justice Brennan's dictum. After quoting the dictum, Justice Stewart wrote:

> The only possible support in . . . [Justice Brennan's opinion] for this statement is its earlier reference to two footnotes in . . . [Justice Stevens'] opinion . . . . The footnotes, however, cite to only two Court opinions, and those cases do not support the proposition advanced by Mr. Justice Brennan.[48]

The cited opinions were *Griswold v. Connecticut*[49] and *Stanley v. Georgia*.[50] Justice Stewart asserted that those two opinions were inapposite to the question of whether there is a constitutional right to informational privacy. *Griswold* clearly related to the substantive aspects of privacy. In Justice Stewart's words, *Griswold* "held that a State cannot constitutionally prohibit a married couple from using contraceptives in the privacy of their home."[51] Although *Griswold* contained some "broad language . . . discuss[ing] . . . privacy,"[52] the opinion could not be read as "recogniz[ing] a general interest in freedom from disclosure of private information."[53] Justice Stewart similarly thought that Justice Brennan had read too much into *Stanley*. Justice Stewart found *Stanley* readily distinguishable:

> The other case referred to, *Stanley* . . . , held that an individual cannot constitutionally be prosecuted for possession of obscene materials in his home. Although *Stanley* makes some reference to privacy rights, . . . the holding there was simply that the First Amendment . . . protects a person's right to read what he chooses in circumstances where that choice poses no threat to the sensibilities or welfare of others . . . .[54]

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45 *Id.*
46 *Id.*
47 *Whalen*, 429 U.S. at 607 (Stewart, J., concurring).
48 *Id.* at 608.
49 381 U.S. 479 (1965).
50 394 U.S. 557 (1969).
51 Whalen v. Roe, 429 U.S. 589, 607-08 (1977) (Stewart, J., concurring).
52 *Id.*
53 *Id.* at 609.
54 *Id.*

There was no compelled disclosure of personal information in *Stanley*. In Justice Stewart's mind, Justice Brennan's dictum represented a misreading of both Justice Stevens' lead opinion and the Court's prior precedents.

One prior precedent in particular, the Court's decision in *Paul v. Davis*,[55] lends powerful support to Justice Stewart's view. *Paul* was decided in 1976, the year immediately preceding the Court's decision in *Whalen*. In that case, Davis was arrested for shoplifting but was never brought to trial on the charge. At the time of his arrest, he was photographed. Davis alleged that the police later included the photograph in a flyer that identified "active shoplifters" in the metropolitan area. He also alleged that the police had distributed the flyer to area merchants. Based on these allegations, Davis sued the police for defamation and violation of his civil rights. Davis claimed that the release of the photograph violated a privacy right protected by the due process clause.

The Court stated that the clause extends to certain aspects of privacy, but the Court noted that its past precedents had protected only "substantive aspects"[56] of privacy. The Court next listed a number of earlier cases in which it had protected independent decision-making in such areas as "marriage, . . . family relationships, and child rearing and education."[57] The Court then commented:

> Respondent's claim is far afield from this line of decisions. He claims constitutional protection against the disclosure of the fact of his arrest on a shoplifting charge . . . . None of our substantive privacy decisions hold this or anything like this, and we decline to enlarge them in this manner.[58]

The *Paul* Court thus made it clear that it interpreted its prior decisions as protecting decisional or autonomy privacy (freedom from control) rather than informational privacy (freedom from scrutiny)[59] and that it had decided not to extend the protection to informational privacy.

A broad reading of Justice Stevens' 1977 *Whalen* opinion would effectively overturn that 1976 decision of the *Paul* Court. *Paul* would have been fresh in the memory of the justices who decided *Whalen*; and if they had intended to overturn *Paul*, common sense suggests that they would have done so expressly. Yet, there is not as much as a single citation to *Paul* in Justice Stevens' opinion. That silence makes a broad reading of *Whalen* highly implausible. Furthermore, there is another relevant

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[55] 424 U.S. 693 (1976).
[56] *Id.* at 713.
[57] *Id.*
[58] *Id.*
[59] ETZIONI, *supra* note 1, at 208-09.

silence—in the almost quarter century between *Whalen* and 2000, the Court did not make a single approving reference to the passage in Justice Stevens' opinion mentioning a possible constitutional interest "in avoiding disclosure of personal matters."[60]

As previously stated, the majority of the published federal decisions touching upon the issue appear to assume that there is a constitutional right to informational privacy.[61] A number of recent court of appeals decisions, however, break with the majority review, rethink the issue, and refuse to read *Whalen* as settling the issue.[62]

CONCLUSION

It seems likely that the Supreme Court will ultimately recognize a limited constitutional right to informational privacy.[63] As we have seen, there is already a widespread expectation of confidentiality in medical information.[64] If that public sentiment grows and solidifies, in the long term the pressure on the Court to announce the existence of such a right may be well nigh irresistible.

The short term presents a radically different picture. Given the present substantial doubts about the reach, strength, scope, and very existence of the alleged constitutional right, it would be a mistake to look to that right as the source of protection for genetic privacy. At least in the short term, we have little choice but to seek legislative and administrative protection for genetic privacy. Within the past year, an important stride was made; the Department of Health and Human Services issued new regulations protecting the confidentiality of personal health information.[65] In the near future, the advocates of genetic privacy would be well advised to concentrate their efforts on the legislative and administrative fronts rather than focusing on litigation in misplaced reliance on a supposed constitutional right to informational privacy.

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[60] *Whalen*, 429 U.S. at 599-600. But see the references to *Whalen* in the Court's recent decision in *Ferguson v. City of Charleston*, 121 S. Ct. 1281, 1289 n.14, 1301 (2001).

[61] TURKINGTON & ALLEN, *supra* note 3, at 150.

[62] Cutshall v. Sundquist, 193 F.3d 466 (6th Cir. 1999), *cert. denied*, 529 U.S. 1053 (2000); Am. Fed'n of Gov't Employees, AFL-CIO v. Dep't of Hous. and Urban Dev., 118 F.3d 786, 788 (D.C. Cir. 1997); Doe v. Wigginton, 21 F.3d 733 (6th Cir. 1994) (holding the Constitution does not encompass a general right to nondisclosure of private information); *see also* TURKINGTON & ALLEN, *supra* note 3, at 150.

[63] *See Ferguson*, 121 S. Ct. at 1289 n.14.

[64] *See supra* notes 1-2 and accompanying text.

[65] *Clinton, Shalala Release Privacy Standards; Final Rule Differs Significantly From Proposal*, 69 U.S.L.W. (BNA) 2380 (Jan. 2, 2001); Laura Meckler, *Clinton to Issue Sweeping Health Privacy Rules*, THE DAVIS ENTERPRISE, Dec. 20, 2000, at A5. The final regulation is available at http://www.aspe.hhs.gov/adminsp (last visited June 9, 2001).