

*Informational Privacy in the Modern Era: Expanding Constitutional Protections to the Mental
Health Care of Minors*

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INTRODUCTION

The Constitution famously begins with the words “We the People,”¹ but fails throughout its 4,400 words² to define who comprises “the People” of the United States of America.³ The term appears throughout the Constitution’s clauses—notably repeated five times within the Bill of Rights alone⁴—yet for years the meaning of this elusive phrase has confounded courts and scholars alike.⁵

Multiple schools of thought have emerged on the subject.⁶ The first holds the meaning of “the People” in the Constitution to be wholly inclusive—encompassing all those subject to the laws of the United States.⁷ Another interpretation finds “only those with political rights—e.g., voting, public office” to fit within the definition of “the People.”⁸ Conversely, yet another approach finds that the term has different meanings within different clauses.⁹ While each of these interpretations has merit, none focuses primarily on the question at hand—whether minors are included in “the People” afforded informational privacy rights under the constitution.

¹ U.S. CONST. pmbi.

² *Fascinating Facts about the U.S. Constitution*, <https://www.constitutionfacts.com/us-constitution-amendments/fascinating-facts/>.

³ See Note, *The Meaning(s) of “The People” in the Constitution*, 126 HARV. L. REV. 1078, 1085 (2013) (“The phrase “the people” is not defined in the Constitution, nor is its meaning clear on its face. It might refer to citizens, or to all citizens and some noncitizens (such as those persons with substantial connections), or to everyone in the United States. Each of these interpretations has received at least some support from courts or individual Justices. In the infamous *Dred Scott v. Sandford* decision, Chief Justice Taney wrote that “[t]he words ‘people of the United States’ and ‘citizens’ are synonymous.” In *Verdugo-Urquidez*, Chief Justice Rehnquist said that “the people” encompassed citizens and those noncitizens with substantial connections to this country. In dissent, Justice Brennan argued that everyone in the United States and subject to its laws should receive constitutional protections. Thus, while several interpretations are possible, the Court has not clearly embraced one, so this analysis turns to other accepted interpretive principles to inform the meaning--or the meanings--of “the people.”).

⁴ See *id.* at 1078; see also U.S. CONST. art. I, §2, cl. 1; *id.* amends. I, II, IV, IX, X, XVII.

⁵ See, e.g., Note, *supra* note 3, at 1079; see also *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990); *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008).

⁶ See Note, *supra* note 3, at 1089.

⁷ See *id.* at 1078.

⁸ See *id.* at 1078.

⁹ See *id.* at 1079 (“These amendments’ texts, origins, precedents, and purposes suggest that the same phrase, “the people,” can have different meanings in different clauses.”).

The Constitution grants numerous rights to the people—some explicitly via the language of the text,¹⁰ and others implicitly understood as the result of painstaking scholarly and judicial interpretation.¹¹ As a result, certain fundamental rights and constitutionally protected liberty interests exist.¹² In some instances, these rights have been held to apply, at least in part, to minors.¹³ In other cases, the Supreme Court has unequivocally held that the Constitution does not afford such rights to minors.¹⁴ Finally, there remains uncertainty with regard to certain rights and constitutionally protected liberty interests—on these the Supreme Court has yet to speak.¹⁵ Among the uncertain is the right to privacy.¹⁶ This implicit right contains within it what has been termed “informational privacy” —that is, the right to control information about oneself.¹⁷ The Supreme Court has only been tasked with issues related to informational privacy three times, and none of these issues dealt with the application of such a right to minors.¹⁸ However, lower courts have grappled with the issue numerous times, unsurprisingly reaching different conclusions.¹⁹ The result is a murky body of law containing ill-defined parameters and varying applications of the right to informational privacy to minors.

While some guidance can be gleaned from the Court’s application of other fundamental rights to minors,²⁰ informational privacy—especially in the age of technology—is a unique and novel element of the implicit right to privacy that poses it’s own distinctive challenges. One such

¹⁰ See Stephen M. Durdena, *Plain Language Textualism: Some Personal Predilections Are More Equal Than Others*, 26 QUINNIPIAC L. REV. 337, 346-49 (2008) (discussing plain language Textualism).

¹¹ See Caleb Hall, *A Right Most Dear: The Case for a Constitutional Environmental Right*, 30 TUL. ENVTL. L.J. 85, 92-93 (2016) (discussing how certain rights “must be implied because the U.S. Constitution does not explicitly guarantee such a right”).

¹² See Adam B. Wolf, *Fundamentally Flawed: Tradition and Fundamental Rights*, 57 U. MIAMI L. REV. 101 (2002).

¹³ See *infra* Part II.

¹⁴ See *infra* Part II.

¹⁵ See *infra* Part II.

