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The Interest in Limiting the Disclosure of Personal Information: A Constitutional Analysis

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I. INTRODUCTION

"We live, inescapably, in an 'information society,' "[1] the result of three decades of dramatic change in the relationship between private citizenry and the informational needs of the government. Increasingly, modern society forces its members to conduct many of the important events of their lives with governmental information-gathering or record-keeping organizations as attentive partners.[2] Governmental activities pervade everyday life in the form of social programs, licensing of occupations and professions, taxation of individuals, and regulation of business, labor, and other public and private institutions.[3]

The expansion of the government's role in society has produced greater need for and reliance upon written records in making decisions about individuals.[4] The explosion in the variety and concentration of institutional relationships with individuals has resulted in record-keeping that covers nearly everyone.[5] Usually, the

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1. PERSONAL PRIVACY IN AN INFORMATION SOCIETY—THE REPORT OF THE PRIVACY PROTECTION STUDY COMMISSION 5 (1977) [hereinafter cited as PRIVACY COMMISSION]; *see also* Miller, *Personal Privacy in the Computer Age: The Challenge of a New Technology in an Information-Oriented Society*, 67 MICH. L. REV. 1089 (1969) [hereinafter cited as *Personal Privacy in the Computer Age*]; Miller, *The Privacy Revolution: A Report from the Barricades*, 19 WASHBURN L.J. 1 (1979) [hereinafter cited as *The Privacy Revolution*]; Project, *Government Information and the Rights of Citizens*, 73 MICH. L. REV. 971 (1975); Comment, *The Use and Abuse of Computerized Information: Striking a Balance Between Personal Privacy Interests and Organizational Information Needs*, 44 ALB. L. REV. 589 (1980).

2. PRIVACY COMMISSION, *supra* note 1, at 13.

3. *Id.* at 4.

4. *Id.* at 13-14.

5. The breadth of the records that the government maintains is staggering. For example, in 1966 when debate over data banks gained momentum, the Senate Judiciary Subcommittee initiated a survey to determine what information government agencies kept on individuals. The survey revealed the existence of more than three billion records on individual citizens, including 27.2 billion names, 2.3 billion past and present addresses, 264 million criminal histories, 280 million mental health records, 916 million profiles on alcoholism and drug addiction, and over 1.2 billion financial records. Project, *supra* note 1, at 1223-24 (citing STAFF OF SUBCOMM. ON ADMIN. PRACTICE AND PROCEDURE OF THE SENATE COMM. ON THE JUD., 90TH CONG., 2D SESS., GOVERNMENT DOSSIER 1 (COMM. Print 1967)). The average American is the subject of an estimated 10-20 files that the government compiles on privato organizations. Project, *supra* note 1, at 1224 n.1517 (citing *Records Maintained by Govern-*

governmental organization alone decides what information the individual must divulge and the pace at which he must divulge it. Because the government now provides so many necessary services and benefits, often the individual's economic circumstances compel him to submit to whatever demands for information the organization may make. Once an individual has established a relationship with a record-keeping organization, he has little control over what personal information the records contain or over its eventual use.[6] Indeed, an individual often finds that one agency has made an evaluation of him—for example, whether he qualifies for certain programs and benefits that depend on legally established criteria—based on information that another record-keeper has compiled[7] and maintained long after its original purpose has expired.[8] Rarely can an individual verify the accuracy of the information that the organization has accumulated about him, much less participate in deciding to whom the organization discloses it. Furthermore, severing the relationship or altering its terms is an unlikely option even if he finds the information demands unacceptable.

In most cases the individual can only guess what type of information a particular decisionmaker will gather about him. Consequently, identifying errors and tracing them to their source may be extremely difficult. Moreover, an individual cannot know whether organizations with which he believes he has a confidential relationship have disclosed records to others without his knowledge or consent. A society that relies increasingly upon written records to mediate relationships between individuals and the government and in which the quality of an individual's life depends on his ability to maintain a variety of these relationships must address this problem.[9] As records have replaced face to face encounters, the individual has received no compensating control over the use and disclosure of personal information in the possession of governmental organizations.[10] Most record-keeping relationships are exceedingly

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ment Agencies, Hearings on H.R. 9527 and Related Bills Before a Subcomm. of the House Comm. on Government Operations, 92d Cong., 2d Sess. 22 (1972) (statement of Rep. Edward Pattern)).

6. PRIVACY COMMISSION, *supra* note 1, at 14.

7. *Id.* at 4.

8. Gerety, *Redefining Privacy,* 12 HARV. C.R.-C.L. L. REV. 233, 288 (1977) [hereinafter cited as *Redefining Privacy*]. Professor Gerety observed that since "[r]ecords are mechanical memories not subject to the erosions of forgetfulness and the promise of eventual obliteration," the "enduring risk" of their misuse is itself an injury. *Id.*

9. PRIVACY COMMISSION, *supra* note 1, at 14.

10. *Id.* at 13; *see The Privacy Revolution, supra* note 1, at 1324-27.

one-sided and likely to remain so unless individuals receive a right to participate in record-keeping relationships commensurate with their interest in the records.

This interest in controlling the collection, maintenance, use, and dissemination by the government of personal information is an integral aspect of individual liberty.[11] The individual must control his personal information to preserve his dignity and sense of separateness, and to prevent personal embarrassment and economic harm.[12] Total individual control over personal information, however, is not a desirable social goal. Society and institutions require information for efficient decisionmaking. Disclosure of information often is made for the individual's own benefit. Nevertheless, he has a substantial interest in restricting its use to the purpose for which the governmental entity originally collected it. Although the courts have manifested serious concern for the individual's interest in the initial gathering of information by the government,[13] they have paid little attention to subsequent improper and unauthorized use and dissemination of the information by the organization that originally compiled it.

Traditionally, decentralized storage of primarily written records and difficulties in access, transfer, and dissemination minimized governmental misuse of information after its collection and protected somewhat the individual's interest in its limited disclosure.[14] The advent of computer technology, however, has altered fundamentally the government's ability to handle vast amounts of

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11. The individual's interest in controlling his personal information subsumes several more limited interests. First, the individual has an interest in the initial *collection* of information that is in his possession. Second is the individual's interest in ensuring that the collected information whicb the organization now is maintaining is *accurate*. Third, the individual has an interest in how the government *uses* the information—whether it restricts the use to the purpose for which it originally gathered the information. Last, the individual is concerned with to whom and to what extent the governmental entity reveals the information. This last interest, the limited disclosure interest, is the subject of this Note.

12. Reinart, *Federal Protection of Employment Record Privacy*, 18 HARV. J. ON LEGIS. 207, 210-11 (1981) (citing K. GREENWALTZ, LEGAL PROTECTIONS OF PRIVACY: FINAL REPORT TO THE OFFICE OF TELECOMMUNICATIONS POLICY, EXECUTIVE OFFICE OF THE PRESIDENT 9 (1975)). *See, e.g.*, Whalen v. Roe, 429 U.S. 589 (1977) (state required central recording of names of patients with prescriptions of dangerous drugs); *infra* notes 141-49 and accompanying text.

13. *See, e.g.*, Katz v. United States, 389 U.S. 347 (1967) (electronic eavesdropping by federal agents a fourth amendment violation); Shelton v. Tucker, 364 U.S. 479 (1960) (state requirement that school teachers disclose all associational memberships a violation of due process under fourteenth amendment).

14. *Personal Privacy in the Computer Age*, *supra* note 1, at 1108; Project, *supra* note 1, at 1222.

information[15] and ended this safeguard. Computers can transfer and assemble information anywhere in the world in microseconds.[16] More ominously, their storage capabilities prolong radically and artificially the life of the information, which makes the threat of disclosure and misuse as permanent as the records themselves.[17]

Computerization not only has affected relationships between individuals and organizations, but also it has upset the balance of power between government and society. Increasing accumulations of information about individuals enhance the government's power by facilitating its efforts to reach individuals directly. As Professor Miller stated: "In accordance with a principle akin to Parkinson's Law, as capacity for information-handling increases there is a tendency to engage in more extensive manipulation and analysis of recorded data, which, in turn, motivates the collection of data pertaining to a larger number of variables."[18] The high degree of official control of personal information has increased public concern over the power of the government to reach individuals.[19] The vast stores of personal information combined with the capabilities of modern technology threaten the very abuses that the framers of the Constitution sought to prevent.[20] The recent revelations of governmental misuse of personal information during the Watergate scandal serve as a reminder of the danger of these abuses.[21]

This Note examines possible constitutional protections for the individual interest in restricting a government agency's dissemination of legitimately compiled personal information to the purpose for which it was originally obtained. Part II of this Note defines the substantive interest that underlies the individual's desire to limit disclosure of information about himself by the government. Part III examines Congress' response to the growing public concern for individual control of personal information and concludes that legislative action has been and likely will continue to be inadequate protection for the individual's interest in limited disclosure.

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15. Shera & Cleveland, *History and Foundations of Information Science*, in 12 ANN. REV. OF INFORMATION SCI. & TECH. 247, 258-59 (1977), *cited in* Cooper, *Acquisition, Use and Dissemination of Information: A Consideration and Critique of the Public Law Perspective*, 33 AD. L. REV. 81, 100 n.77 (1981).

16. *Personal Privacy in the Computer Age*, *supra* note 1, at 1093-1103.

17. *Redefining Privacy*, *supra* note 8, at 288.

18. *Personal Privacy in the Computer Age*, *supra* note 1, at 1103.

19. *See, e.g.*, PRIVACY COMMISSION, *supra* note 1; *The Privacy Revolution*, *supra* note 1.

20. PRIVACY COMMISSION, *supra* note 1, at 6.

21. *Id.*; *see* P. DIONISOPOULOS & C. DUCAT, THE RIGHT TO PRIVACY 4 (1976).

The next part discusses the possible textual sources in the Constitution that secure this interest. Part V examines the level of constitutional scrutiny properly required for the interference with the limited disclosure interest. This Note concludes that an individual who suffers injury should have standing to contend that the government had no legitimate interest in disclosing his personal information in violation of the original confidence, or that the disclosure did not bear a rational relationship to achievement of a valid governmental objective.

II. Defining the Interest at Issue

> Am I not what I am, to some degree, in virtue of what others think and feel me to be?[22]

At the heart of the interest in limited disclosure is the recognition that what is personal and intimate to each individual varies from day to day and setting to setting; that an individual lives in several "worlds," in each of which his mode of response may, or perhaps must, be different; and that each individual has a strong interest in maintaining his freedom to live in his different roles without having his performance and aspirations in one context placed in another without his permission.[23] Much of the personal

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22. I. Berlin, *Two Concepts of Liberty*, in Four Essays on Liberty 155 (1969).

23. *Personal Privacy in the Computer Age, supra* note 1, at 1107 n.61. Legislators and commentators have characterized the right of the individual to control or limit the dissemination of information about himself as an aspect of some "right of privacy." Privacy Act of 1974 § 3, 5 U.S.C. § 552a (1976); A. Westin, Privacy and Freedom 42 (1967); Fried, *Privacy*, 77 Yale L.J. 475, 482-84 (1968); Gavison, *Privacy and the Limits of Law*, 89 Yale L.J. 421, 429 (1980); Gross, *The Concept of Privacy*, 42 N.Y.U. L. Rev. 34, 35-36 (1967). While clearly this interest implicates some philosophical concepts of personal privacy, a debate has ensued ahout whether it falls within any legally protected ambit of a right to privacy. The debate is not germane to this Note, which takes the position that characterization of the paradigm limited disclosure interest as an aspect of a larger right of privacy is of little utility in seeking constitutional protection. The ultimate issue is not whether the paradigm interest is part of a legally recognized right of privacy, but whether it does, or should, receive constitutional recognition and protection on its own merits, independent of any particular theory, label, or conceptualization. This determination need not address the difficult and controversial issues of the existence and scope of a legally recognized right of privacy.

The Consitution does not mention privacy, and the Supreme Court has not recognized its existence as a general right. *See* Roe v. Wade, 410 U.S. 113, 152 (1973); Katz v. United States, 389 U.S. 347, 350-51 (1967). Accordingly, any individual rights of privacy have found legal vindication as an aspect of the individual liberty guaranteed by the due process clause of the fifth and fourteenth amendments. *See* Moore v. City of E. Cleveland, 431 U.S. 494, 499 (1977); Roe v. Wade, 410 U.S. at 152. The expansive concept of privacy (like justice, "everywhere felt but nowhere fixed," *Redefining Privacy, supra* note 8, at 234), however, is hardly an "aspect" of liherty, for the two concepts virtually merge in their effect. Remarkably few individual liberty interests do not implicate privacy values, because both liberty and

information that the government seeks formerly was in the exclusive possession of the individual, and both the law and society recognized his right to control its use and disclosure. Because he alone determined which personal details to reveal, and, to a lesser extent, to whom, he could expose or conceal selectively the more intimate aspects of his life, beliefs, and behavior. Thus, the individual at once promoted his security, and maintained his dignity and reputation. When the government obtains possession of personal information, by force of law or because of an individual's economic need, the individual loses considerable control over who might use or become aware of the information. A legally recognized interest in limited disclosure would allow an individual to restrict the use of the information to its original purpose, and to limit disclosure of the material to the governmental entity to which the individual initially entrusted it.

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privacy in essence secure for the individual a measure of freedom from governmental or societal interference with his affairs. At least for legal purposes, the concepts of privacy and liberty have not been distinguished adequately. Roe v. Wade, 410 U.S. at 152. It follows that if the paradigm interest is properly a constitutionally protected interest in liberty, then to consider it also an aspect of a right to privacy is redundant, for the same guarantee of liberty encompasses the two concepts. Similarly, if the paradigm interest does not merit constitutional protection as a liberty interest in its own right, then to classify it as a right of privacy would be of little avail.

Although in a few instances the argument that the paradigm interest is an aspect of a separate right of privacy could present an additional and perhaps stronger ground for constitutional protection, *see* Gavison, *supra,* at 463, at this point in the legal development of the privacy concept the contention would add little. *But see id.* at 459-71. Privacy has not evolved as a unitary or distinct right; rather it has served as a doctrinal umbrella or slogan ("used in accordance with some loose habits of everyday speech rather than the logic of constitutional law," Gross, *supra,* at 45), providing constitutional protection for seemingly unrelated interests. The Supreme Court has admitted that many of these interests actually derive directly from the constitutional guarantee of liberty, without mentioning any right of privacy. *Moore,* 431 U.S. at 499; *see infra* note 209. In other instances in which plaintiffs have alleged deprivation of a right of privacy, the Supreme Court consistently has looked behind labels and characterizations of particular interests as private or as aspects of a right of privacy to determine the exact nature of the substantive individual interest at stake. If the interest was not itself of constitutional stature, its characterization as "private" was of no avail. *See* Posner, *The Uncertain Protection of Privacy by the Supreme Court,* 1979 SUP. CT. REV. 173 [hereinafter cited as *The Uncertain Protection*]; Silver, *The Future of Constitutional Privacy,* 21 ST. LOUIS U.L.J. 211 (1977). In sum, the Supreme Court's decisions demonstrate that defining an interest as "private," or as an aspect of privacy, has contributed little or nothing to its ultimate constitutional vindication. Rather, the interest has received protection only to the extent that the Court has recognized it as textually grounded in an explicit guarantee of the Constitution itself. Further, in view of the uncertain status and protection accorded any right to privacy and the Supreme Court's historic pattern of focusing on rights of privacy primarily in the familial autonomy factual context, labeling the paradigm interest "private" or seeking its constitutional vindication under a right of privacy, ultimately may prove unnecessarily restrictive or improvident.

The substance, then, of the limited disclosure interest is the individual's freedom to define the role he desires to play in society by mastering the identity that he creates and that society uses to determine many of the circumstances of his existence.[24] The individual's capacity to present his "self" to the different "worlds" in which he moves depends upon the accessibility to society of information about him.[25] When the individual alone possesses the information, he controls that access, and, to a significant extent, what becomes known about him.[26] Thus, the individual can establish the variety of roles and presentations necessary for successful participation in each of the several compartments of his life as he alone deems appropriate.

Individuals increasingly must enter into relationships with governmental organizations in which they have little choice but to

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24. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 966 (1978).

25. *See Personal Privacy in the Computer Age, supra* note 1, at 1108 n.64 (quoting *Hearings on the Computer and Invasions of Privacy Before a Subcomm. on the House Comm. on Gov't Operations*, 89th Cong., 2d Sess. 12-13 (1966) (statement of Vance Packard)). Mr. Packard described the dangers of a federal data center:

> [T]here is [a] hazard [in] permitting so much power to rest in the hands of the people in a position to punch computer buttons. When the details of our lives are fed into the central computer where they are instantly retrievable, we all to some extent fall under the control of the machine's managers. . . .
>
> The file keepers of Washington have derogatory information of one sort or another on literally millions of citizens. The more such files are fed into central files, the greater the hazard the information will become enormously tempting to use as a form of control.

Id.

26. Professor Posner noted an element of fraud in the failure to disclose some discreditable personal information, akin to the concealment by a seller of defects in his products. Posner, *Privacy, Secrecy and Reputation*, 28 BUFFALO L. REV. 1, 14 (1979) [hereinafter cited as *Secrecy*]; Posner, *The Right of Privacy*, 12 GA. L. REV. 393, 399-400 (1978) [hereinafter cited as *The Right of Privacy*]. This fraud frequently amounts to attempts to induce others to enter transactions with the individual that they would not enter if they knew the truth. Professor Posner suggested that everyone should be able to protect himself from disadvantageous transactions by

> ferreting out concealed facts about individuals which are material to the representations (implicit or explicit) that those individuals make concerning their moral qualities. . . . To the extent that people conceal personal information in order to mislead, the economic case for according legal protection to such information is no better than that for permitting fraud in the sale of goods.