¹⁶ See *infra* Section I.A.

¹⁷ See *infra* Section II.D.

¹⁸ See *Whalen v. Roe*, 429 U.S. 589 (1977); *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977); *NASA v. Nelson*, 562 U.S. 134 (2011).

¹⁹ See *infra* Section III.A.

²⁰ See *infra* Part II.

challenge lies with the application of informational privacy. Though some scholars have argued in favor of a minor's full right to informational privacy in the context of sexual information and other physical health care related information,²¹ and others have argued for the full expansion of the right to informational privacy to minors, regardless of context,²² this Note focuses on the access to the mental health care records of minors. Much like informational privacy is a subset of the right to privacy as a whole, and given its own unique treatment by the Court, the varied and unique information protected under this right is deserving of differing treatment.

Mental health care is particularly relevant in today's climate. Suicide is the third leading cause of death for ten- to fourteen-year olds and the second leading cause of death for fifteen to thirty-four-year-olds,"²³ and it is estimated that over 90% of teens that commit suicide suffer from mental health issues.²⁴ After experiencing a decline in the 80's and 90's,²⁵ suicide rates have recently skyrocketed.²⁶ A 2013 poll of students in grades nine through twelve revealed the following: (1) 17% of students "seriously considered attempting suicide" (2) 13.6% of students planned an attempt at suicide, (3) and 8 % of students actually attempted suicide.²⁷

²¹ See Scott Skinner-Thompson, *Outing Privacy*, 110 NW. U. L. REV. 159 (2015); See also *Planned Parenthood of Indiana v. Carter*, 854 N.E.2d 853 (Ind. App. 2006).

²² See Jonathan O. Hafen, *Children's Rights and Legal Representation—The Proper Roles of Children, Parents, and Attorneys*, 7 Notre Dame J.L. Ethics & Pub. Pol'y 423, 431-33 (1993) (discussing the "children's rights movement" of the 1970s").

²³ SUICIDE AT A GLACE, CDC, <https://www.cdc.gov/violenceprevention/pdf/suicide-datasheet-a.pdf>.

²⁴ *Teen Suicide Statistics*, HEALTHYCHILDREN.ORG, <https://www.healthychildren.org/English/health-issues/conditions/emotional-problems/Pages/Teen-Suicide-Statistics.aspx> (last visited March 10, 2017) ("Studies show that at least 90% of teens who kill themselves have some type of mental health problem, such as depression, anxiety, drug or alcohol abuse, or a behavior problem.").

²⁵ See Rae Ellen Bichell, *Suicide Rates Climb In U.S., Especially Among Adolescent Girls*, NPR (April 22, 2016), <http://www.npr.org/sections/health-shots/2016/04/22/474888854/suicide-rates-climb-in-u-s-especially-among-adolescent-girls> ("In the '80s and '90s, America's suicide trend was headed in the right direction: down.").

²⁶ See *id.* ("The suicide rate has risen by a quarter, to 13 per 100,000 people in 2014 from 10.5 in 1999, according to an analysis by Curtin [a statistician with the National Center for Health Statistics] and her colleagues that was released Friday."). Particularly troubling are the statistics for girls aged ten to fourteen. See *id.* This group has tripled its rate of suicide in recent years. See *id.*

²⁷ SUICIDE AT A GLACE, CDC, <https://www.cdc.gov/violenceprevention/pdf/suicide-datasheet-a.pdf>.

This dramatic and troubling trend can be attributed, at least in part, to the stigma surrounding mental health issues.²⁸ Teens are afraid of the social backlash from seeking mental health care and thus opt to avoid treatment altogether for fear that, if they do, they will have no right to keep that care private.²⁹ Therefore, there is a pressing need to afford the mental health records of minors unique treatment—the full privacy protections available under the Constitution—under which infringements are subject to the highest level of judicial scrutiny and minors are placed on equal constitutional footing as their adult counterparts.³⁰

Part I of this Note discusses the history of Constitutional interpretation as applied to the right to privacy, and, whether the right extends to informational privacy.³¹ This Part further explores the standards applied by courts tasked with reviewing cases involving such rights.³² Part II details the history and evolution of the Constitutional rights afforded to minors, the limitations placed thereon, and the levels of scrutiny applied by courts in making such determinations.³³ Part III details the current modes employed by courts facing questions regarding the informational privacy rights of minors and what levels of scrutiny are currently being utilized.³⁴ Finally, Part IV argues for the application of heightened scrutiny to any law infringing on a minor’s right to informational privacy in the context of health care information.³⁵

²⁸ See David R. Katner, *Confidentiality and Juvenile Mental Health Records in Dependency Proceedings*, 12 WM. & MARY BILL RTS. J. 511, 525 (2004) (“Unlike most medical problems, the social stigma of mental health problems creates a barrier against patients seeking out treatment.”).

²⁹ See *id.* at 526 (“The impact of this stigmatization associated with mental health problems may be even greater on children: ‘Twenty percent or less of kids with major depression get treatment,’ says Neal Ryan, a professor of child psychiatry at the University of Pittsburgh. Many of the children who are diagnosed are massively undertreated, Ryan says, in part because of parents’ fears of stigmatizing their children.”).

³⁰ See *id.* at 526-27 (“A strong argument may be made that mental health records are uniquely different from ordinary medical records. Although many medical procedures give rise to privacy concerns, the simple act of consulting a mental health specialist, in itself, often creates such a stigma either in the minds of the public, or from the perspective of the patient, that special treatment of mental health records should be considered.”).

³¹ See *infra* Part I.

³² See *infra* Part I.

³³ See *infra* Part II.

³⁴ See *infra* Part III.

³⁵ See *infra* Part IV.

I. INFORMATIONAL PRIVACY: A FUNDAMENTAL RIGHT?

Although not an enumerated right within the explicit words of the Constitution, the Supreme Court of the United States has found an implicit right to privacy.³⁶ The Court has deemed the right to privacy to be a fundamental right, and with that the Court afforded it added protections in the form of heightened judicial review.³⁷ This right encompasses a variety of elements, from the right to sexual autonomy,³⁸ to the right to medical care decisions.³⁹ A relatively recent element is the right to informational privacy and the ability of individuals to control information about themselves.³⁹ Because this is a contemporary component within the right to privacy as a whole, the Court struggled with the standard of review that should be applied in such cases, ultimately leaving a murky precedent with little direction for lower courts.⁴⁰

A. The Full Protections of the Constitution: Fundamental Rights and Constitutionally Protected Liberty Interests

The Supreme Court of the United States has held that some liberties are so important that they are deemed to be fundamental rights and that generally the government cannot infringe on them unless strict scrutiny is met.⁴¹ Fundamental rights are those enumerated and unenumerated rights recognized to be fundamentally protected by the Constitution.⁴² Constitutionally protected liberty interests are similar in that they receive heightened scrutiny; however, in some cases they do not receive the same level of protection as fundamental rights.⁴³

³⁶ See *infra* Section I.A.

³⁷ See *infra* Section I.A.

³⁸ See *infra* Section I.B.

³⁹ See *infra* Section I.C.

⁴⁰ See *infra* Section I.D.

⁴¹ See Wolf, *supra* note 12, at 106 (“What is generally accepted, however, is that there is such a thing as “fundamental rights,” the denial of which must satisfy strict scrutiny in order to pass constitutional muster.”).

⁴² See *id.* at 102 (“Deciding which asserted “rights” are “fundamental” is no easy task, [as is the] methodological framework for “finding” fundamental rights To start, the disparate theories regarding the source of unenumerated rights specifically, and of constitutional interpretation generally, make it nearly impossible to arrive at one unifying principle for assessing the fundamentality of rights.”).

⁴³ See, e.g., *Planned Parenthood v Casey*, 505 US 833, 882 (1992) (applying the “undue burden” test to abortion, rather than strict scrutiny).

Though various methodologies exist in determining whether a right is fundamental, the most widely applied framework by the Supreme Court of the United States rests firmly in the concept of tradition.⁴⁴ This methodology has been expressed in a variety of tests employed by the Court.⁴⁵ One of the earliest incantations was expressed by Justice Cardozo, who noted the states were free to regulate “unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.”⁴⁶ Later, Justice Cardozo articulated the test somewhat differently, stating that a right was fundamental if it was “implicit in the concept of ordered liberty.”⁴⁷ More recently, the court has blended the various tests and stated that the test for whether a right is fundamental is whether the right is “deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.”⁴⁸

Throughout the course of its fundamental rights jurisprudence, the Court has found numerous rights to be fundamental. Obviously those rights enumerated in the Bill of Rights are given the status.⁴⁹ However, it is those rights not explicitly contained within the words of the Constitution that the Court has grappled with. In 1923, the Court recognized the fundamental right to the upbringing of one’s children through the direction of their education.⁵⁰ Many years later, the Court also held fundamental the right to keep one’s family together.⁵¹ In 1942, in striking down a mandatory sterilization statute, the Court declared that the right to procreate was

⁴⁴ *See id.*

⁴⁵ *See id.*

⁴⁶ *See Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

⁴⁷ *See Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

⁴⁸ *See Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (internal citations omitted).

⁴⁹ *See generally* John R. Vilea, *Proposals to Amend the Bill of Rights: Are Fundamental Rights in Jeopardy?*, 75 JUDICATURE 62 (1991).