The Right of Privacy, supra, at 400-01. *See Secrecy, supra*, at 14. Professor Posner pointed out, however, that this problem occurs most often in the context of disclosure by the individual of pertinent information to entities such as creditors, employers, etc. *The Uncertain Protection, supra* note 23, at 175-76. This factual context is very different from that of the paradigm interest in which the individual is much more concerned with his reputation within society as a whole rather than within the confines of a specific transaction. In the latter situation, Professor Posner noted, the claim of the individual to secrecy or confidentiality of his information is much weaker. *Id.*

divulge sensitive, often detailed information about themselves.[27] Unauthorized disclosure of this information—which may reveal beliefs and interests as well as actions—subjects the individual to unwarranted and false evaluations of his character by those who lack the authority to judge him, and who do so in contexts in which he does not seek evaluation.[28] These superficial judgments by others, usually strangers, affect directly the standing and reputation of the individual in the community.[29] As a result, the individual can suffer a diminished range of opportunities to develop and maintain political, economic, and social realtionships.[30]

By reserving to the individual the freedom to "edit" his "self," the limited disclosure interest permits him to adjust continually his competing internal needs for solitude and companionship, for intimacy and general social intercourse, and for anonymity and responsible participation in society.[31] A democratic society, committed to the ideals of limited government and to regarding individuals as ends unto themselves, properly leaves to the individual—with only extraordinary exceptions in the interests of society—the choice of when, how, to whom, and on what terms to re-

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27. *See* PRIVACY COMMISSION, *supra* note 1. *See, e.g.*, Paul v. Davis, 424 U.S. 693 (1976); Wisconsin v. Constantineau, 400 U.S. 433 (1971) (stigmatization of individuals by governmental action); Shelton v. Tucker, 364 U.S. 479 (1960) (freedom of association); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958).

28. Huff, *Thinking Clearly About Privacy*, 55 WASH. L. REV. 777, 782 (1980). Professor Huff contrasted our attitudes and behavior around friends to our attitude around strangers and concluded that our ultimate concern is the possibility of unauthorized evaluation:

> [W]e are secure exposing the more intimate aspects of our lives to a friend—secure when faced with the friend's use of what is learned from that exposure. We feel comfortable, for example, turning to a friend for advice because we trust the friend to continue to care for us, to continue to respect us, despite what may be known as a consequence of our request for help. We would never, in other words, expect a friend to make us the mere object of his or her judgment. An important and characteristic difference, then, between that part of our lives conducted with family and friends and that part conducted with strangers is the absence in the former, but not in the latter, of a conscious awareness of ourselves as objects of evaluation. We speak of this part of our lives as conducted "in private" and as involving "private relations" because this is where we are safe from scrutiny and thus secure against evaluation.

Id. at 780.

29. Professor Huff noted that the individual's interest in avoiding unauthorized evaluations is absent when such scrutiny is "appropriate or approved," for example, when the individual releases "school or job records to prospective employers or graduate schools," or whenever he chooses to place himself "in a position where evaluations are expected." *Id.* at 782.

30. Professor Fried contended that without this control of information about oneself, "ends and relations of the most fundamental sort: respect, love, friendship and trust . . . are simply inconceivable." Fried, *supra* note 23, at 477.

31. A. WESTIN, *supra* note 23, at 42.

veal his thoughts, acts, and the other details of his personal life.[32]

III. The Legislative Response—The Privacy Act of 1974

The increasing imbalance between the government's informational needs and the desires of individuals to withhold personal, identifying details about their lives led Congress in 1974 to adopt the first comprehensive regulation of the federal government's information practices. The Privacy Act of 1974[33] seeks to protect individual privacy by providing safeguards against unauthorized governmental use of personal information.[34] Accordingly, the Act addresses both individual access to government records of which the individual is the subject and dissemination of those records by the government agency in possession. The Act established a Privacy Protection Study Commission (Privacy Commission) to investigate and report upon the implementation of the Act.[35]

The Act provides that no agency shall disclose any record in its record system to any person, or to another agency without the

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32. *Id.; see* P. Dionisopoulos & C. Ducat, *supra* note 21, at 1; Fried, *supra* note 23, at 478.

33. 5 U.S.C. § 522a (1976). For a discussion of congressional attempts prior to the Privacy Act to regulate governmental information practices through specific answers to selected problems, see Project, *supra* note 1, at 1297-1303 and authorities cited therein.

34. Privacy Act of 1974, Pub. L. No. 93-579, § 2(b), 88 Stat. 1896, 1896 (1974).

35. *Id.* § 5, 88 Stat. at 1905. *See also* Privacy Commission, *supra* note 1, at 497-536. In its report the Privacy Commission explained that the Privacy Act, which *limits* disclosure to the public, does not conflict substantively with the Freedom of Information Act [FOIA], which *directs* such disclosure:

> The "conditions of disclosure" section of the Privacy Act that establishes the ten categories of permissible external disclosures allows an agency to disclose a record about an individual to a member of the public who requests it, if the disclosure would be *required* under the Freedom of Information Act. On the other hand, subsection (b)(6) of the Freedom of Information Act allows an agency to refuse to disclose a record to a member of the public (i.e., anyone other than the individual to whom the record pertains) if it is a medical, personnel, or similar record, the disclosure of which would constitute a "clearly unwarranted invasion of privacy."
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> To understand the meshing of these requirements, a consideration of the situation prior to the passage of the Privacy Act is useful. The exemptions on access to information in the Freedom of Information Act are discretionary, not mandatory. Thus, under the FOIA (prior to the passage of the Privacy Act), an agency *could* withhold information, the disclosure of which would, in the agency's opinion, constitute a "clearly unwarranted invasion of personal privacy," but the agency was not *required* to do so. Today, after passage of the Privacy Act, an agency is still *required,* by the Freedom of Information Act, to disclose information that would *not* constitute a "clearly unwarranted invasion of personal privacy," but now an agency no longer has the *discretion* to disclose information it believes would constitute such a clearly unwarranted invasion.

Id. at 520.

subject individual's consent,[36] unless the situation falls within one of the statutory exceptions. The Act allows access to the records by the subject individual for the purposes of copying and review.[37] The Act also restricts the collection and storage of information by requiring that the agency maintain only information which is relevant and necessary to accomplish the governmental objective. Furthermore, the agency must publish the existence and character of all its personal information systems.[38] Individuals may bring civil actions against the offending agency for failure to comply with provisions of the Act, and specific violations have criminal penalties.[39]

In 1977 the Privacy Commission concluded that the Act had not protected adequately the individual's interest in controlling the use of his personal information after its release to the government: "The Privacy Act represents a large step forward, but it has not resulted in the general benefits to the public that either its legislative history or the prevailing opinion as to its accomplishments would lead one to expect."[40] The Act's failure to reach its objectives is attributable both to an inherent flexibility that allows agencies to escape its proscriptions and to a narrowness of scope. First, the Act is ambiguous about which entities are subject to it. The Act specifies that it applies to "agencies," as defined in the Freedom of Information Act, and to certain government contractors, as the Privacy Act itself defines them.[41] In April 1975 the Justice Department advised the Office of Management and Budget of its interpretation of agency under the Privacy Act:

> For example, it may be desirable and in furtherance of the purposes of the

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36. Privacy Act of 1974 § 3, 5 U.S.C. § 552a(b) (1976).

37. *Id.* § 552a(d)(1).

38. *Id.* § 552a(e).

39. *Id.* § 552a(g) (civil remedies); *id.* § 522a(i) (criminal penalties).

40. PRIVACY COMMISSION, *supra* note 1, at 502. The Commission posed the following two questions to guide its assessment of the Privacy Act: (1) "Does the Act effectively address the issues and problems it was intended to address?" and, (2) "Are there important information policy issues and problems the Act might address but does not address, or does not address adequately?" *Id.*

In addition to its general finding that the Act had not accomplished its purpose, the Commission made two observations. First, although agency compliance with the Act is difficult to assess because of the ambiguity of some of the Act's requirements, on balance, it appears neither deplorable nor exemplary. Second, the Act iguores or addresses only marginally some personal data record-keeping policy issues of major importance now and for the future. *Id.* at 502-03.

41. The FOIA defines "agency" to include "any executive department, military department, [g]overnment corporation, [g]overnment controlled corporation, or other establishment in the executive branch of the [g]overnment . . . or any independent regulatory agency." 5 U.S.C. § 552(e) (1976).

> Privacy Act to treat the various components of a Department as separate "agencies" for purposes of entertaining applications for access and ruling upon appeals from denials, while treating the Department as the "agency" for purposes of those provisions limiting intragovernmental exchange of records.[42]

Thus, the definition of agency depends upon function, not organizational structure. A particular agency can use different definitions for varying functional purposes, regardless of its organizational boundaries. Each entity within a given organizational structure may define itself as an agency at the highest possible level to provide for free flow of information about individuals to all others within that structure.[43]

Second, the Act's inconsistent definition of "record" and "system of records" narrows significantly the scope of the statute. The Act defines records as "[a]ny item, collection, or grouping of information about an individual that is maintained by an agency,"[44] which includes potentially every record that contains any kind of information associated with that individual. The Act, however, applies only to a record that is retrieved from a "system of records" by the name of the individual or by some identifying number, symbol, or other "identifying particular" assigned to that individual.[45] Thus, while record is defined broadly to include any information about an individual that *contains* his name or identifier, the Act covers only information that is *retrieved* by name, identifier, or identifying particular. The Privacy Commission found that this distinction effectively excludes from the Act's purview many records containing sensitive personal information.[46] The Act fails to provide for the computer's ability to conduct "attribute" and "textual" searches by scanning records for predetermined conditions or arrangements of data,[47] and identify particular individuals without resort to unique "identifiers."

The Act's inadequacies extend beyond the general problems of ease of agency contravention and limited scope. The Act enumerates exceptions to the proscription on external disclosure without

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42. PRIVACY COMMISSION, *supra* note 1, at app. four 2-3 (quoting Letter from Assistant Attorney General, Office of Legal Counsel, U.S. Dep't of Justice, to the Office of Management and Budget, April 19, 1975).

43. PRIVACY COMMISSION, *supra* note 1, at 3.

44. Privacy Act of 1974 § 3, 5 U.S.C. § 552a(a)(4) (1976).

45. 5 U.S.C. § 552a(a)(5).

46. PRIVACY COMMISSION, *supra* note 1, at app. four 5.

47. *Id.* at 6-7.

the individual's consent.[48] Most importantly, the statute permits any disclosure for a "routine use"—"for a purpose which is compatible with the purpose for which [the information] was collected."[49] Some agencies have broadly interpreted "compatible" to facilitate disclosure; they have employed the "routine use" provision to permit the free flow of law enforcement and investigative information. The informal information network that exists among the various investigative law enforcement agencies exacerbates this problem. Further, as the federal government has continued to provide more services and benefits, the pressure has increased to ensure that all recipients are qualified. As a result, almost all federal agencies now have enforcement branches through which they exchange information under the "routine use" exception.[50] For this reason, and because of the statute's elastic definition of agency, the Privacy Commission concluded that the Privacy Act has had no deterrent effect on interagency sharing of information.[51]

While the Privacy Act has not markedly restricted unauthorized disclosure by federal agency personnel, it does evidence substantial public and legislative recognition of the importance of the individual's interest in limited disclosure.[52] As Professor Tribe pointed out, however, legislative enactments such as the Privacy Act are products of the majority, and hence, have inherently limited power; the majority may amend or take away at any time. Furthermore, informational privacy rights that the legislature has conferred would yield much more readily to other asserted governmental interests than would the same rights embodied in or protected by the Constitution itself.[53] In view of the Privacy Act's inadequate protection of the important individual liberty interests at stake, and the inherently limited nature of legislatively conferred rights, substantial need remains for an interest in limited disclosure grounded ultimately in the Constitution.

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48. 5 U.S.C. § 552a(b).

49. *Id.* § 552a(a)(7), (b)(3).

50. PRIVACY COMMISSION, *supra* note 1, at 517-19. See *Personal Privacy in the Computer Age, supra* note 1, at 1180-93 for a discussion of the "sharing of information" problem. *See* Cooper, *supra* note 15, at 84-86.

51. PRIVACY COMMISSION, *supra* note 1, at 518.

52. In Detroit Edison Co. v. NLRB, 440 U.S. 301 (1979), the Supreme Court took judicial notice of the burgeoning federal and state legislation giving "forceful recognition" to the individual's interest in preventing disclosure of sensitive personal information that his files might contain. *Id.* at 318. *See infra* text accompanying notes 153-57 & 243-44.

53. L. TRIBE, *supra* note 24, at 895-96.

IV. A Constitutional Interest in Limited Disclosure

A. The First Amendment

The first amendment[54] does not mention an interest in control of information. The United States Supreme Court, however, has recognized a right of freedom of association as a necessary concomitant to the specific guarantees of the first amendment, since the exercise of freedoms of speech, the press, assembly, and petition frequently requires group activity.[55] The Court has noted that this freedom of association often depends upon the concealment of one's associations—the prevention of disclosure of information pertaining to a particular association.[56]

The judicially created interests in freedom and privacy of association promote the individual's ability to develop and maintain relationships that he otherwise might forego because of the hostility he would expect to attend revelation of his association. The interest in limited disclosure advances the identical goal of preserving for the individual the ability to choose his relationships himself, free of societal pressure or external interference.[57] By providing the individual with control of what information about himself becomes exposed for public evaluation, the interests in both

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54. The first amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press, or the right of the people peacably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.

55. In Alabama *ex rel.* Patterson, 357 U.S. 449 (1958), the Supreme Court elevated freedom of association to the status of a constitutional interest emanating from the first amendment and made applicable to the states by the due process clause of the fourteenth amendment. *See* Annot., 33 L. Ed. 2d 865, 901-06.

56. In *Alabama* ex rel. *Patterson*, the Court denied effect to a state court order compelling disclosure by tbe NAACP of its membership lists and declared that disclosure of affiliation with groups engaged in controversial advocacy could constitute an effective restraint upon the first amendment freedom of association. 357 U.S. at 460-63. The Court emphasized that past revelation of NAACP affiliation had subjected rank and file members to loss of employment, threats of physical harm, and other displays of public hostility. The Court found it foreseeable that disclosure would affect adversely petitioners' ability to pursue their beliefs and would induce some members to leave the organization and discourage others from joining. *Id.* at 462-63.

In Shelton v. Tucker, 364 U.S. 479 (1960), the Court extended to individuals the right to refuse disclosure to the government of information pertaining to private associational relationships absent a compelling state interest. *Shelton* concerned an Arkansas statute that required teachers, as a condition of employment, to file affidavits listing all organizations to which they had belonged or had made substantial contributions over the past five years. In declaring the statute unconstitutional, the Court observed that public exposure potentially could bring public pressure upon school boards to discharge teachers who were members of unpopular or minority organizations, which would impair a teacher's right to pursue freely his preferred associations.

57. *See supra* part II.

privacy of association and limited disclosure allow him to define his public identity. This presentation of self to others in turn determines the individual's range of associational opportunities. When the government assumes control of personal information and is under no concomitant duty to observe confidentiality, it can shape, to some degree, community reaction to an individual, either by disseminating information that it has acquired legitimately, or by compelling public disclosure of information in the individual's possession.[58] If community reaction to the individual is unfavorable, he can suffer a reduced opportunity to associate. This loss offends the most classic conceptions of individual liberty—the right of the individual to adjust continually between his competing desires for solitude and intimacy, and responsible participation in society.[59] Although the interests in limited disclosure and the privacy of association seek to promote identical ends by identical means, the first amendment does not necessarily provide a constitutional haven for protection of a general interest in limited disclosure.

A finding that the interest in privacy of association established under the first amendment embraces a general interest in limited disclosure imparts to the term "association" a far broader meaning than the Supreme Court contemplated when it initially established privacy of association as a constitutionally protected interest. To embrace a general interest in limited disclosure, freedom of association necessarily must mean that whatever action a person lawfully can pursue as an individual, he also can pursue with others. Only isolated dicta exists to support such a sweeping proposition.[60] The

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58. *See, e.g.*, Shelton v. Tucker, 364 U.S. 479 (1960).

59. The Supreme Court has recognized the potentially devastating effect that public reaction to governmental disclosure or government-mandated disclosure of information about associational relationships can have upon an individual's ability to participate in society. The Court has demonstrated its concern by considering carefully the expected degree of public reaction to the contemplated disclosure or evidence of past reaction to similar disclosures, in its adjudication of freedom of association claims. *See* Alabama *ex rel.* Patterson, 357 U.S. 449, 462-63 (1958). If the Court anticipates minimal hostility, it finds no impairment of freedom of association, and hence, no corresponding interest in privacy of association. Thus, in Konisberg v. State Bar, 366 U.S. 36 (1961), the Court sustained the inquiry of the California State Bar into petitioner's reported affiliation with the Communist party. The Court observed that the investigations were private with no disclosure to unauthorized persons. The Court determined accordingly that adverse public reaction which could harm petitioner's associational interest was not foreseeable. *See In re* Anastaplo, 366 U.S. 82 (1961).

60. For example, in Griswold v. Connecticut, 381 U.S. 479 (1965), the Court stated that the right to freedom of association includes not only political associations, but also associations that benefit individuals legally and economically. The Court specifically mentioned marriage as an associational relationship. *Id.* at 485-86. *See also* Moose Lodge v. Iris,

Court almost consistently has reduced freedom of association issues to the narrow question of whether the members joined the group to pursue more effectively a goal expressly protected by the first amendment, such as speech or petition, and not to the broader question of whether they joined to further *any* activity.[61] The freedom of association does not protect the interest in forming any future, speculative, social, economic, or even political associations that do not relate to first amendment concerns. Similarly, the Court has limited strictly the concomitant interest in privacy of association to the *fact* of one's past or present association with a particular group, the disclosure of which might result in public hostility and discourage further association and exercise of first amendment interests.[62] Accordingly, the Supreme Court has noted that it cannot entertain an interest in limiting or withholding disclosure of any general information under the first amendment interest in privacy of association unless effective exercise of speech and petition rights are directly at stake.[63]

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407 U.S. 163 (1972) (Douglas, J., dissenting) (right to freedom of association includes right to form exclusive social club).

61. L. TRIBE, *supra* note 24, at 701. Two Court decisions a decade apart established unequivocally the contrast between group association to pursue first amendment goals, and group association to seek unrelated, even though no less compelling, goals. In NAACP v. Button, 371 U.S. 415 (1963), the Court scrutinized and struck down a Virginia statute that sought to prohibit a form of group legal practice by the NAACP on the ground of improper solicitation of legal business. The challenged activity was the NAACP's practice of financing and otherwise assisting certain kinds of litigation on behalf of its declared purpose of ending racial segregation. Specifically, the NAACP maintained a staff of 15 attorneys available to aggrieved black citizens who sought to vindicate their civil rights. The Court sustained this practice, declaring that over and above the actual vindication of specific legal rights, this form of litigation was the most effective political action method under the circumstances, in that it made possible the contributions of minorities to the nation's beliefs and ideals. *Id.* at 430-31. Conversely, in Garcia v. Texas Bd. of Medical Examiners, 384 F. Supp. 434 (N.D. Tex. 1974), *aff'd*, 421 U.S. 995 (1975), the Court affirmed a district court holding that a health maintenance organization formed by low income consumers to secure lower cost medical care by pooling members' resources to hire doctors on a salaried basis is not an associational relationship that the first amendment protects from state interference. In both *Garcia* and *Button* group association was essential to each group's obtaining the necessary service at an affordable cost. The salient difference was that the activity of the association for health maintenance did not relate directly to the first amendment, while the association for legal purposes was pursuing the goals of speech and petition.

62. In Whalen v. Roe, 429 U.S. 589 (1977), in which plaintiffs sought unsuccessfully to prevent the release of their names to New York health authorities, the Court refused to entertain under the first amendment a claim to an interest in limited disclosure of any general information that, if exposed to the public, might reduce the subject individual's community standing or make his company less desirable, unless effective exercise of the speech and petition interests was at stake. *Id.* at 604 n.32.

63. *Id.*

B. The Fourth Amendment

Similar to the first amendment, the fourth amendment[64] does not refer explicitly to control of personal information; rather, it protects the interest in seclusion. For many years the courts interpreted the amendment literally without considering its broader objectives.[65] Since "searches and seizures" now are possible without the physical intrusion previously thought necessary to trigger fourth amendment protection, the Court has faced the task of redefining the scope of the individual interest protected by the fourth amendment to determine whether it protects a narrow interest in physical seclusion, as courts traditionally held, or a broader interest in confidentiality of "papers and effects"—in short, information.

The relevant inquiry becomes whether the fourth amendment protects against the *means* of governmental intrusion, or whether it maintains the substantive interest or *value* compromised by the intrusion.[66] The means-oriented approach seeks to determine the extent to which the practice at issue is similar to the physical search and seizure of tangible property. Conversely, under the value-oriented approach, the relevant determination is twofold: first, the identity of the values that the framers sought to preserve by prohibiting forcible physical searches by government officials and second, the extent to which the practice at issue threatens to undermine these values.[67] If the fourth amendment is construed to protect the individual's interest in the secrecy and confidentiality of information in his possession, then arguably its conceptual embrace extends to the individual's interest in preserving the confidentiality of any information that the government compels him to divulge.

In *Katz v. United States*[68] the Court appeared to adopt a value-oriented approach, abandoning the previously held "consti-

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64. The fourth amendment extends to individuals the right "to be secure in their persons, houses, papers and effects against unreasonable searches and seizures." U.S. CONST. amend. IV.

65. *The Uncertain Protection, supra* note 23, at 177.

66. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 363-64 (1974).

67. Professor Amsterdam noted that the two approaches can lead to dissimilar results because questioning whether a means of intrusion is similar to official rummaging is quite different from asking if the value that precludes one intrusion also precludes another. *Id.* at 362-64; *see* Stone, *The Scope of the Fourth Amendment*, 1976 AM. BAR FOUND. RESEARCH J. 1193, 1199.

68. 389 U.S. 347 (1967).

tutionally protected place" rationale for limiting protection of fourth amendment privacy interests.[69] In *Katz* FBI agents acting without a warrant attached a listening device to the outside of a public phone booth to monitor defendant's conversation. Finding this practice to be an unconstitutional search and seizure, the Court rejected explicitly the means-oriented approach and declared that "the Fourth Amendment protects people—and not simply 'areas'—against unreasonable searches and seizures."[70] Focusing its analysis on "*what* [the individual] seeks to preserve as private,"[71] the Court emphasized that the individual's interest in *Katz* was not in the physical security of the phone booth, but rather in the secrecy of the phone call—his entitlement "to assume that the words he utters into the mouthpiece will not be broadcast to the world."[72] Accordingly, the Court held that by "listening to and recording the petitioner's words [the government] violated the privacy upon which he justifiably relied . . .[; hence, the activity] constituted a 'search and seizure.' "[73] In place of the discredited "means" approach, the *Katz* Court developed a test for determining whether the individual's interest in the secrecy and confidentiality of information[74] warrants fourth amendment protection: did

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69. In Olmstead v. United States, 277 U.S. 438 (1928), the Court held that wiretapping hy federal officers is not within the purview of the fourth amendment. Finding that no trespass had taken place on defendant's property, the Court adopted a means-oriented approach and reasoned that the wiretapping at issue did not sufficiently resemble a physical search and seizure to trigger fourth amendment protection. During the period after *Olmstead* the Court developed the concept of a "constitutionally protected place," to test fourth amendment intrusions. This concept symbolized the Court's belief that the fourth amendment's purpose is to ensure the physical security of certain places, for example, houses and cars, against governmental intrusion. Thus, the Court in Goldman v. United States, 316 U.S. 129 (1942), held that electronic eavesdropping by a "bug" attached to the *outside* wall of defendant's quarters was not subject to fourth amendment constraints. In Silverman v. United States, 365 U.S. 505 (1961), however, the Court found that electronic eavesdropping by a "bug" on the *inside* wall of defendant's house constituted a prohibited search and seizure.

70. Katz v. United States, 389 U.S. at 353.

71. *Id.* at 351 (emphasis added).

72. *Id.* at 352. Writing in dissent, Justice Black objected strenuously to the "omnipotent lawmaking" the Court employed in its adoption of the " 'broad . . . and ambiguous concept' of 'privacy' as a 'comprehensive substitute for the Fourth Amendment's guarantee against "unreasonable searches and seizures." ' " *Id.* at 374 (Black, J., dissenting) (quoting from Griswold v. Connecticut, 381 U.S. 479, 509 (1965) (Black, J., dissenting)). Justice Black found that the language of the fourth amendment did not proscribe the government's contested activities and that the Court should not rewrite the amendment so that the language would apply. Katz v. United States, 389 U.S. at 364 (Black, J., dissenting).

73. 389 U.S. at 353.

74. Clark, *Constitutional Sources of the Penumbral Right to Privacy*, 19 VILL. L. REV. 833, 865 (1974). If a person has a reasonable expectation of privacy, a valid warrant now is

the individual justifiably rely upon or intend to maintain the secrecy or confidentiality of the information.[75]

Although the value-oriented approach provides needed flexibility to deal with innovative methods of intrusion, it remains difficult to apply. Identifying the values that the framers sought to protect by the fourth amendment is a rather speculative inquiry.[76] From the tenor of *Katz,* the paradigm limited disclosure interest—the individual's interest in determining for himself when, how, and to what extent the government reveals information about him to others—arguably constitutes the core protected value of the fourth amendment. As Professor Stone explained, "prohibiting the unrestrained entry by government officials into homes and offices and the unrestrained rummaging and examination of the individual's possessions, the framers were seeking to protect, not only the property interests of the owner, but also the individual's interest in controlling the circulation of information about him."[77] The interest advanced by an individual's ability to limit disclosure is virtually identical to Professor Stone's formulation of the fourth amendment interest: keeping secret or confidential the information that the individual does not wish others to know. Although fourth amendment concerns arise traditionally when the government seeks to obtain information in the possession of the individual, whereas the limited disclosure inquiry begins when the information is already in the hands of the government, the distinction apparently is only a factual one. In substance the fourth amendment and limited disclosure interests merge to preserve the individual's interest in controlling the circulation of his personal information. Language in *Katz* suggests that the Supreme Court impliedly agrees that limited disclosure is the core fourth amendment value.[78]

Assuming that the framers did draft the fourth amendment to protect the interest in controlling the circulation of personal infor-

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necessary to seize his words, as it would he for any other information in his possession. *Id.*

75. Stone, *supra* note 67, at 1203.

76. *Id.* at 1204.

77. Stone, *supra* note 75, at 1207.

78. The *Katz* Court identified the interest that plaintiff sought to preserve as private as being "entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world." 389 U.S. at 352. Plaintiff presented a threshold interest in a limited disclosure claim by seeking and reasonably expecting strict confidentiality in his telephone conversation. To that end, he required control over its disclosure. In striking down the unwarranted governmental interference with the confidentiality interest, the Court vindicated plaintiff's interest in determining for himself what personal information to reveal.

mation, the second and final step in the value-oriented approach is to determine the circumstances in which interference with this interest in limited disclosure falls within the ambit of the fourth amendment.[79] While *Katz* arguably provides prima facie support for the fourth amendment as a constitutional base upon which to establish a general interest in limited disclosure, several important restrictions on the scope of the Amendment strongly indicate an opposite result.

First, the Court has limited application of the fourth amendment to factual contexts in which the government collects information directly from the individual, usually in the course of a criminal investigation.[80] The undercover agent cases[81] and the Bank Secrecy Act cases[82] demonstrate the Court's unwillingness to ex-

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79. *See* Stone, *supra* note 67, at 1207-09.

80. *See* Whalen v. Roe, 429 U.S. at 600 n.32.

81. *See, e.g.,* United States v. White, 401 U.S. 747 (1971); Lopez v. United States, 373 U.S. 427 (1963); On Lee v. United States, 343 U.S. 747 (1952). The Court has refused to reconsider these undercover agent decisions in light of *Katz*: in *White* the Court held that the actions of a government informant who recorded four of eight conversations with defendant about illegal narcotic sales did not infringe upon defendant's reasonable expectation of privacy or constitute an illegal search and seizure. The Court concluded that since "the law gives no protection to the wrongdoer whose trusted accomplice is or becomes a police agent, neither should it protect him when that same agent has recorded or transmitted the conversation." 401 U.S. at 752. The majority opinion relied on *On Lee* and *Lopez,* two pre-*Katz* decisions in which the Court held that undercover agents' third party bugging activities do not violate the fourth amendment. In the *White* majority's view *Katz* changed nothing in this area.

82. The Bank Secrecy Act of 1970 requires banks and other financial institutions to retain records of customers' identities, to make and retain copies of certain checks and other records of various transactions, and, to make these copies available to law enforcement agencies upon demand. 12 U.S.C. § 1829b (1953). The purpose of the Act is to facilitate law enforcement. *See* Silver, *supra* note 23, at 246-48. In California Bankers Ass'n v. Schultz, 416 U.S. 21 (1974), the Court upheld the record-keeping practices of the Act against a constitutional challenge. Regarding the fourth amendment claim, the Court found that the bank was a party to the transaction and, therefore, possessed the right to record the transactions. The Court reserved until the issue actually arose the question whether a depositor could later challenge a governmental subpoena for production of the records. In dissent Justice Marshall declared that if the depositor could not challenge the record-keeping practices immediately, he would not be able to do so at all, and any fourth amendment claims he might present would "be labeled premature until such time as they can be deemed too late." *Id.* at 97. Justice Marshall predicted accurately the facts and holding of United States v. Miller, 425 U.S. 435 (1976).

In *Miller* a law enforcement agency had subpoenaed from a hank copies of a criminal defendant's checks that the bank kept pursuant to the Bank Secrecy Act. The Court found that defendant "had no protectable Fourth Amendment interest in the subpoenaed documents." *Id.* at 437. The Court reasoned that because checks are an independent record of an individual's participation in the flow of commerce, they are not confidential communications. Furthermore, the Court found that an account record is the property of the bank, not of the individual account holder. The Court apparently believed that, like the wrongdoer in

tend fourth amendment secrecy protection to information that an individual already has revealed or otherwise delivered to others—the fact pattern of the paradigm interest. While subjecting intrusions upon secrecy such as electronic eavesdropping and wiretapping to fourth amendment strictures, the Court consistently has refused to find that the Amendment proscribes the use of undercover agents and informants to collect the same information.[83] The Court has declared that while the scope of the fourth amendment extends to the individual's reasonable expectation of privacy, it does not include a constitutionally protected expectation that a person with whom an individual communicates will not later reveal that conversation to the police.[84] This narrow protection of the interest in secrecy and confidentiality in the context of information collection by the government does not augur well for an expansion

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the undercover agent cases, the depositor assumes the risk that the bank may reveal his affairs to the government when he decides to deal with the institution.

The *Miller* Court's approach is open to criticism. Property rights in materials and documents, such as cancelled checks, should be of no consequence in light of the interpretation of *Katz* holding that privacy, in the form of secrecy, or confidentiality of information, is the protected fourth amendment value. The interest at stake is the preservation of the *confidentiality* of the information, not title to the documents. The Court also stressed that delivery of the checks to the bank, where the bank's employees read them, compromised any interest in their confidentiality, so that they no longer were confidential communications for purposes of the fourth amendment. By this holding, the Court destroyed defendant's reasonable expectation of privacy in his financial transactions, which he might have under *Katz*. *See The Uncertain Protection, supra* note 23, at 212. *Miller* emphatically illustrates not only the Court's refusal to extend fourth amendment protection to the confidentiality in the information that the individual has released to others, but also the individual's present "defenselessness" regarding information gathered and records maintained about him. PRIVACY COMMISSION, *supra* note 1, at 7.

Read together, *Miller* and *Schultz* may suggest that no one has standing to challenge the Bank Secrecy Act "since [Miller] was an individual whose checks were copied by a bank pursuant to the record keeping requirements of the Bank Secrecy Act, and since he was convicted, in part, because of evidence revealed by the production of those checks." Silver, *supra* note 23, at 247. Yet, in *Schultz* five Justices, including Justice Powell, the author of *Miller*, wrote that bank depositors do have a legitimate expectation of privacy in their bank records. *Miller* arguably is inconsistent with *Schultz*; certainly, it fulfills Justice Marshall's warning in his *Schultz* dissent.

83. *See, e.g.*, Hoffa v. United States, 385 U.S. 293 (1966).

84. The Court based its reasoning on the fiction of consent. *See The Uncertain Protection, supra* noto 23, at 187. Thus, in On Lee v. United States, 343 U.S. 747 (1952), and Lopez v. United States, 373 U.S. 427 (1963), undercover federal agents, who were wired for sound in *On Lee* and equipped with a portable recorder in *Lopez*, entered the offices of the defendants and recorded incriminating statements about narcotics violations and the evasion of excise taxes, respectively. The Court found no fourth amendment privacy violation in either case because each agent had come into the office not as a trespasser, but with the defendant's *consent*. Professor Posner, however, pointed out that the fraud in most of these cases vitiates this form of consent. *The Uncertain Protection, supra* note 23, at 188.

of the fourth amendment's ambit to include a general interest in controlling disclosure of that information once it is in the government's possession.[85]

The explicit language of the fourth amendment clearly restricts its scope. "Searches and seizures" covers only collection of information;[86] hence protection extends to the limited interest of the individual in keeping information out of the government's possession in the first instance but provides no restraints on what the government does with the information after its collection.[87] Even though dissemination of personal information by the government after its collection can impair the individual's interest in the confidentiality of that information, and perhaps cause him injury, factually it is too dissimilar from the traditional fourth amendment context to receive protection. To embrace a general interest in limited disclosure, the language of the fourth amendment would require a far more expansive interpretation than it heretofore has received.[88] The Court is unlikely to expand its interpretation of the Amendment's scope to embrace a general interest in limited disclosure.[89]

C. *The Privilege Against Self-Incrimination*

Nearly a century ago the Supreme Court in *Boyd v. United States*[90] conjoined the fifth amendment privilege against self-incrimination[91] and the fourth amendment prohibition against unreasonable searches and seizures to create a constitutional barrier to the compulsory governmental production from a defendant of personal information in the form of incriminating documents.

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85. In *Katz* as well as in the undercover agent and the Bank Secrecy Act cases, the Court only sustained the interest in secrecy and confidentiality of personal information when the government made an unwarranted attempt to collect material in the exclusive possession of the individual. When the individual had relinquished control over the information by conveyance to a third party, the fourth amendment did not restrain further disclosure to others.

86. *See* Amsterdam, *supra* note 66, at 356; Stone, *supra* note 75, at 1209.

87. Clark, *supra* note 74, at 856-71; Project, *supra* note 1, at 1287; Stone, *supra* note 75, at 1209. The undercover agent cases, *supra* note 81, demonstrate that the fourth amendment privacy interest is not always secure even in the favored information collection context.

88. *See, e.g.*, Whalen v. Roe, 429 U.S. 589 (1977); *The Uncertain Protection*, *supra* note 23, at 215; *infra* notes 141-49 and accompanying text.

89. *See* 429 U.S. at 604 n.32.

90. 116 U.S. 616 (1886).

91. The fifth amendment provides that no person shall be compelled in any criminal case to be a witness against himself. U.S. CONST. amend. V.

Boyd established the principle that the fifth amendment prohibited the evidentiary use of documents obtained in contravention of the fourth amendment because such use violated the fifth amendment zone of privacy.[92] Thus, *Boyd* would provide some basis for establishing an interest in limited disclosure in the fifth amendment privilege against self-incrimination.

In a series of recent decisions, however, the Court has shown a marked disregard for self-incrimination concerns in the context of an individual seeking to control the release or dissemination of personal information in the government's possession. In *Couch v. United States*[93] the Court held that a taxpayer may not invoke his privilege against compulsory self-incrimination to prevent the production of his business records that are in an accountant's possession. The Court found the vital ingredient of *personal* compulsion lacking because defendant had turned her records over to a third party; the order for production was directed to the accountant, not to the taxpayer herself. The Court further narrowed the scope of *Boyd* in *Fisher v. United States*[94] by holding that a taxpayer suffers no invasion of fifth amendment interests when the government orders his attorney to produce the taxpayer's records that are in the attorney's possession, even if the documents would have been subject to the taxpayer's privilege had the taxpayer received the production order. Following the *Couch* rationale, the Court found that the government order compelled the taxpayer himself to do nothing; rather, the incriminating evidence came from the attorney.[95] Thus, the factual situation in which the paradigm disclosural privacy interest arises appears too dissimilar from the narrow context within which the Court has sustained the fifth amendment privilege against self-incrimination to warrant its protection.