⁵⁰ *See Myer v. Nebraska*, 262 U.S. 390, 401 (1923). “The American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted . . . Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life; and nearly all the states, including Nebraska, enforce this obligation by compulsory laws.” *Id.* at 399.

⁵¹ *See Moore v. City of E. Cleveland*, 431 U.S. 494, 505 (1977) (“[T]he Constitution prevents East Cleveland from standardizing its children and its adults by forcing all to live in certain narrowly defined family patterns.”).

a fundamental right deserving of the full protections of the constitution.⁵² The Court also declared that the right to use contraception is fundamental,⁵³ regardless of marital status.⁵⁴

In 1966 the Court declared that the right to interstate travel was indeed fundamental.⁵⁵ The following year, in deciding whether a Virginia statute that essentially prevented marriage between people of different races violated the Equal Protection Clause, the court declared that “[m]arriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival.”⁵⁶ The Court has also published one of many opinions expounding the various rights associated with voting—though not an absolute right, the Court has found the right to vote free of charge⁵⁷ and the right to have one’s vote counted equally,⁵⁸ among others.

Other rights, though not given the elevated status of fundamental rights, have been deemed to be constitutionally protected liberty interests and thusly afforded similar protection under the Constitution.⁵⁹ One example, perhaps the most controversial in the Court’s history, is the right of a woman to obtain an abortion. In *Roe v. Wade*, the Court did not go so far as to call abortion a fundamental right, but rather it referred to it as a liberty interest.⁶⁰ Though the Court ultimately held that the right to abortion existed, it did not apply strict scrutiny, the level of scrutiny given to fundamental rights.⁶¹ This case is exemplary of the fact that though some rights

⁵² See *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

⁵³ See *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965).

⁵⁴ See *Eisenstadt v. Baird*, 405 U.S. 438, 454 (1972) (expanding the right to contraception to unmarried persons). “We hold that by providing dissimilar treatment for married and unmarried persons who are similarly situated, [the statutes] violate the Equal Protection Clause.” *Id.*

⁵⁵ *United States v. Guest*, 383 U.S. 745, 757 (1966).

⁵⁶ *Loving v. Virginia*, 388 U.S. 1, 2 (1967) (quoting *Skinner v. State of Oklahoma*, 316 U.S. 535, 541(1942)).

⁵⁷ See *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 670 (1966) (holding that there is a fundamental right to vote for free).

⁵⁸ See *Reynolds v. Sims*, 377 U.S. 533, 555, 564 (1964).

⁵⁹ See e.g., *Roe v. Wade*, 410 U.S. 113 (1973).

⁶⁰ See *id.* at 152-54.

⁶¹ See *id.* at 154 (“We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation.”).

have not explicitly been given the status of fundamental, the Court has ensured their protection by applying varying forms of heightened scrutiny to violations thereof.

B. Giving Fundamental Rights the Highest Level of Protection: Strict Scrutiny and Beyond

While the determination of fundamental rights is certainly not without controversy, what has been virtually universally accepted is that infringements of denials of such rights must meet strict scrutiny review.⁶² In order to satisfy strict scrutiny review courts must first determine if the government has a compelling purpose underlying the particular law.⁶³ If the government's purpose is deemed to be compelling, the next inquiry is whether the law is "a narrowly tailored means of furthering those governmental interests."⁶⁴ Narrow tailoring means that the law is neither overinclusive nor underinclusive and is the "least restrictive alternative" available to pursue those ends.⁶⁵ "This inquiry into "fit" between the ends and the means enables courts to test the sincerity of the government's claimed objective."⁶⁶ In application, it is virtually impossible for a law infringing on a fundamental right to survive this level of judicial scrutiny⁶⁷—in fact, the last time a law that discriminated on the basis of national origin was upheld resulted in the Japanese Internment of World War II.⁶⁸

⁶² See Wolf, *supra* note 33, at 106 ("What is generally accepted, however, is that there is such a thing as "fundamental rights," the denial of which must satisfy strict scrutiny in order to pass constitutional muster."); see also Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) ("We advert to them merely in emphasis of our view that strict scrutiny of the classification which a State makes in a sterilization law is essential, lest unwittingly or otherwise invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws."); Korematsu v. U.S., 323 U.S. 214, 216 (1944) ("It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.").

⁶³ See Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 800 (2006). "Because the government is impinging upon someone's core constitutional rights, only the most pressing circumstances can justify the government action." See *id.*

⁶⁴ See *id.*

⁶⁵ See *id.* at 800-01.

⁶⁶ See *id.* at 801.

⁶⁷ See *id.* at 794 (noting the widely accepted belief that the "strict scrutiny standard of review applied to enforce rights such as free speech and equal protection is 'strict' in theory and fatal in fact").