D. The Fifth and Fourteenth Amendments—Substantive Liberty or Property

1. *Paul v. Davis* and the Interest in Reputation

> Good name in man and woman, dear my lord,
> Is the immediate jewel of their souls:
> Who steals my purse steals trash—

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92. *See, e.g.*, Gouled v. United States, 255 U.S. 298 (1921).

93. 409 U.S. 322 (1973).

94. 425 U.S. 391 (1976).

95. The Court declared, "We adhere to the view the Fifth Amendment protects against 'compelled self-incrimination, not [the disclosure of] private information.'" *Id.* at 401 (quoting United States v. Nobles, 422 U.S. 225, 233 n.7 (1975) (brackets in original)).

'tis something, nothing;
'Twas mine, 'tis his, and has been slave to thousands;
But he that filches from me my good name
Robs me of that which not enriches him,
And makes me poor indeed.[96]

Inextricably related to an individual's control of his personal information and presentation of self[97] is the maintenance of reputation. An individual's reputation is the result of his own selective disclosure of information, or "editing" of himself. Accordingly, the freedom of the individual to determine for himself the extent to which he will reveal his personal information, and to whom, is central to the maintenance of reputation. It follows that maintenance of reputation is the core concern of the interest in limited disclosure.

The Supreme Court in *Paul v. Davis*[98] held that reputation *alone* is not a liberty or property interest that the due process clause of the fifth and fourteenth amendments protects.[99] *Paul* provides a classic illustration of the paradigm limited disclosure interest: wide public dissemination by the government of potentially injurious information legitimately acquired from the plaintiff. In anticipation of the Christmas shopping season, the police department of Louisville, Kentucky, circulated flyers of "active shoplifters," including photographs, to eight hundred local merchants. At the time of the distribution, police had arrested plaintiff for shoplifting but his guilt was undetermined. Nevertheless, the flyer included his name and photograph. Shortly thereafter, the charges against him were formally dismissed. Alleging that defendant government officials deprived him of liberty without due process of law, plaintiff sought damages and other relief.[100] The Sixth Circuit reversed the district court's grant of defendants' motion to dismiss[101] on the ground that plaintiff's interest in his reputation was well established as a liberty interest protected by the due process clause of the fourteenth amendment,[102] and that plaintiff could not suffer the imputation of criminality without procedural due process guarantees. The Supreme Court, while conceding

96. W. SHAKESPEARE, OTHELLO, act III, scene 3, line 156.
97. *See* Gavison, *supra* note 23, at 450; *supra* part II.
98. 424 U.S. 693 (1976).
99. *Id.* at 713.
100. Plaintiff sought relief under 42 U.S.C. § 1983.
101. 424 U.S. at 696.
102. *Id.* at 697.

that defendants acted "under color" of state law[103] and probably caused plaintiff economic and personal injury,[104] nonetheless held that reputation alone, apart from a "more tangible" interest otherwise deprived by the state, is neither liberty nor property for purposes of constitutional review. The Court dismissed the complaint for failure to state a federal claim.[105] Because the injury to reputation is so often the concern underlying the individual interest in limited disclosure, the holding in *Paul* appears to dispose of possible constitutional standing for that interest as well. Yet an examination of the decision and context of *Paul* demonstrates that this result is unlikely. *Paul* is starkly inconsistent with the Court's other decisions that have granted protection to an individual's interest in reputation alone.

(a) The Precedent of Paul v. Davis

In a series of decisions before *Paul* the Court held that an individual whose only complaint is that governmental conduct threatens to injure his "good name, reputation, honor, or integrity"[106] can assert a procedural due process claim under the fourteenth amendment. Accordingly, the government could not take any action that explicitly labeled or stigmatized an individual in an invidious or derogatory manner without first meeting procedural due process requirements.[107]

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103. *Id.* at n.2.

104. *Id.* at 697.

105. *Id.* at 713-14.

106. Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971). *See* Goss v. Lopez, 419 U.S. 565 (1975); Board of Regents v. Roth, 408 U.S. 564 (1972); Jenkins v. McKeithen, 395 U.S. 411 (1969).

107. 424 U.S. 693, 724-32 (1976) (Brennan, J., dissenting); L. TRIBE, *supra* note 24, at 527-31. The development of a "stigma" doctrine began in Joint Anti-Facist Refugee Comm. v. McGrath, 341 U.S. 123 (1951), in which the Court intimated that any official governmental stigmatization requires compliance with fourteenth amendment procedural due process guarantees. Plaintiff had complained that the United States Attorney General's labeling of its organization as "communist" was patently arbitrary. *Id.* at 137-38. The Court found for plaintiff by interpreting narrowly the enabling executive order that required the Attorney General to determine appropriately the nature of each organization before identifying it as communist or subversive. *Id.* at 136 (construing Exec. Order No. 9835, 3 C.F.R. 129 (Supp. 1947), *reprinted in* 5 U.S.C. app. § 631 (Supp. 1948) (revoked 1953)). The Court's finding that the Attorney General had exceeded the order's authority by failing to make the requisite investigation rendered moot the due process issue. Although the opinion only suggests that due process considerations lay behind the holding, Joint Anti-Facist Refugee Comm. v. McGrath, 341 U.S. at 136-38, the four concurring Justices contended that the Constitution mandated adherence to due process requirements prior to publication of government sanctioned blacklists. *Id.* at 144-45 (Black, J., concurring); *id.* at 168 (Frankfurter, J., concurring); *id.* at 175-76 (Douglas, J., concurring); *id.* at 184-85 (Jackson, J., concurring). *See*

Paul attempted to distinguish this precedent by interpreting those cases as attaching procedural due process requirements not to the defamatory injury to reputation, but rather to the denial by the state of a "more tangible" interest—a right or status that the state previously had recognized, and protected.[108] The Court found plaintiff in *Paul* unable to assert any denial of a "more tangible" interest, such as employment. Accordingly, the Court held that "petitioners' defamatory publications, however seriously they may have harmed respondent's reputation, did not deprive him of any 'liberty' or 'property' interests protected by the Due Process Clause."[109]

The *Paul* majority apparently chose a distinction more linguistic than analytical[110]—a "re-rationalization" of its precedent

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Note, *Reputation, Stigma and Section 1983: The Lessons of* Paul v. Davis, 30 STAN. L. REV. 191 (1977).

108. Paul v. Davis, 424 U.S. at 711. The *Paul* majority distinguished *McGrath* on the grounds that at least six of the eight Justices in *McGrath* considered the stigmas or label alone "an insufficient hasis" upon which to impose procedural due process standards and that something more, such as potential loss of tax exemptions or government employment because of membership in the blacklisted organization, was necessary. *Id.* at 704-05. Justice Jackson, however, was the only Justice in *McGrath* who indicated that stigma alone was insufficient. Joint Anti-Facist Refugee Comm. v. McGrath, 341 U.S. at 187 (Jackson, J., concurring). The *Paul* majority ignored that Justice Douglas relied on *alternative* grounds of stigma and possible loss of employment, *id.* at 175, 177-78 (Douglas, J., concurring); that Justice Frankfurter suggested an indirect deprivation of liberty or property justified procedural due process requirements, *id.* at 164 (Frankfurter, J., concurring); and that Justice Black took the position that the state could not impose a stigma without adhering to procedural due process, *id.* at 144-45 (Black, J., concurring).

Paul distinguished Wieman v. Updegraff, 344 U.S. 183 (1952), which recognized that governmental denial of employment accompanied by disparaging charges constituted a "badge of infamy," by narrowly construing the *Wieman* due process requirement as resting upon the loss of government employment. Paul v. Davis, 424 U.S. at 705. While *Wieman* and *McGrath* did not hold explicitly that injury to reputation by stigmatization requires procedural due process guarantees, they did set the stage for Jenkins v. McKeithen, 395 U.S. 411 (1969). *See infra* notes 113-17 and accompanying text. In his dissenting opinion in *Paul*, Justice Brennan assailed vigorously the Court's distinction between the interest in reputation and the "more tangible" interests in employment or the right to purchase liquor, for example, by declaring that this distinction had a "hollow ring" in light of the Court's admission that the "active shoplifter" label could "seriously impair Plaintiff's further employment opportunities." *Id.* at 734. (Brennan, J., dissenting). Justice Brennan also stated:

> It is inexplicable how the Court can say that a person's status is "altered" when the State suspends him from school, revokes his driver's license, fires him from a job, or denies him the right to purchase a drink of alcohol, but is in no way "altered" when it officially pins upon him the brand of a criminal, particularly since the Court recognizes how deleterious will be the consequences that inevitably flow from its official act.

Id. See Note, *supra* note 107.

109. 424 U.S. at 712.

110. Tushnet, *The Constitutional Right to One's Good Name: An Examination of the Scholarship of Mr. Justice Rehnquist*, 64 KY. L.J. 753, 759 (1976). Contending that it "is

that Professor Monagham found "wholly startling to anyone familiar with those precedents."[111] The cases immediately preceding *Paul* and discussed therein traced the development of a constitutional tort doctrine that focused on governmental stigmatization of private citizens and indicated strongly that the injury to reputation commands procedural due process protection under the fourteenth amendment, independent of whatever additional liberty or property deprivations result from the governmental action.[112]

Jenkins v. McKeithen[113] marked the Court's first unequivocal pronouncement that before a state government publicly labels individuals in a derogatory manner it must afford them procedural due process. In *Jenkins* the Court found that plaintiff presented a valid calim for relief in his complaint that the state Labor-Management Commission's practice of investigating and finding facts about criminal violations by persons in the labor management relations field did not meet procedural due process requirements.[114] The Commission publicized its findings about whether probable cause existed to believe that the violations had occurred.[115] Impressed that the sole purpose and effect of the Commission's actions was to label and identify individuals and groups publicly as violators of the criminal laws,[116] the Court found that the "personal and economic consequences" to the stigmatized persons triggered procedural due process requirements, regardless of whether the state took any other official action.[117] The police in *Paul* performed a remarkably similar accusatory function to that of the

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important to know not only how cases may be interpreted hut how they were intended," Professor Tushnet criticized the *Paul* majority for failing to comprehend the Court's intent in *Roth* and *Constantineau* to establish a liberty interest in reputation sufficient to invoke procedural due process guarantees. *Id.* *See supra* note 106 and accompanying text.

111. Monaghan, *Of "Liberty and Property"*, 62 CORNELL L. REV. 405, 424 (1977). Professor Monaghan found this failure to follow precedent to be the most "disturbing aspect" of *Paul* because "[f]air treatment by the Court of its own precedents is an indispensable condition of judicial legitimacy." *Id.*

112. *See* Goss v. Lopez, 419 U.S. 565 (1975); Board of Regents v. Roth, 408 U.S. 564 (1972); Wisconsin v. Constantineau, 400 U.S. 433 (1971); Jenkins v. McKeithen, 395 U.S. 411 (1969); Cafeteria & Restaurant Workers Local 473 v. McElroy, 367 U.S. 886 (1961); Wieman v. Updegraff, 344 U.S. 183 (1952); Joint Anti-Fascist Rofugee Comm. v. McGrath, 341 U.S. 123 (1951); United States v. Lovett, 328 U.S. 303 (1946).

113. 395 U.S. 411 (1969).

114. *Id.* at 427-28.

115. *Id.* at 416.

116. *Id.* at 424, 427-28. The Court determined that the Commission's purpose was primarily accusatory because the Commission's authority extended only to specific types of violations and its findings had no indicated legislative purpose. *Id.*

117. *Id.* at 424.

Commission in *Jenkins*; the purpose and effect of the shoplifters' flyer was not to aid police investigations of shoplifting, but rather to publicize the identity of suspected shoplifters for the benefit of local merchants.[118] Notwithstanding this factual similarity, the majority in *Paul* cursorily considered in a footnote only the *Jenkins* dissent.[119]

In *Wisconsin v. Constantineau*[120] the Court invalidated a state statute authorizing state officials to display a notice in all liquor stores that sales of liquor to the named persons were forbidden for one year, on the ground that the statute failed to comport with procedural due process standards.[121] The Court considered the posting of an official publication that labeled an individual an excessive drinker or a danger to the peace of the community and declared:

> [C]ertainly where the State attaches a "badge of infamy" to the citizen, due process comes into play. . . .
>
> Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential. "Posting" . . . may to some be merely the mark of illness, to others it is a stigma, an official branding of a person. The label is a degrading one. . . . Only when the whole proceedings leading to the pinning of an unsavory label on a person are aired can oppressive results be

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118. Paul v. Davis, 424 U.S. at 695; see Note, *supra* note 107.

119. *Id.* at 706 n.4. The *Paul* dissent termed this treatment of *Jenkins* "dissembling." *Id.* at 727 (Brennan, J., dissenting). Professor Shapiro noted that *Jenkins* was "very much in point" and found "startling" the *Paul* majority's failure to discuss it adequately. Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293, 325 (1976). The *Paul* majority attempted to distinguish *Jenkins* on the ground that the police in *Paul* "are not by any stretch of the imagination . . . an agency whose sole or predominate function . . . is to expose and publicize the names of persons it finds guilty of wrongdoing." 424 U.S. at 706 n.4. The majority apparently misconstrued the intent and import of *Jenkins*. The *Jenkins* decision focused not on whether the injury to reputation required procedural due process but on whether the Commission's practices actually complied with procedural due process requirements. As Justice Brennan noted, the *Jenkins* Court *assumed* that protection of the liberty interest in reputation required procedural due process. *Id.* at 727-28 (Brennan, J., dissenting). *Jenkins* distinguished and reaffirmed Hannah v. Larche, 363 U.S. 420 (1960), which had sustained the activities of a civil rights commission against a similar challenge. The *Jenkins* Court found the Commission in *Hannah* purely investigatory, not accusatory, since it made no determination of violations of criminal statutes. Jenkins v. McKeithen, 395 U.S. at 426-27. See Note, *supra* note 107.

120. 400 U.S. 433 (1971).

121. The statute provided that designated persons (certain local government officials and the individual's wife) could prohibit in writing the sale of liquor to a person who by "excessive drinking" exhibited certain described conditions or traits, such as exposing himself or his family "to want" or becoming "dangerous to the peace of the community." *Id.* at 434. The Court assumed apparently that the posting, although not required on the face of the statute, was unavoidable since sales to a designated person were a misdemeanor. *Id.* at 435 n.2.

prevented.[122]

While the *Paul* Court interpreted *Constantineau* to concern primarily the deprivation of the state recognized right to purchase liquor,[123] the *Constantineau* Court made clear that it sought to protect the individual against arbitrary stigmatization resulting from official publications by government personnel.[124] The *Constantineau* Court did not address any denial of a right to buy liquor;[125] rather it stated explicitly that the "*only* issue present here is whether the label or characterization given a person by 'posting' . . . is to others such a stigma or badge of disgrace that procedural due process requires notice and an opportunity to be heard."[126]

The Court showed similar regard for the interest in reputation one year later in *Board of Regents v. Roth*.[127] The *Roth* Court declared in dictum that failure by the government to review the employment of a nontenured public employee, in a manner injurious to his reputation, would give rise to procedural due process claims.[128] Contrary to the *Paul* Court's interpretation, *Roth* did

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122. *Id.* at 437.

123. Paul v. Davis, 424 U.S. at 708.

124. Shapiro, *supra* note 119, at 326. The Sixth Circuit relied heavily upon *Constantineau* in finding that the *Paul* plaintiff deserved procedural due process for his stigmatization. Paul v. Davis, 424 U.S. at 697 (citing Davis v. Paul, 505 F.2d 1180, 1182 (1974)).

125. Shapiro, *supra* note 119, at 326. In his *Paul* dissent, Justice Brennan noted specifically the *Constantineau* Court's lack of attention to plaintiff's loss of the right to buy liquor. Paul v. Davis, 424 U.S. at 729-30 (Brennan, J., dissenting).

The dissent in *Constantineau* expressed no disagreement with the majority's disposition of the procedural due process issue and focused instead on the propriety of the Supreme Court's decision to declare a state statute unconstitutional without first giving the state courts the opportnnity to dispose of the matter under the state or federal constitution. Wisconsin v. Constantineau, 400 U.S. at 440 (Burger, C.J., dissenting); *id.* at 444 (Black, J., dissenting).

126. 400 U.S. at 436. The *Paul* majority did not agree with the *Constantineau* Court that the only issue present was the stigmatization of plaintiff; thus it searched for "any other possible interpretation." Paul v. Davis, 424 U.S. at 708. The *Paul* Court construed the language in *Constantineau* that notice and an opportunity to be heard are essential if " 'a person's good name, reputation, honor or integrity is at stake *because of what the government is doing to him,*' " *id.* (quoting Wisconsin v. Constantineau, 400 U.S. at 437 (emphasis added in *Paul*)), to refer not to the stigmatization of posting but to the denial of plaintiff's previously held right to purchase liquor. This interpretation is contrary to the tenor and language of *Constantineau*. The opinion gives "no hint" that the Court ever considered the rather trivial matter of a one year restriction upon plaintiff's right to buy liquor. *See* Shapiro, *supra* note 119, at 326. The *Paul* Court offered no explanation why stigmatization, unlike denial of the right to purchase liquor, does not require procedural due process.

127. 408 U.S. 564 (1972).

128. Roth worked as a teacher at a Wisconsin state college under a one year contract with no rights to continued employment. At the end of the year the administration exercised its full discretion not to renew his contract. Applicable state law did not provide Roth with any rights to an appeal, a review, or even to be given reasons for his termination. The

not condition procedural due process protection solely upon the refusal to renew plaintiff's employment; rather it established an analytical framework within which to examine the liberty interest in reputation and the property interest in employment, which, upon injury or deprivation, independently are entitled to procedural due process protection.[129]

The *Roth* Court's discussion of the procedural due process required upon deprivation of property interests caused the *Paul* Court a further interpretive problem.[130] *Roth* held that state law normally defines property interests for due process purposes.[131] Thus, if governmental action deprives an individual of a state-defined property interest, fourteenth amendment procedural due process requirements attach. The *Paul* Court recognized that plaintiff's complaint "presented a classic case of defamation in the courts of virtually all the states"[132]—in short, injury to a state-de-

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Court found that the state did not deprive plaintiff of any property interest because he had no expectation of or other entitlement to continued employment. *Id.* at 576-79. Nor did the state deny Roth any protected liberty interest since it made no charges that would stigmatize him or seriously harm his standing in the community, or his opportunities for future employment, *id.* at 572-76.

The dissenting Justices in *Roth* contended that plaintiff's interest in continued government employment did entitle him to procedural due process guarantees. *Id.* at 588-89 (Marshall, J., dissenting); *id.* at 604 (Brennan, J., dissenting).

129. Paul v. Davis, 424 U.S. at 709-10. Referring to the *Roth* decision, the Court in *Paul* stated, "[I]t was not thought sufficient to establish a claim under § 1983 and the Fourteenth Amendment that there simply be defamation by a state official; the defamation had to occur in the course of termination of employment." *Id.* at 710.

130. The *Roth* Court clearly distinguished between liberty and property interests for procedural due process purposes. The Court addressed first the liberty interest in reputation, Board of Regents v. Roth, 408 U.S. at 572-75, and concluded that because plaintiff did not suffer stigmatization, no procedural due process was required, *id.* at 575. Next the Court discussed plaintiff's property interest in employment. *Id.* at 576-79. In a footnote the Court declared that the purpose of a hearing was to provide plaintiff with an opportunity to clear his name; thereafter the employer could fire him for other reasons. *Id.* at 573 n.12. This statement illustrates further the Court's distinction between the liberty interest in reputation and the property interest in employment.

Nevertheless, the *Paul* Court distinguished *Roth* by finding that any defamation in *Roth* "*had* to occur in the course of termination of employment," Paul v. Davis, 424 U.S. at 710 (emphasis added), to merit procedural due process protection. This conjunctive requirement appears to contradict an important principle of procedural due process jurisprudence: "to determine whether due process requirements apply in the first place, we must look not to the 'weight' but to the *nature* of the interest at stake." Board of Regents v. Roth, 408 U.S. 564, 570-71 (1972) *quoted in* Goss v. Lopez, 419 U.S. 565, 575-76 (1975). *See* Note, *supra* note 107, at 221 n.169.

131. Board of Regents v. Reth, 408 U.S. at 576-78. The Constitution does not create property interests. Rather, existing rules or understandings that stem from an independent source such as state law create and define the dimensions of these interests. *Id.* at 577.

132. Paul v. Davis, 424 U.S. at 697.

fined property interest in the plaintiff's good name. Under *Roth*, deprivation of this property interest by the state officials would have demanded procedural due process.[133] The *Paul* Court, however, ignored this requirement.[134]

In *Goss v. Lopez*[135] the Court continued to employ the analytical framework developed in *Roth* and held that suspension of high school students on charges of misconduct must adhere to procedural due process requirements.[136] The Court characterized the students' right to attend school, guaranteed by state law, as a property interest to which procedural due process requirements attach.[137] The Court also found that the students had a separate and distinct liberty interest in their reputations that commanded procedural due process protection, because suspension for certain conduct could injure a student's "good name, reputation, honor, and integrity."[138]

Jenkins, Constantineau, Roth, and *Goss* establish unequivocally the constitutional stature of the interest in reputation.[139] The *Paul* Court's refusal to overrule or to distinguish convincingly that precedent seriously weakens its assertion that injury to reputation alone does not present a federal claim for procedural due process protection under the fourteenth amendment.[140]

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133. Tushnet, *supra* note 110, at 760.

134. *See infra* notes 173-77 and accompanying text.

135. 419 U.S. 565 (1975).

136. *Id.* at 573-74.

137. *Id.* at 574-76.

138. *Id.* at 574-75. As Justice Brennan observed in dissent, the *Paul* majority ignored the careful differentiation that the *Goss* Court made between liberty and property interests, Paul v. Davis, 424 U.S. at 730-31 n.15 (Brennan, J., dissenting), and instead distinguished *Goss* in the same manner that it had *Roth*—the state had denied a property right that it had recognized previously, and this action, not the attendant imposition of the stigma, justified the invocation of procedural due process standards. *Id.* at 709-10.

Professor Tushnet found that Justice Brennan's dissent in *Paul* provided a far more satisfactory "conceptual framework" under *Roth* and *Constantineau* than did the *Paul* majority (which provided none). Justice Brennan argued that "the failure to rehire and the denial of access to liquor were state actions and the [resulting] stigmatization was a deprivation of [liberty]." Tushnet, *supra* note 110, at 759.

139. Prior to *Paul* the circuit courts had followed the Supreme Court's lead in according the liberty interest in reputation procedural due process protection whenever the government charged a public employee with disloyalty, Wilderman v. Nelson, 467 F.2d 1173 (8th Cir. 1972); excessive dissemination of narcotics, Suarez v. Weaver, 484 F.2d 678 (7th Cir. 1973); failure to perform duties of employment, McNeill v. Butz, 480 F.2d 314 (4th Cir. 1973); mental incompetence, Stewart v. Pearce, 484 F.2d 1031 (9th Cir. 1973), Dale v. Hahn, 440 F.2d 633 (2d Cir. 1971); or diminished intellectual ability, Greenhill v. Bailey, 519 F.2d 5 (8th Cir. 1975). *See* Note, *supra* note 130, at 222 nn.172-75.

140. Even if the *Paul* Court had been free to view the question before it as an open one, surely that did not compel it to reject freedom from deprivation as a protected interest.

(b) *The Aftermath of* Paul v. Davis

Whalen v. Roe,[141] in which the Court discussed governmental dissemination of information potentially injurious to reputation, indicates strongly that the *Paul* Court's denigration of the interest in reputation was to be short lived. In *Whalen* plaintiffs challenged the constitutionality of a New York statute that required them, as prescription users of certain lawful but dangerous drugs, to disclose their names and other information to the state for retention in centralized computerized records for five years. Plaintiffs contended vigorously that the statute infringed upon their constitutional rights in two ways: first, inadvertent or deliberate governmental disclosure of their drug use could seriously affect reputation; and second, this threat to reputation could impair their decisionmaking capacity about their health care because doctors would be reluctant to prescribe, and patients unwilling to use, the necessary drugs.[142] The Court realized that plaintiffs' "genuine concern" was that the information would become known and adversely affect their reputations.[143] To ensure that the state did not jeopardize plaintiffs' reputations without overriding justification,[144] the Court carefully examined the problem for which the statute was a partial solution—diversion of these drugs to illegal uses—and described in detail the safeguards in place to prevent unauthorized disclosure or other misuse of the information.[145] Finding the threatened disclosure in *Whalen* too similar to the dissemination of often sensitive personal information that inevitably

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In a "Constitution for a free people," a conception of "liberty" that protects an individual against state interference with his access to liquor but not with his reputation in the community is an unsettling one. To the extent that this area is one for judicial exercise of the "sovereign prerogative of choice," the Court's decision seems to cut sharply against the grain of the American political-constitutional order, whose central emphasis is on individual dignity. Defamation is a serious assault upon an individual's sense of "self-identity," and since ancient times has been viewed as "psychic mayhem." Accordingly, the Court's conclusion that this assault implicates no interest protected by the fourteenth amendment stands wholly at odds with our ethical, political, and constitutional assumption about the worth of each individual. Monaghan, *supra* note 111, at 426-27.

141. 429 U.S. 589 (1977).

142. *Id.* at 595.

143. *Id.* at 600.

144. A special state commission found that no less intrusive means existed to control the prescription of dangerous drugs. *Id.* at 593-95.

145. State officials recorded the information at issue on magnetic tapes for computer processing. Locked closets and alarm systems protected the computer tapes and the originals were destroyed after five years. Officials only used the tapes "off line" so that no outside terminal could copy or record them. *Id.* Furthermore, public disclosure of the patient's identification constituted a criminal offense. *Id.*

occurs with the delivery of adequate health care, the Court concluded that "neither the immediate nor the threatened impact of the patient-identification requirements . . . on either the reputation or the independence of patients . . . is sufficient to constitute an invasion of any right or liberty protected by the Fourteenth Amendment."[146]

Because the interest in reputation that was at issue in *Whalen* did not concern the deprivation of a "more tangible" or state recognized interest,[147] the Court's high regard for plaintiffs' reputational claim represents a substantial departure from *Paul.* If the *Paul* Court's denial that an interest in reputation is a constitutionally protected liberty interest were conclusive, then the *Whalen* Court's extensive discussion of the state's justification for an action that only portended an inchoate and highly speculative injury to plaintiffs' reputations would have been unnecessary.[148] *Whalen*'s balancing of plaintiffs' reputational interests, as protected by the right of limited disclosure, against the state's justification for intruding upon that interest, marks a forceful step away from *Paul* and a significant return to the Court's earlier concern for the individual's "good name, reputation, honor [and] integrity."[149]

During the 1977 term, the Court again discussed the interest in limited disclosure in *Nixon v. Administrator of General Services.*[150] The former President challenged, in part on constitutional privacy grounds, the Presidential Recordings and Materials Preservation Act,[151] which directed the Administrator of General Services to take custody of presidential tapes and other materials that had accumulated during Nixon's presidency, to separate the private materials from those that were public, and to retain the latter for eventual access to the public. Citing *Whalen* for the proposition that one element of a constitutional right of privacy is the individual's interest in avoiding revelation of personal matters, the Court agreed that Nixon had advanced a valid claim for limiting the disclosure of the information contained in his Presidential materials.[152] Following strictly the analysis employed in *Whalen,* the

146. *Id.* at 603-04.

147. *See supra* notes 104-12 and accompanying text.

148. *See* L. TRIBE, *supra* note 24, at 971.

149. Wisconsin v. Constantineau, 400 U.S. 433, 457 (1971).

150. 433 U.S. 425 (1977).

151. 44 U.S.C.S. § 2107 (1980).

152. Nixon v. Administrator of Gen. Serv., 433 U.S. at 457 (citing Whalen v. Roe, 429 U.S. 589, 599 (1977)).

Court considered the impairment of Nixon's interest in restricting disclosure of the information by balancing carefully the interest's alleged contravention by the Act against the public benefit of the Act. The Court concluded that the public good which would result from the archival screening of the materials and their eventual availability to the public outweighed any harm to Nixon's interests.

In *Detroit Edison Co. v. NLRB*[153] the Court again displayed the same regard for the individual's interest in reputation. In *Detroit Edison* a labor union sought access to psychological aptitude test scores of Detroit Edison's employees to assist the union in processing a grievance. Despite a National Labor Relations Act (NLRA) ruling imposing a duty on an employer to provide relevant information to its employees' bargaining representative,[154] Detroit Edison refused to disclose the scores absent the affected employees' consent. The Court noted that mere disclosure of the test scores to the union, while a breach of the confidence under which the utility originally obtained them, was not the ultimate harm that Detroit Edison was seeking to prevent. Rather, the "substantial risk that the test questions would be disseminated" was the gravamen of Detroit Edison's concern.[155] The Court emphasized the company's strong interest in preserving both the future integrity of the tests and the reputational interests of the subject employees. In a dramatic departure from the *Paul* view of reputation as a relatively unimportant individual interest, the *Detroit Edison* Court took judicial notice of the dependence of the employees' efforts to maintain their reputations upon their ability to limit the disclosure and dissemination of personal information when not in their possession.[156] After a careful examination of the reasonableness and magnitude of the union's need for the contested information, the Court sustained the employees' interest in controlling the circulation of information about themselves.[157]

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153. 440 U.S. 301 (1979).

154. *Id.* at 303.

155. *Id.* at 313.

156. *Id.* at 318. "The sensitivity of any human being to disclosure of information that may be taken to bear on his or her basic competence is sufficiently well known to be an appropriate subject of judicial notice." *Id.*

157. The Court concluded, "[A]ny possible impairment of the . . . Union in processing the grievances of employees is more than justified by the interests served in conditioning the disclosure of the test scores upon the consent of the very employees whose grievance is being processed." *Id.* at 319.

(c) The Circuit Courts

Circuit court decisions influence substantially the development of constitutional law by translating what the judges perceive as Supreme Court mandates, preferences, or even hints and applying their interpretations to varying factual situations. The circuit courts of appeal that have reviewed the *Whalen* and *Nixon* decisions have reached opposite conclusions about them, which demonstrates the uncertainty surrounding the constitutional status and protection of the limited disclosure interest.

The circuit courts generally, however, have responded favorably in recent limited disclosure litigation to the increased emphasis of *Whalen* and *Detroit Edison* on the liberty interest in reputation. *Fadjo v. Coon*,[158] for example, presented the Fifth Circuit with a limited disclosure claim that provides a classic illustration of the paradigm interest. Fadjo was the target of concurrent investigations by a private investigative service acting for six insurance companies and the state attorney for the eleventh judicial district of Florida. Assuring Fadjo of absolute privilege under Florida law, and pledging that they would not reveal the information to anyone, the state investigators obtained confidences from Fadjo.[159] Fadjo alleged that subsequently the state released the damaging information to the insurance companies through their private investigative agents. Fadjo claimed that, as a result, he felt compelled to relocate and was unable to find employment.[160] This disclosure by the state to the insurance agencies' investigators violated the original confidence under which the state obtained the information and allegedly caused tangible injury to plaintiff.[161]

The Fifth Circuit in *Fadjo* specifically declined to follow *Paul* even though the factual contexts of the two cases were strikingly similar. In both cases the government collected personal information pertaining to criminal liability and without obtaining the consent of the subject individual, released that information to a special interest group, to the immediate injury of the individual. The government's action in *Fadjo* is arguably less defensible than in *Paul* due to the pledge of absolute confidentiality under which the government obtained Fadjo's information. Acknowledging that the *Whalen* Court identified the interest in avoiding disclosure of per-

158. 633 F.2d 1172 (5th Cir. 1981).
159. *Id.* at 1174.
160. *Id.*
161. *Id.*

sonal matters as of constitutional stature, the Fifth Circuit reversed the district court's dismissal for failure to state a claim and remanded the case for a determination of whether a legitimate state interest existed to warrant the invasion of Fadjo's limited disclosure interests.[162] Noting that *Paul* must be read in light of *Whalen,* the court distinguished *Paul* on the ground that it concerned official, rather than intimate, information. Further, the court declared that *Whalen* and *Nixon* had added the limited disclosure interest to the list of constitutionally protected liberty interests outlined in *Paul.*[163]

The Third Circuit has considered the individual's interest in reputation and limited disclosure in a factual context analogous to *Detroit Edison.*[164] In *United States v. Westinghouse Electric Corp.*[165] a large corporate employer stood in the shoes of its employees to resist the release to a government agency of sensitive medical records that the employees had on file with the employer. Westinghouse asserted the limited disclosure interests of its employees in resisting a subpoena from the National Institute for Occupational Safety and Health (NIOSH) for production of employees' medical records. The Third Circuit noted that plaintiff's interest "falls within the first category referred to in *Whalen v. Roe,* the right not to have an individual's private affairs made public by the government."[166] The court found, however, that the strong public interest in facilitating NIOSH's research, coupled with the adequate safeguards to prevent further unauthorized disclosure by the government to other parties, justified the minimum intrusion into the employees' privacy. Recognizing the gravity of plaintiff's concern about subsequent dissemination of information—some of it highly sensitive—to the employees' detriment, the court fashioned a *Detroit Edison* type of relief that required NIOSH to give prior notice to any employee before reviewing his record so that the particular individual could raise a personal claim to prevent disclosure.[167]

In a broader limited disclosure context the Sixth Circuit took

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162. *Id.* at 1176-77.

163. *Id.* at 1176.

164. *See supra* notes 153-57 and accompanying text.

165. 638 F.2d 570 (3d Cir. 1980).

166. *Id.* at 577. Although the court was addressing individual-to-government disclosure, its formulation of the interest reveals its understanding of plaintiff's underlying concern with further, more damaging disclosures. *See infra* part IV(D)(2).