⁶⁸ See Korematsu, 323 U.S. 214 (1944) ("It is said that we are dealing here with the case of imprisonment of a citizen in a concentration camp solely because of his ancestry, without evidence or inquiry concerning his loyalty

Conversely, the Court has employed a varied, hybrid approach when reviewing infringements of what it deems to be constitutionally protected liberty interests. Again, abortion is a prime example of heightened scrutiny that does not quite rise to the level of strict scrutiny. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court held that rather than needing to meet strict scrutiny, laws that infringed on the constitutionally protected liberty interest in abortion must meet a different standard.⁶⁹ The Court developed what it called the “undue burden” test, deeming that only laws that placed an undue burden on a woman’s ability to obtain an abortion would be found unconstitutional.⁷⁰

Consequently, being deemed a fundamental right or constitutionally protected liberty interest by the Supreme Court of the United States imbeds a particular right with the highest level of protection from the Court. Though many such rights were easily identified by the Court, others have developed after years of judicial interpretation and heated debate. The right to privacy, and the rights it entails, is a prime example.

and good disposition towards the United States. Our task would be simple, our duty clear, were this a case involving the imprisonment of a loyal citizen in a concentration camp because of racial prejudice. Regardless of the true nature of the assembly and relocation centers—and we deem it unjustifiable to call them concentration camps with all the ugly connotations that term implies—we are dealing specifically with nothing but an exclusion order. To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders—as inevitably it must—determined that they should have the power to do just this. There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short. We cannot—by availing ourselves of the calm perspective of hindsight—now say that at that time these actions were unjustified.”)

⁶⁹ 505 U.S. 833, 874 (1992).

⁷⁰ *See id.* (“The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it. Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.”).

C. What is the Right to Privacy?

“[The] right of privacy [is] older than the Bill of Rights—older than our political parties, older than our school system.”⁷¹ Privacy, a fundamental right that encompasses many others, has long been accepted as an implicit grant under the Constitution. However, determining the origin of this right has not been without controversy.⁷² Though the Court has found the right to exist through differing avenues, it ultimately became a well-settled fundamental right.⁷³ Eventually, as the right was challenged in the modern era, a new subset—informational privacy—emerged.⁷⁴ Determining what informational privacy entails and how infringements thereof are to be reviewed is extremely challenging given the lack of guidance from the Court.⁷⁵

1. *Constitutional Support: The Ninth Amendment and the Penumbra of the Bill of Rights*

Some jurists have argued that the right to privacy, though not an enumerated right, exists because of the protections guaranteed by the Ninth Amendment. The Ninth Amendment states: “The enumeration in the Constitution of certain rights, shall not be construed to disparage others retained by the people.”⁷⁶ In short, while there are no actual rights under the Ninth Amendment, it is used as a textual justification for the Court to protect unenumerated rights, such as the right to privacy. One of the biggest proponents of this view is Justice Douglas.⁷⁷ However, aside from the dissenting opinions of Justice Douglas, the Court has often opted to apply a different approach to identifying the right to privacy within the Constitution.

⁷¹ *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

⁷² *See infra* Subsection I.C.1.

⁷³ *See infra* Subsection I.C.1.

⁷⁴ *See infra* Section I.D.

⁷⁵ *See infra* Section I.D.

⁷⁶ U.S. CONST. amend. IX.

⁷⁷ *See, e.g., Palmer v. Thompson*, 403 U.S. 217, 233-34 (1971) (Douglas, J., dissenting); *Osborn v. United States*, 385 U.S. 323, 341 (1966) (Douglas, J., dissenting).

Instead, the Court has repeatedly found the right to privacy to exist in the “penumbra” of the Bill of Rights.⁷⁸ This methodology finds the right to privacy to exist because it is derived from those rights that are explicitly protected by the Bill of Rights.⁷⁹ It finds that the rights exist due to the “the zone of privacy created by [those other] fundamental constitutional guarantees.”⁸⁰

The Court has made it clear that regardless of where the right is to be found, the right to privacy unequivocally exists.⁸¹ In *Roe v. Wade* the court upheld the right to privacy in the context of abortion, stating that it exists “whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people.”⁸² Once the right was clearly acknowledged, the next issue became determining what it encompassed.⁸³

2. *The Rights Encompassed Within the Right to Privacy*

Since determining that the right to privacy is implicitly protected by the Constitution, the Supreme Court has found this fundamental right to encompass numerous other protections. The

⁷⁸ See generally *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Roe v. Wade*, 410 U.S. 113 (1973);

⁷⁹ See *Griswold*, 381 U.S. at 484-85 (“The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers ‘in any house’ in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the ‘right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.’ The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment . . . The Fourth and Fifth Amendments were described in *Boyd v. United States*, as protection against all governmental invasions ‘of the sanctity of a man's home and the privacies of life. We recently referred in *Mapp v. Ohio*, to the Fourth Amendment as creating a ‘right to privacy, no less important than any other right carefully and particularly reserved to the people.’”) (internal citations omitted).