167. *Id.* at 581. *See supra* note 157.

vitriolic exception to the *Fadjo* and *Westinghouse* interpretations of *Whalen* and *Nixon*. In *J.P. v. DeSanti*[168] a class of juveniles sought to enjoin on constitutional grounds the creation and dissemination of "social histories" that state authorities compiled about them in preparation for separate legal proceedings against the juveniles. The social histories, obtained without written consent of the juveniles or their families, contained information from a number of sources, including the parties at bar, the parents, any available school records, and past juvenile records. The histories also included any information on record about other members of the family. After each proceeding, the juvenile court maintained the social history on file and provided it upon request to fifty-five different governmental, social, and religious agencies that belonged to a "social services clearing-house."[169]

Finding the contemplated disclosure "indistinguishable from that permitted in *Paul*,"[170] which the court considered controlling notwithstanding *Whalen*, the court held that plaintiffs had no constitutionally protected interest in restricting the dissemination of the social histories. The court apparently interpreted the language of *Whalen* that purportedly established a constitutional interest in limited disclosure as merely "isolated statements" that, "[a]bsent a clear indication from the Supreme Court," should not be construed "more broadly than their context allows."[171] The court based this conclusion upon the failure of the *Whalen* Court and the Second, Third, and Fifth Circuits to cite any precedent or constitutional provision for the establishment of the interest in limited disclosure.[172]

(d) The Impact of Paul v. Davis *on Defamation*

The *Paul* Court cursorily disregarded the inconsistency between its position and the status that the tort of defamation accords the interest in reputation. Plaintiffs consistently have asserted, with notable success, the liberty interest in reputation in actions for damages resulting from libelous publications. In many cases they have recovered damages notwithstanding first amendment concerns.[173] The *Paul* decision has not diminished the

168. 653 F.2d 1080 (6th Cir. 1981).
169. *Id.* at 1082.
170. *Id.* at 1088.
171. *Id.* at 1089.
172. *See id.* at 1090.
173. *See The Uncertain Protection, supra* note 23, at 207-08; Smith, *The Public Dis-*

Court's enthusiasm for protecting the reputational interest in the defamation context. Indeed, recent decisions indicate that the Court is increasingly sympathetic to injured reputations.[174]

Arguably, an interest that protects an individual from defamatory publication and allows him to obtain civil relief under tort law also would protect him against the same type of injurious publication by the government. The Court considered this issue tangentially in *Doe v. McMillan.*[175] The *Doe* Court permitted the parents of children whose names, absence reports, test scores, and disciplinary records were released by a congressional subcommittee investigating District of Columbia public schools, to proceed against the printer and supervisor of documents for that dissemination.[176] Although the majority did not discuss the countervailing justifications for the legislative action, three concurring Justices declared that such exposure for its own sake, especially in an age of computer data banks that exacerbate the potential for abuse, violated the Constitution.[177]

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semination of Arrest Records and the Right to Reputation: The Effect of Paul v. Davis *on Individual Rights*, 5 AM. J. CRIM. L. 72, 87-89 (1977). The Supreme Court has sustained the interest in reputation in defamation contexts by a variety of standards, depending upon the countervailing public interest. The Court declared in New York Times Co. v. Sullivan, 376 U.S. 254 (1964), that when a "public figure" is the object of the unfavorable publication, recovery is available only upon a showing that the defendant published the information with knowledge of its falsity, or with reckless disregard for its truth. The concern that impelled this difficult burden for recovery by public figures was not indifference to the interest in reputation, but rather fear that public figures would employ a reduced burden of proof to suppress public comment and criticism of their official actions. *See* Smith, *supra*, at 88 n.50. In Gertz v. Robert Welch, 418 U.S. 323 (1974), the Court held that a much easier standard—any one that the state chooses except liability without fault—should apply to private individuals seeking recovery for injury to reputation resulting from defamatory publication. *Id.* at 347-48. The *Gertz* Court emphasized that while the state's interest in protecting the reputation of private individuals is paramount, "this does not mean that the right is entitled to any less recognition by *this Court* as a basic of our constitutional system." *Id.* at 341 (quoting Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring)) (emphasis added).

174. The Court appears to be applying the public figure test more narrowly to permit recovery. Thus, in Hutchinson v. Proxmire, 443 U.S. 111 (1979), and Wolston v. Reader's Digest Ass'n, 443 U.S. 157 (1979), the Court held that the public figure standard of *New York Times* does not apply to plaintiffs who are not *voluntary* public figures. In *Hutchinson* the Court allowed a scientist who had not sought publicity outside the scientific community to proceed under the more relaxed standard of *Gertz* against a United States Senator who had ridiculed him publicly. 443 U.S. at 133-36. Similarly, in *Wolston* the Court held that a man convicted of contempt of Congress sixteen years previously was not a public figure by the time of the suit. *Id.* at 163-69.

175. 412 U.S. 306 (1973).

176. *Id.* at 324.

177. *Id.* at 329-30 (Douglas, J., joined by Brennan, J., and Marshall, J., concurring). In Whalen v. Roe, 429 U.S. 589 (1977), Justice Brennan repeated this concern over the poten-

(e) Conclusion

The Court's departure in *Paul* from its venerable concern with individual reputation in both direct and analogous lines of authority arguably is attributable to a preoccupation with providing the state, not the federal government, with the initial opportunity to discipline state officials for improper acts committed under color of state law. The *Paul* decision coincided with the Court's resurgent interest in protecting the sovereignty of the individual states. As Professor Tribe observed, the strong reaffirmation of states' rights in *National League of Cities v. Usery*,[178] decided a few months after *Paul*, supports reading *Paul* as requiring exhaustion of state remedies and affirming the federalism-based limits of federal judicial authority under 42 U.S.C. § 1983.[179] The *Paul* Court's concern with the undesirable consequences of federalizing the state law of torts is clear from the outset. The opinion begins by noting that plaintiff's construction of section 1983 and the fourteenth amendment would "make actionable many wrongs inflicted by government employees which had heretofore been thought to give rise only to state-law tort claims."[180] The Court could foresee no logical stopping point to this construction, which it considered inconsistent with the history of the fourteenth amendment. Hence, the Court refused to make the fourteenth amendment "a font of tort law to be superimposed upon whatever systems may already be administered by the States."[181]

In view of the Supreme Court's refusal in *Paul* to overrule *Jenkins, Constantineau, Roth,* and *Goss*, its strong reaffirmation of the constitutional status of reputation in *Whalen*, and its admitted preoccupation in *Paul* with state sovereignty, it would seem unwise to consider *Paul* an insurmountable barrier to constitutional review of dissemination of personal information by the government that causes actual or potential injury to an individual's "good name, reputation, honor, or integrity."

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tial for abuse of information presented by computer data banks. *Id.* at 606-07 (Brennan, J., concurring). The *Doe v. McMillan* Court appeared unanimous that such exposure without sufficient justification is unconstitutional. The disagreement between the majority and the dissenting Justices concerned only the necessity of remand to determine whether the facts warranted the dissemination. *See* L. TRIBE, *supra* note 24, at 969.

178. 426 U.S. 833 (1976).

179. *See* L. TRIBE, *supra* note 24, at 970-72; *see also* J.P. v. DeSanti, 653 F.2d 1080 (6th Cir. 1981) (court preferred plaintiff vindicate limited disclosure interest in state court).

180. Panl v. Davis, 424 U.S. at 699.

181. *Id.* at 701.

2. The Scope of the Limited Disclosure Interest

If *Whalen* and *Nixon* do establish a constitutionally protected interest in limited disclosure, their failure to specify its scope—that is, who can disclose the information and to whom—is critical. The possibility exists that the protection does not extend to limited disclosure interests in all factual contexts. The success of the effort to establish constitutional stature for the interest in limited disclosure thus depends upon the extent of the interest in *Whalen* and *Nixon*.

The facts and language of *Whalen* apparently contemplated two distinct disclosures of information, each with its own concern and potential for injury to the individual. The first disclosure of *Whalen* was by the individual to the government. The *Whalen, Nixon,* and *Detroit Edison* plaintiffs actually contested this disclosure, not solely because of its harm, but because they feared a second, further disclosure by the government to someone else. Regarding the first disclosure, the plaintiffs were concerned that the collecting governmental entity would use the information for a purpose inimical to their interests. While a necessary first step to creating the factual context of the paradigm dissemination interest, this form of disclosure is completely separate in nature from the second step of the government's disclosure of personal information to someone else, in violation of the original confidence or for a purpose beyond that of its original collection. The paradigm dissemination interest concerns only this latter disclosure. Because plaintiffs in *Whalen* and *Nixon* did not contest this type of disclosure, the Court did not address it directly and reserved a ruling on it.[182] The scope of the interest's constitutional protection depends, however, on whether courts can read *Whalen* and *Nixon* to safeguard the interest in controlling disclosure of personal matters in the broad sense of limiting subsequent dissemination by a governmental entity that legitimately has acquired the information or in the narrow sense of revelation solely to the government. Not surprisingly, *Whalen* and *Nixon* offer support for both interpretations.

Whalen declared that the constitutional right of privacy protects the interests in avoiding the disclosure of personal matters and in making important decisions. Quoting Professor Kurland in a footnote, the Court noted that the concept of a constitutional

182. Whalen v. Roe, 429 U.S. at 605-06. *See infra* text accompanying notes 199-201.

right of privacy embodies at least three as yet not fully defined facets.[183] The Court found that the fourth amendment directly protects Professor Kurland's first facet—"the right of the individual to be free in his private affairs from governmental surveillance and intrusion."[184] The Court stated that Professor Kurland's second and third facets—"the right of an individual not to have his private affairs made public by the government" and the right "of an individual to be free in action, thought, experience, and belief from governmental compulsion,"[185] correspond to the interests in avoiding the disclosure of personal matters and in making important decisions. The Court did not otherwise modify or limit its textual use of "disclosure." Its use of Professor Kurland's expansive definition of limited disclosure to include subsequent disclosures by the government implies perhaps that the Court comprehended the interest in this broad sense. This interpretation embraces the paradigm limited disclosure interest.

The foregoing argument draws support from the Court's unmistakable awareness that the *Whalen* plaintiffs' "genuine concern" was not with the mere disclosure to the government, but rather that the information would become known to the public and would harm their reputations.[186] This could only occur through governmental disclosure, by design or inadvertance. The potential consequences of this disclosure to plaintiffs' reputations prompted the Court's searching examination of the procedures adopted to prevent further dissemination and the civil and criminal penalties that accompanied them.[187] The Court showed comparatively little interest in the rather innocuous effect that plaintiffs' initial disclosure to the government would have on their reputations. In sum, the Court's choice of Professor Kurland's broad definition of limited disclosure to modify its own open-ended expression of the interest, coupled with its overriding awareness that plaintiffs worried primarily about the consequences of later governmental dissemination of the information, establishes the viability of interpreting *Whalen* as the basis upon which to found a constitutional interest in controlling governmental dissemination of personal information.

Nixon likewise supports the constitutional establishment of a

183. 429 U.S. at 599 n.24 (quoting Kurland, *The Private I*, U. CHI. MAG. 7, 8 (Autumn 1978)).

184. *Id.*

185. *Id.*

186. *Id.* at 600.

187. *Id.* at 600-04. *See supra* note 145.

broad interest in limited disclosure. In *Nixon* the government sought information from the individual for the express purpose of making that information available for public review. Thus, unlike *Whalen,* in which the existence of extensive security measures and substantial statutory penalties greatly reduced the inchoate threat of public dissemination of the individual's information, public disclosure of the *Nixon* material was the primary purpose of the statute, and, therefore, of the intrusion.[188] The *Nixon* Court, which was well aware that the broad limited disclosure interest was directly at stake, chose to apply the *Whalen* "intervention without strict scrutiny" approach to ensure that the government did not infringe unreasonably upon Nixon's limited disclosure interests. In this sense, *Nixon* arguably provides stronger authority than *Whalen* for the constitutional protection of the interest.

Alternative *Whalen* and *Nixon* interpretations, however, indicate support for the establishment of a fourteenth amendment liberty interest in limited disclosure only in the narrow factual context of the individual's initial disclosure to the government. The Court's closing effort to limit *Whalen* to its facts[189] weakens the argument for interpreting the decision as support for a broad limited disclosure interest. Furthermore, the Court has focused traditionally on constitutionally protected interests in limited disclosure in the narrow factual pattern of individual disclosure to the government and within the theoretical confines of the first, fourth, and fifth amendment guarantees.[190] These amendments share a common theme of concern for the protection of sensitive information in the individual's possession from unwarranted or improper governmental collection. The first amendment protects the individual from disclosing his membership in controversial organizations absent a compelling governmental need for the information.[191] Similarly, the fourth amendment protects information that the in-

188. The contested Act required that the Administrator of the General Services Administration promulgate instructions for public access to the materials. Indeed, the public interest in obtaining the materials was a major factor in finding the privacy invasion reasonable. Nixon v. Administrator of Gen. Serv., 433 U.S. at 465.

189. *See infra* text accompanying notes 199-201.

190. Although the existence of precedent for both the limited disclosure and the autonomy interests is implicit in the *Whalen* decision, the Court cites no authority in support of the former interest. The Court includes *Roe, Griswold,* and, of course, *Meyer* and *Pierce,* in support of the autonomy interest. Whalen v. Roe, 429 U.S. at 600 n.26. *See infra* note 209.

191. *See, e.g.,* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958); *supra* text accompanying notes 54-63.

dividual possesses and in which he has a reasonable expectation of privacy, unless the government produces a valid warrant to seize the material.[192] The fifth amendment prohibits the government from forcing an individual to divulge self-incriminating information about which only he may have knowledge.[193]

The Court has emphasized particularly the fourth amendment considerations inherent in the factual context of compelled individual disclosure to the government.[194] Even though the *Nixon* decision followed *Whalen,* it mirrors the pre-*Whalen* Court's consideration of claims concerning disclosure of information by the individual to the government in the broad fourth amendment search and seizure context.[195] In *Nixon* the former President relied primarily upon the fourth amendment in contending that the contemplated archival screening infringed upon his privacy rights because it was "tantamount to a general warrant authorizing search and seizure of all of his . . . 'papers and effects.' "[196] The *Nixon* Court relied on *Whalen*'s finding that a constitutional right to pri-

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192. *See, e.g.,* Katz v. United States, 389 U.S. 347 (1967); *supra* text accompanying notes 64-89.

193. *See supra* text accompanying notes 90-95. *But see* Fisher v. United States, 425 U.S. 391 (1976) (fifth amendment protection applies only to *testimonial* communication that is incriminating).

194. In *Katz,* which concerned the individual's confidentiality interest in his phone conversation, the Court established that confidentiality of information is a protected fourth amendment interest. Katz v. United States, 389 U.S. at 35-52. In the Bank Secrecy Act cases, California Bankers Ass'n v. Schultz, 416 U.S. 21 (1974), and United States v. Miller, 425 U.S. 435 (1976), the Court again discussed limited disclosure claims in the fourth amendment context. *See supra* notes 64-89 and accompanying text. The Court in *Schultz* held that the recording by a bank of its customers' financial transactions does not implicate fourth amendment guarantees. In *Miller* the Court found that the individual whose records the government obtained by issuing a subpoena *duces tecum* to the bank has no fourth amendment interest in the records. The *Miller* Court found implicitly that the exposure of the records to the bank employees abrogated the individual's reasonable expectation of privacy required by *Katz.* Furthermore, the Court found that because the subpoena *duces tecum* was sufficiently within the *Schultz* requirement that access to the records be controlled by "existing legal process," it did not constitute a warrantless search and seizure. 425 U.S. at 445-46. The *Miller* Court's detailed consideration of the individual's limited disclosure concerns in the fourth amendment context is significant because it demonstrates the Court's inconsistent treatment of this interest and arguable lack of sympathy for it. Whereas in *Miller* the Court found that the information's exposure to the bank's employees destroyed the expectation of privacy necessary to bring plaintiff's claim within the fourth amendment, in *Whalen* the Court found the identical exposure so limited that no invasion had occurred. *The Uncertain Protection, supra* note 23, at 212.

195. The Supreme Court agreed with the district court's treatment of the privacy issue in *Nixon* as a search and seizure problem: "The District Court treated appellant's argument as addressed only to the *process by which the screening of the materials* will be performed." 433 U.S. at 456-57 (emphasis added).

196. *Id.* at 460.

vacy encompasses an "interest in avoiding disclosure of personal matters" apparently to establish Nixon's "legitimate expectation of privacy" in his presidential papers—a requirement of the *Katz* fourth amendment analysis.[197] While agreeing that Nixon had a legitimate expectation of privacy in his personal communications, the Court held that Nixon's status as a public figure diminished that expectation. Because the public already had seen so many of the materials about the Presidency, the Court found that this form of search was a reasonable intrusion upon Nixon's limited disclosure interest.[198]

The Court's pre-*Whalen* experience with limited disclosure claims and its fourth amendment orientation in *Nixon* by themselves might indicate that the *Whalen* Court intended to limit the recognition of any new fourteenth amendment liberty interest in limited disclosure to the traditional concerns of the first, fourth, and fifth amendments. The Court in *Whalen* declined to place its holding in a broader context.[199] Indeed, concluding the opinion with a discussion of "issues . . . not decided," the Court clouded the force and effect of the decision's previous pronouncements on the interest in limited disclosure, and may have narrowed significantly the scope of *Whalen*. The *Whalen* Court's conscious effort to exclude similar factual contexts from the ambit of its holding against plaintiff's limited disclosure interest may suggest its reluctance to establish new constitutional interests wholly removed from the text of the document.[200] If so, the Court might confine the *Whalen* and *Nixon* approach to any compelled disclosure from the individual to the government without extending protection to include the interest in preventing further, subsequent disclosures of the information by the governmental entity that originally col-

197. *Id.* at 457-58. *See supra* notes 68-80 and accompanying text.

198. 433 U.S. at 465. The Court agreed with the district court that the fourth amendment's warrant requirement was inapplicable since Congress had approved the "search." *Id.* at 458 n.21.

199. Silver, *supra* note 23, at 263. The Court stated that it was "not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files," and found that the duty which attended the collection and use of that information to avoid any unauthorized disclosures "in some circumstances . . . arguably has its roots in the Constitution." Whalen v. Roe, 429 U.S. at 605. The Court, however, then declared that New York had met its burden of protecting the individual's interest; the Court held that it "need not, and [did] not, decide any question which might be presented by the unwarranted disclosure of accumulated private data—whether intentional or unintentional—or by a system that did not contain comparable security provisions." *Id.* at 605-06.

200. *See* Silver, *supra* note 23.

lected it. This conclusion takes account of the longstanding concern of the Bill of Rights for justification of government-compelled production of personal information, and might appeal somewhat to the judicial temperament's normal reluctance to establish constitutional rights wholly divorced from constitutional structure, theory, or text.[201] But this narrow interpretation of the *Whalen, Nixon,* and *Detroit Edison* holdings contravenes the tenor of those decisions. Indeed, the circuit courts have used the *Whalen/Nixon* analysis to extend constitutional protection to the limited disclosure interest in the broader context of public dissemination by the government.[202]

V. The Applicable Standard of Review

A. Strict Scrutiny

1. Defining a "Fundamental" Interest

The highest standard of constitutional review requires that a governmental entity demonstrate a compelling interest in its proposed action to justify any potential or actual interference with an individual's constitutional interests. Furthermore, the government must show that the contested legislation accomplishes its aim by the least intrusive means.[203] This standard applies to a few select liberty interests which the Court considers so precious that they are "fundamental" or "implicit in the concept of ordered liberty."[204] These "fundamental rights" include the first eight amendments and all claims of individual rights drawn from sources outside the first eight amendments that the Court has elevated to this preferred status.