⁸⁰ See *id.* at 485.

⁸¹ This finding, however, was not without criticism. For example, in his dissenting opinion in *Griswold v. Connecticut*, Justice Stewart, joined by Justice Black, adamantly argued that no such right could be found within the constitution or any precedent. 381 U.S. at 1706 (Stewart, J., dissenting) (“The Court says it is the right of privacy ‘created by several fundamental constitutional guarantees.’ With all deference, I can find no such general right of privacy in the Bill of Rights, in any other part of the Constitution, or in any case ever before decided by this Court.”) In essence, he argued that the court was improperly acting in a legislative capacity by conveniently discovering a new right to overturn law it disagreed with. *Id.*

⁸² See *Roe*, 410 U.S. at 152-53 (1973).

⁸³ See *infra* Subsection II.C.2.

right to privacy has been employed to protect rights related to family autonomy. For example, in 1923, the court held that the right of parents to direct the education of their children was a “privilege long recognized” in the tradition of the country.⁸⁴ Years later, in *Moore v. City of East Cleveland*, the Court also held that the right to live with one’s family members was a traditional right encompassed by privacy.⁸⁵

Furthermore, the Court has also articulated that the right to privacy is what protects those rights related to reproductive health and autonomy. In 1965, the Court held that an implied right of privacy exists within the Bill of Rights, and that such a right prohibits a state law preventing married couples from using contraception.⁸⁶ Less than a decade later, this holding was expanded to include unmarried couples as well.⁸⁷ Moreover, the Court cited the right to privacy as governing its landmark decisions regarding abortion.⁸⁸ In *Roe v. Wade*, the Court held that the “right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.”⁸⁹

More recently the Court held that the right to privacy also includes the right to engage in

⁸⁴ *Myerson v. Nebraska*, 262 U.S. 390, 399, 401 (1923).

⁸⁵ 431 U.S. 494, 501, 504-05 (1977).

⁸⁶ *See Griswold*, 381 U.S. at 485-86 (“These cases bear witness that the right of privacy which presses for recognition here is a legitimate one. The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the use of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a ‘governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.’ Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.”).

⁸⁷ *See Eisenstadt v. Baird*, 405 U.S. 438, 454 (1972). In 1977, the Court also held that a restriction on selling contraceptives based on age was also unconstitutional. *Carey v. Population Services Int'l*, 431 U.S. 678, (1977),

⁸⁸ *See Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 60 (1976).

⁸⁹ *Roe*, 410 U.S. at 153.

consenting sexual activity in one’s home, regardless of sexual orientation.⁹⁰ In 2003, the Court applied strict scrutiny and overturned a law preventing consenting adult homosexual persons from engaging in homosexual sexual relations in the privacy of their homes.⁹¹ The court explored the history of the right to privacy, ultimately holding that the “petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.”⁹² The Court noted that “[a]t the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life . . . Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.”⁹³

Finally, the Court has explored whether the right to privacy encompasses rights related to medical decisions—in particular the right to refuse medical treatment.⁹⁴ Though the Court declined to expand the right to privacy to be so broad as to include the unrestricted right to refuse medical treatment that would lead to the patient’s ultimate death,⁹⁵ it did acknowledge that autonomy in making medical decisions was traditionally protected by the right to privacy.⁹⁶

Accordingly, the Court has made it clear that the right to privacy encompasses rights related to sexual activity, rights related to reproductive health and autonomy, rights related to family autonomy, and, potentially, rights related to medical care decisions. However, as the jurisprudence developed, the Court noted a distinction among privacy rights in the cases brought before it—some involved the right to make certain decisions deemed as private, while others

⁹⁰ See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

⁹¹ See *id.* at 564-67, 578.

⁹² *Id.* at 578 (“Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. ‘It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.’ The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.”) (internal citations omitted).

⁹³ *Id.* at 574.

⁹⁴ See *Cruzan by Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990).

⁹⁵ See *id.* at 286.

⁹⁶ See *id.* at 267-77.

involved an interest in avoiding disclosure of personal information.⁹⁷ In fact, more recently, the Court has outright acknowledged the right to privacy of information.⁹⁸ Not surprisingly, this has led to varying approaches by the lower courts and a less-than-definitive stance from the Supreme Court.