Although the compelling state interest standard of review developed originally in the context of fourteenth amendment equal protection adjudication, the Court in *Roe v. Wade* incorporated this standard into the due process clause of the fourteenth amendment to provide a similar degree of protection for substantively determined "fundamental" liberty interests.[205] The fundamental

201. *Id.*

202. *See infra* notes 245-53 and accompanying text.

203. "In a series of decisions this Court has held that, even though the governmental purpose he legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." Shelton v. Tucker, 364 U.S. 479, 488 (1960).

204. Roe v. Wade, 410 U.S. 113, 155 (1973).

205. *Id.* at 173 (Rehnquist, J., dissenting).

rights/compelling state interest doctrine imposes a difficult burden upon the government. The burden of persuasion shifts from the individual alleging the deprivation of liberty to the government. The greater degree of judicial intervention required to weigh the competing interests increases the government's difficulty in establishing its proof. Because few values are clearly fundamental or nonfundamental, the standard inescapably entails subjective, result-oriented analysis. Although application of the compelling state interest standard may be vague, the classification of an interest as fundamental is virtually outcome determinative.[206] Rarely is the government able to justify even a "least intrusive" interference of an interest that the Court considers fundamental. Accordingly, characterization of an interest as fundamental is a crucial beginning for its ultimate constitutional vindication.

The Court's distinction between fundamental and nonfundamental liberty interests has proved in essence to be a return to the form of substantive due process analysis symbolized by *Lochner v. New York*[207]—unbridled judicial review and substitution of the Court's values for those of the state legislatures.[208] Although the Court has discredited and abandoned the *Lochner* method and philosophy, recent fundamental rights decisions appear to be an

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206. *See* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 589 (10th ed. 1980); Note, *On Privacy: Constitutional Protection for Personal Liberty*, 49 N.Y.U. L. REV. 670 (1973).

207. 198 U.S. 45 (1905). From the end of Reconstruction to the 1937 decision of West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937), the Court used the due process clause of the fifth and fourteenth amendments to oppose governmental regulation of economic activity. *See* L. TRIBE, *supra* note 24, at 427-55. Professor Lupu observed that this form of the substantive due process doctrine "worked a reign of terror on attempted regulation of wages, hours of labor, and unionization." Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981, 986 (1979) (footnote omitted). The *Lochner* approach came to symbolize "boundless intervention" in matters putatively within the exclusive province of the legislature. *Id.* at 986 n.23.

208. G. GUNTHER, *supra* note 206, at 571. Professor Gerety observed that, like *Lochner*, the modern fundamental rights decisions have violated an important convention: having a text for any assertion of judicial review power.

> Going without a text is like going naked. . . . To say that the king has no clothes, after all, is not to say that he is no longer king; but to say that the judge has no text is to say he has no authority at all. *Writtenness* plays a central part in our constitutional tradition. A judge without a text is not only streaking, if you will, he is usurping.

Gerety, *Doing Without Privacy*, 42 OHIO ST. L.J. 143, 145 (1981). *See* Epstein, *Substantive Due Process By Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159, 168-70; *Redefining Privacy*, *supra* note 8, at 239 n.25; Huff, *supra* note 28, at 785-93; Lupu, *supra* note 207, at 997-1003; *The Uncertain Protection*, *supra* note 23, at 195-96; Prickett, *The Right of Privacy: A Black View of* Griswold v. Connecticut, 7 HASTINGS CONST. L.Q. 777, 812 (1980).

extension of a form of *Lochner* era adjudication that the Court never repudiated.[209] During the *Lochner* era the Court did not

209. *See* G. GUNTHER, *supra* note 206, at 571. In the initial fundamental rights decisions the Court strove to avoid even the appearance of "Lochnerizing." The Court began in Griswold v. Connecticut, 381 U.S. 479 (1965), by disclaiming any reliance on *Lochner*, although it did affirm its responsibility under Meyer v. Nebraska, 262 U.S. 390 (1923), and Pierce v. Society of Sisters, 268 U.S. 510 (1925), to deflect any unjustified state regulation of an individual's fundamental rights. 381 U.S. at 482-83. The Court discovered a protected zone of "privacy" created by "penumbras" and "emanations" of the specific guarantees of the Bill of Rights. The *Griswold* Court held that this zone of privacy embraced married plaintiffs' fundamental right to use contraceptives, an interest not expressed in the Constitution, and found that the state could show no interest sufficiently compelling to justify its infringement. 381 U.S. at 484-86. *See The Uncertain Protection, supra* note 23, at 198. Four Justices averred that *Griswold* was indistinguishable from *Lochner*. Concurring Justices White and Harlan concluded that the law impairing marital choices about contraceptives violated the due process clause independent of any connection with the Bill of Rights. 381 U.S. at 502 (White, J., concurring); *id.* at 499 (Harlan, J., concurring). Justices Black and Stewart, in dissent, vigorously decried the Court's return to unrestrained review and substitution of its views for those of the state legislature. *Id.* at 507 (Black, J., dissenting); *id.* at 527 (Stewart, J., dissenting). *Griswold* is somewhat defensible on grounds that the Court attempted to relate the right to use contraceptives to the familiar first amendment concept of privacy and association and to the fourth amendment concept of seclusion by speculating about the intrusive search methods for enforcing the ban and the attendant intrusion upon the association of marriage. This tenuous textual connection to the Bill of Rights, however, was unavailable in Eisenstadt v. Baird, 405 U.S. 438 (1972), in which the challenged statute proscribed the distribution, not use, of contraceptives. In striking down the statute, the Court declared that "the decision whether to bear or beget a child" is a fundamental individual interest with which the government cannot interfere without a compelling interest. *Id.* at 453.

Characterizing abortion as an alternative to contraception for preventing an unwanted birth, the Court in Roe v. Wade, 410 U.S. 113 (1973), easily found that a woman's decision to undergo an abortion is a fundamental interest. *Roe* is too far removed factually from *Griswold* to be able to disclaim any reliance on "Lochernizing." *Griswold*'s implicit concern with the inviolability of the home tenuously linked its factual setting to the first and fourth amendments. A decision whether to conceive, or abort a conception, however, cannot assert even this strained textual connection to the Constitution.

Moore v. City of E. Cleveland, 431 U.S. 494 (1977), dispelled any ambiguity left in *Roe*'s wake regarding the revitalization of *Lochner*-type substantive due process analysis for the determination of fundamental rights. The plurality opinion invalidated an East Cleveland, Ohio, zoning ordinance that limited dwelling unit occupancy to members of a specially defined nuclear family. While the Court acknowledged that "[t]here *are* risks when the judicial branch gives enhanced protection to certain substantive liberties without the guidance of the more specific provisions of the Bill of Rights," *id.* at 502 (emphasis in original), and that, as the *Lochner* era demonstrated, perhaps the only possible "limits to such judicial intervention become the predilections of those who happen at the time to be Members of the Court," *id.* (footnote omitted), the Court defended, by relying on *Meyer* and *Pierce*, the invocation of the *Lochner* form of analysis. The Court stated, "[H]istory counsels caution and restraint. But it does not counsel abandonment . . . ." *Id.* The Court appeared unanimously in favor of the renewed use of substantive due process analysis to protect some interests wholly removed from the Bill of Rights. The dissenting Justices disagreed with the plurality only about the standard for determining whether a particular liberty interest indeed was fundamental.

limit its protection of fundamental values to so-called "economic rights"; it also scrutinized any governmental interference in more personal forms of liberties with equal zeal. Among the most notable of these decisions are *Meyer v. Nebraska*,[210] in which the Court held unconstitutional a state statute that required schools to teach only English until the students passed the eighth grade, and *Pierce v. Society of Sisters*,[211] in which the Court struck down on the same ground a state statute requiring children between ages eight and sixteen to attend public schools. The Court found that both statutes interfered with the liberty of the parents and guardians to control the upbringing and education of their children. The personal liberties protected during the *Lochner* era correspond closely to those values that the modern Court finds fundamental. Accordingly, the Court has relied heavily upon *Meyer* and *Pierce* to reestablish the *Lochner* form of substantive due process analysis for the determination of fundamental rights.[212]

The subjective nature of unrestrained judicial intervention in nontextual fundamental rights adjudication has caused some division on the Court about the proper standard for distinguishing those liberty interests that are fundamental for purposes of compelling state interest review. *Moore v. City of East Cleveland*[213] presents the competing views. The dissenting Justices in *Moore* narrowly determined fundamental rights according to the "implicit in the concept of ordered liberty" standard.[214] The dissent ac-

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210. 262 U.S. 390 (1923).

211. 268 U.S. 510 (1925). Professor Lupu suggested that the survival of these cases means that "the only durable objection to the *Lochner* era's handiwork is that it generally selected the 'wrong' values for protection." Lupu, *supra* note 207, at 989 (footnote omitted). The Supreme Court's explanation for the reaffirmance of *Meyer* and *Pierce* is that these cases built on the traditions that developed from the nation's balance of its regard for individual liberty against the demands of organized society. Moore v. City of E. Cleveland, 431 U.S. 494, 501 n.8 (1977).

212. "The most recent reliances on *Meyer* and *Pierce* . . . have stressed their nontextual underpinnings of protected interests in family autonomy." Lupu, *supra* note 207, at 988-89 (footnote omitted).

213. 431 U.S. 494 (1977); *see supra* notes 209 & 211.

214. "When the Court has found that the Fourteenth Amendment placed a substantive limitation on a State's power to regulate, it has been in those rare cases in which the personal interests at issue have been deemed 'implicit in the concept of ordered liberty.'" Moore v. City of E. Cleveland, 431 U.S. 494, 537 (Stewart, J., joined by Rehnquist, J., dissenting). Justice White likewise dissented on the ground that the interest at bar called for an impermissible expansion of substantive due process analysis and protection. *Id.* at 549-50 (White, J., dissenting). Chief Justice Burger expressed the dissenting view that when state or local governments provide an administrative remedy, no federal relief is available unless the claimant has exhausted this remedy or has shown that it is inadequate or useless. *Id.* at 521 (Burger, C.J., dissenting).

cepted existing fundamental rights decisions such as *Roe v. Wade* and *Griswold,* and was willing to recognize only those new claims that were closely analogous factually to these previously recognized interests.[215] The *Moore* plurality preferred a broader, more liberal standard, equating fundamental rights with "basic values":[216] "Appropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful 'respect for the teachings of history [and] solid recognition of the basic values that underlie our society.' "[217]

The interests that the Court as a whole has found most deserving of constitutional protection under the compelling state interest standard of review are those that inhere in the traditional concerns of the family: marriage, conception and abortion, child rearing and education.[218] This family-oriented concern in funda-

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215. *Id.* at 536-37 (Stewart, J., joined by Rhenquist, J., dissenting).

216. *Id.* at 503. Concurring Justice Stevens expressed the view that no justification appeared for the ordinance's restriction on an owner's use of his property and thus, the ordinance constituted a taking of property without due process or just compensation. *Id.* at 520-21.

217. *Id.* at 503 (quoting Griswold v. Connecticut, 381 U.S. 479, 501 (Harlan, J., concurring)).

218. During the early 1970's the Supreme Court decisions protecting these fundamental interests in familial autonomy recognized that the right at stake also comprehended some privacy interest in the sense of freedom from governmental interference. *See* Roe v. Wade, 410 U.S. 113, 152-53 (1973). The decisions, however, offered scant discussion or analysis of any substantive privacy concerns. Rather, the Court appeared to determine subjectively whether a particular interest deserved protection as a fundamental right by comparing it to the rights recognized in the line of authority that extends from *Meyer* and *Pierce* to *Griswold* and *Roe. See supra* note 209 and accompanying text. In view of the government's difficulty in meeting the compelling state interest burden, identification of an interest as fundamental almost always disposed of the case. The Court often sought to legitimize the result by relating the subjectively determined fundamental interest to a constitutional right of privacy, which it expanded to encompass the particular interest at issue. Since governmental dissemination of personal information arguably infringes upon an individual's privacy, *see* A. WESTIN, *supra* note 23; Huff, *supra* note 28, the interest in limited disclosure could claim status as fundamental by virtue of its inherent privacy implications. The concept of privacy in effect provided a constantly changing majority of the Court with a doctrinal cover or verbal slogan beneath which it could exercise unrestrained judicial review and intervention to advance its own value judgments. Silver, *supra* note 23, at 215. What was private under this view was simply what activity the Court thought at the time should not be subject to governmental regulation. *The Uncertain Protection, supra* note 23, at 199. The Court made no attempt to discern any true, substantive privacy interest independent of the factual context of family-oriented autonomy concerns.

Recent Court decisions protecting familial autonomy interests have made no mention of privacy as a fundamental right deserving compelling state interest review. *Moore* abandoned completely the concept of privacy as a cover for its invalidation of state restriction on the individual's choice of family members with whom he could live. Similarly, the Court in Zablocki v. Redhail, 434 U.S. 374 (1978), did not mention privacy, and instead applied equal protection analysis to invalidate state attempts to regulate the freedom to marry. *Moore* and

mental value adjucation traces its roots to *Meyer* and *Pierce*.[219] *Moore* confirms the Court's understanding that a traditional regard for the family and its function in our society forms the gravamen of fundamental rights adjudication.[220] The Court has demonstrated that it will not afford compelling state interest review to any individual liberty interest, regardless of its nature and intensity, unless the interest arises as a family matter of decision—a "freedom of personal choice in matters . . . of . . . family life . . . ."[221] Thus, to qualify for compelling state interest review, the paradigm limited disclosure interest either must possess the family decisional aspects that the Court traditionally has favored, or constitute a fundamental right on its own merits as a "basic value" of society under the more expansive approach of the *Moore* plurality.

2. The Limited Disclosure Interest Not "Compelling"

The paradigm limited disclosure interest appears too far removed both conceptually and factually from the interest in familial autonomy to merit compelling state interest protection.[222] Each interest promotes a separate and distinct substantive individual interest. The interest in limited disclosure provides the individual with control over the circulation of information about himself and promotes his liberty interest in presenting various identities to the world.[223] The interest in autonomy preserves the individual's inter-

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Zablocki appear to signal that the Court no longer is willing to ground subjectively determined fundamental interests in a constitutional right of privacy.

219. *See supra* notes 210-12 and accompanying text. The Court also has upheld in fundamental rights adjudication the right of married and unmarried persons to obtain and use contraceptives, Griswold v. Connecticut, 381 U.S. 479 (1965); the right of pregnant teachers to forego maternity leaves, Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); the right of women, even of minority age, to elect abortion, Belloti v. Baird, 443 U.S. 622 (1979); Roe v. Wade, 410 U.S. 113 (1973); and the right of the extended family to live together, Moore v. City of E. Cleveland, 431 U.S. 494 (1977).

220. "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in the Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural." Moore v. City of E. Cleveland, 431 U.S. at 503-04 (footnotes omitted).

221. *Id.* at 499 (quoting Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-40 (1974)).

222. The difference between an interest in secrecy or confidentiality in personal information and the interest in autonomy of decisionmaking is not always clear to the Court. In Whalen v. Roe, 429 U.S. 589 (1977), the Court identified and analyzed the two interests as distinct. Plaintiff's claim in *Whalen*, however, presented only a limited disclosure interest; the majority mistook the consequences of disclosure for the second, autonomy interest claim. *See* Huff, *supra* note 28, at 791-92.

223. *See supra* part II.

est in choosing from among competing alternatives a particular course of action that in the familial context normally entails significant consequences. Even though this autonomy may relate to or depend upon certain nondisclosures, it cannot be expanded to encompass an interest in limited disclosure. Unlike laws banning contraceptives or abortions, governmental dissemination of personal information does not remove any alternatives from the decisionmaking process. Although it might deter some actions, its effect on any pending decisions in the majority of cases is indirect. More importantly, official disclosure rarely interferes with the "freedom of personal choice in matters of . . . family life" considered "fundamental" by the Court. Furthermore, stripped of the family matters *factual* context, the interest in limited disclosure does not rise to constitutional stature so that only a compelling state interest would justify its interference.

Nevertheless, the individual's loss of control over personal information divulged voluntarily to the government occasionally may affect familial autonomy. Although the paradigm limited disclosure interest and the autonomy interest are distinct by definition, this interrelationship may offer the former some scattered compelling state interest protection. Should the Court find that an individual's control over his personal information in the government's possession affects significantly his autonomy in the familial context, then protection would seem to follow. In an analogous situation, the Court protects freedom of association, even though the first amendment does not mention it, in recognition that freedom of association often enables effective exercise of the expressed freedoms of speech, the press, assembly, and petition.[224] This instance, however, rarely will occur in the limited disclosure context, and thus, does not represent a viable method for vindication of a general interest in controlling governmental dissemination of personal information.

The prospects appear equally dim for extending compelling state interest protection to individual interests under the *Moore* plurality's "basic values" standard. The *Moore* plurality gave no indication that it would consider fundamental any "basic values" outside the "private realm of family life." Indeed, the Court's division in *Moore* centered on whether the substantive due process clause limited the state's power to regulate "aspects of family life" more removed from, or less consequential than, the previously pro-

224. *See supra* text accompanying notes 54-63.

tected interests such as the decisions to marry and to bear and rear children. The tenor of *Moore* indicates that the Court considers fundamental rights adjudication available primarily for preserving the sanctity of the family against less than compelling governmental interference. As the Court prevented undue state regulation of economic and business affairs during the *Lochner* era, the modern Court has "deregulated" the family.[225] The unresolved issue is the question of limits upon the Court's power to intervene in "deregulating" the family, not the expansion of fundamental rights adjudication to encompass individual liberty interests wholly removed from the familial autonomy factual context.[226]

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225. *The Uncertain Protection, supra* note 23, at 196.

226. Indeed, recent Court decisions seem to have curtailed vindication of the fundamental rights established in the *Griswold/Roe* line of authority. In the recent abortion case of Maher v. Roe, 432 U.S. 464 (1977), the Court held that the Social Security Act does not require a state that participates in the Medicaid program to use state or federal funds to provide for nontherapeutic abortions. The Court held that *Roe* does not establish an unqualified constitutional right to an abortion; rather the *Roe* privacy right merely "protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy." *Id.* at 473-74. The *Maher* Court claimed that its decision did not signal a retreat from *Roe.* The Court emphasized the "basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." *Id.* at 475 (footnote omitted). In an approach more akin to the states' rights thrust of *Paul* and *Usery* than to the expansive fundamental rights logic of *Griswold* and *Roe,* the *Maher* Court focused upon the power of the state to spend according to its own dictates, not upon the effects of the exercise of that spending power on the substantive, previously declared liberty interests of the individual.