D. The Right to Informational Privacy

The right to informational privacy, yet another subcategory of the fundamental right to privacy, was first articulated in 1977 in *Whalen v. Roe*.⁹⁹ The Court was presented with the question of whether the State of New York could store the names and addresses of persons who had obtained particular prescription drugs in a centralized computer.¹⁰⁰ Although the Court found no constitutional violation in this instance, it was the first time the court articulated a right to privacy of information¹⁰¹ as distinct from the privacy interest in making certain decisions.¹⁰² The Court's holding explained a concept that was perhaps instinctually known, but never properly enunciated—that a basic aspect of privacy is the ability to control information about oneself.¹⁰³

⁹⁷ See *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977) (“The cases sometimes characterized as protecting “privacy” have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.”).

⁹⁸ See *id.*

⁹⁹ 429 U.S. 589 (1977).

¹⁰⁰ *Id.* at 591.

¹⁰¹ *Id.* at 605-06 (“Recognizing that in some circumstances that duty arguably has its roots in the Constitution, nevertheless New York's statutory scheme, and its implementing administrative procedures, evidence a proper concern with, and protection of, the individual's interest in privacy. We therefore need not, and do 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. We simply hold that this record does not establish an invasion of any right or liberty protected by the Fourteenth Amendment.”).

¹⁰² See *id.* at 598-600 (“The cases sometimes characterized as protecting “privacy” have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions); see also Caitlin M. Cullitan, *Please Don't Tell My Mom! A Minor's Right to Informational Privacy*, 40 J.L. & Educ. 417 (2011) (“The Court delineated two categories of privacy interests: first, founded in *Griswold*, is the right to make certain decisions; second is the interest in avoiding the disclosure of one's private information, coined ‘informational privacy.’”).

¹⁰³ *Whalen*, 429 U.S. at 599 (what the Court termed “the individual interest in avoiding disclosure of personal matters”).

That same year, the Court again took on the issue of informational privacy, this time in the context of the President of the United States' rights regarding his presidential papers.¹⁰⁴ Though this case weighed the informational privacy interests against President Nixon's unique expectations as a public figure, ultimately finding no unconstitutional infringement, the Court was once again explicit in stating that such a right exists.¹⁰⁵

More recently the court has upheld background checks for astronauts and other National Aeronautics and Space Administration employees as not violative of the constitutional right to informational privacy.¹⁰⁶ In *NASA v. Nelson*, the Court was faced with the issue of whether background checks for contract employees as required by NASA was a violation of those employees' right to informational privacy.¹⁰⁷ The Court explicitly stated that there was indeed a constitutional right to informational privacy; however, it was not found to be violated in this instance due to the protections and nondisclosure requirements placed on NASA by the Privacy Act.¹⁰⁸

Though these cases stand for the fact that the right to informational privacy exists, because they have failed to find an actual violation, some scholars and jurists doubt that the right actually exists.¹⁰⁹ Others acknowledge its existence, but doubt that the right is truly

¹⁰⁴ *Nixon v. Administrator of General Services*, 433 U.S. 425, 457 (1977).

¹⁰⁵ *Id.* at 456-57 ("Thus, the Act 'is a reasonable response to the difficult problem caused by the mingling of personal and private documents and conversations in the midst of a vastly greater number of nonprivate documents and materials related to government objectives. The processing contemplated by the Act at least as narrowed by carefully tailored regulations represents the least intrusive manner in which to provide an adequate level of promotion of government interests of overriding importance.' We agree with the District Court that the Act does not unconstitutionally invade appellant's right of privacy.").

¹⁰⁶ *NASA v. Nelson*, 562 U.S. 134 (2011).

¹⁰⁷ *See id.* at 138.

¹⁰⁸ *See id.* at 159 ("In light of the protection provided by the Privacy Act's nondisclosure requirement, and because the challenged portions of the forms consist of reasonable inquiries in an employment background check, we conclude that the Government's inquiries do not violate a constitutional right to informational privacy.").

¹⁰⁹ *See Cullitan, supra* note 102, at 424 n. 48 ("The D.C. Circuit has refused to recognize informational privacy rights, arguing that the Supreme Court's discussion of informational privacy should be construed as dicta."); *see also* *Am. Fed'n Gov't Employees v. Dep't of Hous. & Urban Dev.*, 118 F.3d 786, 791 (D.C. Cir. 1997).

fundamental.¹¹⁰ Nonetheless, lower courts have proceeded on the belief that the right does exist. In fact, every federal circuit court, with the exception of the D.C. circuit court, has recognized this right.¹¹¹

E. The Standard of Review? Analyzing Whether the Right to Informational Privacy Has Been Infringed

Though the Supreme Court and the lower courts have acknowledged the right to informational privacy, there has been no declaration that the right is indeed fundamental.¹¹² Because of the uncertainty regarding the status of the right, courts have grappled with what level of scrutiny to apply to infringements on the right.¹¹³ Unfortunately, in the three instances the Supreme Court has been faced with an informational privacy question, the Court has failed to articulate a clear standard.¹¹⁴