The Court carried *Maher* one step further in Harris v. McRae, 448 U.S. 297 (1980), in which it held that the state is not required to pay for medically necessary abortions when federal reimbursement is unavailable under the Hyde Amendment. Following strictly its holding in *Maher,* the Court declared that the Hyde Amendment places no obstacles in the path of the choice to terminate the pregnancy; rather it encourages alternative activity by unequal subsidization of abortions, and leaves the indigent woman contemplating abortion with the same range of choices. *Id.* at 315. Plaintiff contended that *Maher* was factually different from *Harris* because the *Harris* abortion was medically necessary and, therefore, directly related to the interest of the woman in protecting her health during pregnancy—the core concern that *Roe v. Wade* sustained. *Id.* The Court found, nevertheless, that "a woman's freedom of choice [does not] carr[y] with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices." *Id.* at 316.

The Court may be correct in asserting that *Maher* and *Harris* do not constitute a retreat from *Roe.* The Court's self-imposed limitation of its review to the question of the power of the state to act in these circumstances, however, bodes ill for the expansion of fundamental rights adjudication to protect additional liberty interests—even those that are the subject of serious scholarly and public concern—or to vindicate fully those rights currently recognized as fundamental.

B. Intervention Without Strict Scrutiny

1. Development of Heightened Rational Basis Scrutiny

Fundamental rights adjudication has proved to be an all or nothing process. The government rarely can demonstrate the compelling interest required to justify interference with a right deemed fundamental.[227] On the other hand, the showing of a colorable rational basis for the governmental action readily justifies interference with nonfundamental rights.[228] In the equal protection context the Court has become dissatisfied with the all or nothing results of the fundamental rights adjudicatory process that strictly protects fundamental rights and easily contravenes all others.[229] Accordingly, the Court has developed the rational basis test with more rigor to determine whether state classifications that impair the nonfundamental interests of certain individuals in fact promote a legitimate state objective.[230] This development of heightened rational basis scrutiny in the equal protection field seems to suggest that the Court does not consider the magnitude of a particular interest—whether or not it is "fundamental"—to be of sole dispositive importance.[231] Rather, the nature of the interest determines ultimately whether it will receive constitutional protection.[232] "Fundamentality" is not an exclusive test of whether a state may restrict certain personal interests because the concept's inherently subjective analytical nature prevents it from extending protection to other valid and important liberty concerns.

Similarly, in the substantive due process context, many interests that implicate the individual's liberty to control the conduct of some aspects of his life free from unjustified governmental interference may not rise to the level of fundamental rights; nonetheless they may deserve recognition as essential elements of fourteenth amendment interests. For example, the interest in limited disclosure, although apparently not a fundamental right, commands

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227. *See* Dunn v. Blumstein, 405 U.S. 330, 363-64 (1972) (Burger, C.J., dissenting). *But see* Korematsu v. United States, 323 U.S. 214 (1944) (held national security during wartime justified a federal statute).

228. Professor Gunther referred to this particular standard of review as a "toothless minimal scrutiny standard." Gunther, *Supreme Court 1971 Term*, 86 HARV. L. REV. 1, 19 (1972). *See, e.g.*, Paris Adult Theater I v. Staton, 413 U.S. 49 (1973).

229. *See* Dandridge v. Williams, 397 U.S. 471, 519-21 (1970) (Marshall, J., dissenting); Gunther, *supra* note 228, at 17-20.

230. Professor Gunther described this new test as "intervention without strict scrutiny." Gunther, *supra* note 228, at 18.

231. Note, *supra* 206, at 703-04.

232. *Id.*

some degree of constitutional protection, albeit less than the compelling state interest standard.

The Court itself recognized in *California Bankers Association v. Schultz*[233] the serious implications of the burgeoning governmental control of sensitive information about an extraordinary number of people. The three dissents and two concurring opinions demonstrate that at least five Justices found "substantial and difficult Constitutional questions" about governmental information gathering and dissemination capabilities that could "touch upon intimate areas of an individual's personal affairs."[234]

Frequently, limited disclosure claims arise in cases in which the state's interest is ill-defined at best; for example, when the disclosure is not pursuant to statute but rather is the unilateral act of a government official. The individual who suffers injury from such misuse should have standing to assert that the state had no legitimate interest in the dissemination or that the disclosure did not bear a rational relationship to the achievement of a valid governmental purpose. The government should bear the burden of showing that the contemplated disclosure promotes legitimate state interests. Several recent Supreme Court cases have indicated strongly that the paradigm limited disclosure interest merits constitutional protection under this heightened rational basis or "intervention without strict scrutiny" level of review.

2. Analysis

Although the Court in *Whalen v. Roe*[235] upheld the statute requiring disclosure, its decision nonetheless contains several important elements that favor constitutional protection of the paradigm interest. First, the Court recognized that the underlying substance of plaintiffs' disclosural privacy concern was the prevention of harm to their reputations that foreseeably would attend public revelation of their drug use. Second, *Whalen* undertook an undeclared, heightened rational basis examination of the type the Court used when scrutinizing the interference with nonfundamental rights of constitutional dimension in the equal protection context. The Court balanced carefully the state's interest in obtaining the information against plaintiffs' concern for its subse-

233. 416 U.S. 21 (1974). *See supra* note 82.

234. 416 U.S. at 78 (Powell, J., joined by Blackmun, J., concurring); *id.* at 79 (Douglas, J., dissenting); *id.* at 91 (Brennan, J., dissenting); *id.* at 93 (Marshall, J., dissenting).

235. 429 U.S. 589 (1977). *See supra* text accompanying notes 141-49.

quent dissemination.

The Court in *Nixon v. Administration of General Services*[236] followed the same careful examination and balancing of the competing interests employed in *Whalen* and declared that the statute's admitted intrusion "must be weighed against the public interest in subjecting the Presidential materials . . . to archival screening."[237] In rejecting the former President's claim, the Court emphasized the limited intrusion of the screening process, the important public interest in preserving the materials, Nixon's status as a public figure and concomitant lack of expectation of privacy in the vast majority of the materials, and the unavailability of a less intrusive means to segregate the small quantity of private materials.[238] The Court concluded that Nixon's limited disclosure interest was weaker than that of plaintiffs in *Whalen,* and that the contested legislation did not infringe unreasonably or improperly upon the interest.

The *Whalen* and *Nixon* decisions produced uncertainty about precisely what interest in limited disclosure, if any, exists in their wake.[239] Three salient features common to both *Whalen* and *Nixon,* however, indicate that the Court may be very sympathetic to future assertions of limited disclosure claims. First, in both cases the Court described the interest with language that standing alone at once defines and embraces the paradigm limited disclosure interest[240] and distinguishes it from the autonomy interest. This language represents a critical step toward establishing limited disclosure as an interest of constitutional dimension. Second, by recognizing the threat to reputation from unauthorized governmental disclosure of sensitive personal information, the Court properly identified reputation as the substantive, underlying interest in plaintiffs' claim. This recognition is crucial for two reasons: It legitimizes the interest in limited disclosure as constitutionally protected in contexts other than the computerized data bank situation of *Whalen,*[241] and it prevents the Court from focusing solely on the government's interest in disclosing the personal informa-

236. 433 U.S. 425 (1977). *See supra* notes 150-52 and accompanying text.

237. *Id.* at 458.

238. *Id.* at 465.

239. The circuit courts have rendered opposite interpretations of the two opinions. *See supra* notes 158-72 and accompanying text.

240. Nixon v. Administrator of Gen. Serv., 433 U.S. at 457; Whalen v. Roe, 429 U.S. at 598-600.

241. *See supra* notes 141-49 and accompanying text.

tion. Thus, the recognition provides for a more balanced consideration of the interests. Last, the Court actually employed a standard of review in *Whalen* and *Nixon* intermediate between the all or nothing poles of fundamental rights and rational basis adjudication. Although the Court did not impose upon the government the burden of demonstrating a compelling interest in its proposed action, neither did the Court engage in the "toothless" minimum scrutiny that so often had sanctioned governmental conduct upon the showing of a colorably reasonable basis. Rather, the Court engaged in a form of "intervention without strict scrutiny" analysis.[242] It probed the development and purpose of the contested legislation, examined its likely effect on the plaintiffs' asserted liberty interests, and determined that no less intrusive alternative was available to accomplish the same legislative end. The Court paid particular attention to the physical and statutory safeguards in place to prevent unauthorized dissemination. It balanced the plaintiffs' interests in nondisclosure against the governmental and public interest in disclosure. The Court sustained the legislation only upon its satisfaction that the statute's purpose outweighed the plaintiffs' interests. The Court's analysis of the disclosure interest as if it were of constitutional dimension is more siguificant than the Court's comments about the status of the interest and provides the most positive indication that the Court considers the disclosure interest constitutionally protected. Notwithstanding the Court's use of heightened constitutional scrutiny, in both *Whalen* and *Nixon* it actually withheld complete vindication of the limited disclosure interest by finding that the government's need for the information outweighed the plaintiffs' interests in confidentiality.

In *Detroit Edison Co. v. NLRB*,[243] in which plaintiff resisted disclosure to a private rather than a governmental entity, the Court again applied heightened scrutiny analysis. *Detroit Edison* incorporated the aspects of *Whalen* and *Nixon* that favored most strongly the establishment of a constitutionally protected interest in limited disclosure. *Detroit Edison* displayed the Court's willingness to employ heightened scrutiny, or "intervention without strict scrutiny," even though the individual's true concern was not with the immediate consequences of disclosure, but rather, with the potential harm that might result from subsequent dissemination of the information by the collecting entity. Thus, the *Detroit Edison*

242. *See* Gunther, *supra* note 228.

243. 440 U.S. 301 (1979). *See supra* text accompanying notes 153-57.

Court went a step further than *Whalen* and *Nixon*; it conditioned any disclosure upon the consent of each affected individual. The Court completely vindicated the limited disclosure interest in the contested information and returned to each individual almost the same measure of control over revelation of his personal information that he enjoyed when that information remained in his possession.[244]

3. The Circuit Courts

Interpretation of *Whalen* and *Nixon* began in the Fifth Circuit,[245] which addressed factual situations that remarkably resembled *Nixon*. These limited disclosure claims arose initially in response to governmental mandates for financial disclosures by public officials for the express purpose of making the information available for public review. In *Plante v. Gonzales*[246] several Florida state senators challenged the state's sunshine law, which required them to reveal their assets, liabilities, and sources of income. Noting *Whalen*'s identification of some constitutional interest in avoiding disclosure of personal matters, the Fifth Circuit interpreted *Whalen* and *Nixon* to require a balancing of this concern against the state's interest in disclosure, with "[s]omething more than mere rationality . . . [to] be demonstrated."[247] The court examined carefully the statute's purpose, noted the public status of plaintiffs, and considered the effect of several of the statute's more burdensome provisions on plaintiffs. Finding no other less intrusive means to achieve the important legislative and public goals, the court held that the public's interest in this disclosure out-

244. 440 U.S. at 317-20.

245. The Second Circuit has considered the interest in limited disclosure only in the individual to government disclosural context. In Schachter v. Whalen, 581 F.2d 35 (2d Cir. 1978), the Second Circuit summarily disposed of a limited disclosure claim brought by a physician and his patients seeking to enjoin enforcement of a subpoena that the New York State Board of Professional Medical Conduct issued to compel production of the patients' medical records. The court found that plaintiff physician, whose fitness was the subject of the Board's investigation, had less standing than the *Whalen* plaintiffs to assert a limited disclosure intrusion. *Id.* at 37. The court acknowledged that *Whalen* extended to plaintiff a constitutioual interest in avoiding disclosure of personal matters, but concluded quickly that the state's interest in the medical records for review of the physician's competency far outweighed the privacy interests of the doctor in his patients' records. *Id.* The court, like the Supreme Court in *Whalen*, was most impressed with the safeguards and procedures in place to prevent the unauthorized disclosure or other misuse of the information after its release to the government. *Id.*

246. 575 F.2d 1119 (5th Cir. 1978), *cert. denied*, 439 U.S. 1129 (1979).

247. 575 F.2d at 1134.

weighed plaintiffs' desire for nondisclosure.[248]

The factual context of *Fadjo v. Coon*[249] was much broader than that of *Plante* or *Whalen.* In *Fadjo* the governmental entity that had collected plaintiff's personal information disclosed it without authorization and in violation of the confidence under which the individual originally released the information to the government. The Fifth Circuit again followed its *Plante* interpretation of *Whalen* and *Nixon* to require that the state demonstrate something "more than mere rationality."[250] Concurring in this approach, the Third Circuit adopted a similar standard of review in *United States v. Westinghouse Electric Corp.*[251] Although actually holding against Westinghouse, the court's remedy allowing each individual to resist disclosure of his own record underscores the court's emphasis on employing heightened scrutiny of any interference with a limited disclosure interest.[252]

In taking exception to the *Fadjo* and *Westinghouse* interpretations of *Whalen* and *Nixon,* the *DeSanti* court[253] failed to mention the single most important feature of the *Whalen, Nixon,* and *Detroit Edison* decisions: the heightened "intervention without strict scrutiny" analysis.[254] The use of this rigorous test demonstrates clearly the depth of the Court's persuasion that the interest in limited disclosure merits constitutional protection. No reference

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248. The Fifth Circuit reached the same result on similar acts in DuPlantier v. United States, 606 F.2d 654 (5th Cir. 1979). Appointed federal judges in *DuPlantier* challenged the financial disclosure provisions of the Ethics in Government Act and contended that as appointed rather than elected officials, their situation was distinguishable from that of plaintiffs in *Plante,* because the public had less interest in their financial affairs. Again applying the rigorous scrutiny and balancing of interests test that *Plante* had interpreted *Whalen* to require, the court held that the public interest remained sufficiently strong to outweigh plaintiffs' interests in nondisclosure.

249. 633 F.2d 1172 (1981).

250. 633 F.2d at 1176 (quoting Plante v. Gonzales, 575 F.2d 1119, 1134 (5th Cir. 1978), *cert. denied,* 439 U.S. 1129 (1979)).

251. 638 F.2d 570 (3d Cir. 1980). *See supra* notes 165-67 and accompanying text.

252. The Third Circuit declared:

> The factors which should be considered in deciding whether an intrusion into an individual's privacy is justified are the type of record requested, the information it does or might contain, the potential for harm in any subsequent nonconsensual disclosure, the injury from disclosure to the relationship in which the record was generated, the adequacy of safeguards to prevent unauthorized disclosure, the degree of need for access, and whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access.

638 F.2d at 578. The Third Circuit thus conducted a rather stiff and thorough examination of the competing interests.

253. *See supra* notes 168-72 and accompanying text.

254. *See supra* text accompanying notes 227-44.

to the language or holding of *Paul,* nor even to the language or facts of *Whalen,* can diminish the import of what the Court actually did when it faced the limited disclosure claims in the three decisions. The Sixth Circuit's failure to recognize the significance of the Court's analytical process weakens seriously the impact of its refusal to treat limited disclosure as a constitutionally protected interest.

VI. Conclusion

The past thirty years have witnessed a revolution in the government's need for and ability to handle information about individual members of society. The information practices of the government at once threaten individual liberty interests and the balance of power between government and the rest of society. The directly opposing interpretations of *Whalen* by the circuit courts of appeal provide the Supreme Court with a propitious opportunity to redress the striking imbalance between the government's exploding accumulation of personal information and the individual's need for security and control of reputation and public identity. The Court's growing awareness of the threat inherent in current government information practices, which began in *Schultz* and *Doe,* has mirrored the public's concern, expressed primarily through legislation.[255] Later in *Whalen* the Court recognized the individual's interest in controlling the disclosure of information about himself: at stake was the individual's reputation—his "good name, reputation, honor and integrity"—an interest for which the Court long had evinced a particularly high regard. The *Whalen, Nixon,* and *Detroit Edison* Courts' use of heightened scrutiny analysis to ensure that the alleged interference with the plaintiffs' limited disclosure interests was a reasonable and necessary intrusion offers the strongest possible indication of the Court's readiness to consider the constitutional dimension of the interest.

When personal information remains in the individual's sole possession, both the law and society recognize his right to its control. The government cannot compel the individual to produce the material or otherwise obtain possession of it without first demonstrating a justified need that outweighs the individual's interest in confidentiality. Several specific guarantees of the Bill of Rights directly comprehend this interest in preventing unrestrained governmental "seizure." Yet the individual's gravest concern about gov-

255. *See supra* part III.

ernment information collection often is not the use for which the government initially acquires the information, but the fear that the government will disseminate the information to others without the consent or even the knowledge of the subject individual. For the individual to control freely the direction of his life, as he does when he alone determines when, how, and to whom he will reveal his thoughts, beliefs, and actions, he must be able to maintain control when operation of law or his own economic necessity force him to divulge personal information to the government. Removing both possession and the right to regulate disclosure of personal information to the government emasculates the individual's interest in his reputation and dignity. Careless or deliberate governmental disclosure can damage irreparably those interests while the individual stands helplessly or unknowingly aside. The government's computer-based ability to disseminate information to a wide audience perhaps increases the individual's interest in controlling disclosure since this capability far exceeds that of the individual himself. The Supreme Court, in recognition of the individual's reputational interest in avoiding misuse of information, has refused to allow the government to collect personal data from an individual without good reason, the presence of safeguards to prevent further disclosure, and the use of the least intrusive means. The *Whalen, Nixon,* and *Detroit Edison* decisions open the way to complete the vindication of the individual's limited disclosure interest by extending the power that the individual has over the release of information in his sole possession to include control over subsequent dissemination by the government of that material information which the individual earlier had revealed. To countenance the opposite result increases greatly the government's strength at the citizen's expense, and creates an anomaly intolerable in a society that purports to regard individuals as ends unto themselves.

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