In *Whalen*, as the Court first wrestled with informational privacy, it applied what can only be termed a “hybrid” approach.¹¹⁵ In examining the law in question, the Court noted that it was “manifestly the product of an orderly and rational legislative decision” and not “unreasonable.”¹¹⁶ The use of the terms “rational” and “unreasonable” suggests that the court was

¹¹⁰ See Francis S. Chlapowski, Note, *The Constitutional Protection of Informational Privacy*, 71 B.U. L. REV. 133, 150 (1991) (“The rights deemed fundamental have all stemmed from concepts of autonomy. Although *Whalen* and *Nixon* both allude to the possible constitutional protection of informational privacy, neither explicitly articulates a standard of review or holds that the right to informational privacy is a “fundamental” right.”); see also Skinner-Thompson, *supra* note 21, at 177-78 (“The Supreme Court has been squarely confronted with whether there exists a constitutional right to informational privacy on three occasions. Each time, the Court has avoided recognizing the right. Instead, the Court has assumed for the sake of argument that such a right exists but found no violation under the facts of the case presented.”).

¹¹¹ See Cullitan, *supra* note 102, at 424.

¹¹² See Chlapowski, *supra* note 110, at 150 (discussing how the Court has never expressly stated that information privacy is a fundamental right).

¹¹³ See *infra* notes 115 to 129 (discussing what, if any, standard the Court has applied in these cases).

¹¹⁴ See *Whalen v. Roe*, 429 U.S. 589 (1977); *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977); *NASA v. Nelson*, 562 U.S. 134 (2011).

¹¹⁵ See Skinner-Thompson, *supra* note 110, at 180.

¹¹⁶ *Whalen*, 429 U.S. at 597.

applying a rational basis test, the most lenient form of judicial review.¹¹⁷ However, the court later explored the state’s interest behind the legislation, categorizing it as “vital.”¹¹⁸ This language might reasonably be understood to mean that the Court was actually applying some form of heightened scrutiny.¹¹⁹ Unfortunately, the Court made no mention whatsoever of what standard it was applying.¹²⁰

Given another opportunity that same year, in *Nixon*, the Court again failed to articulate a discernable standard of review when deciding informational privacy issues.¹²¹ Instead, the Court stated that if there is an infringement on informational privacy it “must be weighed against the public interest” at stake.¹²² In finding that the law was not an infringement on the right to informational privacy, the Court noted that the law was not “an unreasonable solution.”¹²³ These two phrases do not point to any discernible level of scrutiny, heightened or otherwise. Instead, the methodology employed by the court resembles Fourth Amendment analysis.¹²⁴ Finding no guidance from its earlier informational privacy decisions, the hope was that when the Court faced the issue again in 2011, it would definitively answer what level of scrutiny is to be applied in such cases.¹²⁵

In *NASA v Nelson*, decided only a few years ago, the Court was presented with yet another opportunity to pronounce the appropriate test for evaluating informational privacy

¹¹⁷ See Skinner-Thompson, *supra* note 110, at 180 (“The test applied to determine whether the New York statute violated any assumed right to informational privacy was unclear. At times, the Court characterized the law as a “rational legislative decision” that was not “unreasonable,” perhaps suggesting that a rational basis test was applied.”).

¹¹⁸ Whalen, 429 U.S. at 598.

¹¹⁹ See Skinner-Thompson, *supra* note 110, at 180.

¹²⁰ See generally Whalen v. Roe, 429 U.S. 589 (1977).

¹²¹ See *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977).

¹²² *Id.* at 458.

¹²³ *Id.* at 464-65.

¹²⁴ See Skinner-Thompson, *supra* note 110, at 181 (“The Court’s analysis, therefore, was similar to the traditional Fourth Amendment analysis employed when nonprosecutorial government action not amounting to a “search” is at issue, or when determining whether a search ought to be exempted from warrant requirement.”).

¹²⁵ See *NASA v. Nelson*, 562 U.S. 134 (2011).

infringements; however, yet again, the opportunity was missed.¹²⁶ Instead of simply stating the level of scrutiny to be applied, the Court focused on the “reasonableness” of the questionnaire required by the government.¹²⁷ In fact, the Court mentioned the reasonableness of the questionnaire ten times in its opinion.¹²⁸ This language and emphasis would seem to suggest a rational basis test. Moreover, the Court explicitly rejected any requirement imposing a burden on the Government to show that its questionnaires were “necessary.”¹²⁹ In fact, the Court relied on its prior holding in *Whalen*, to support this position.¹³⁰ Regrettably, this circular argument leaves no real guidance as to how to proceed.

Unfortunately, none of these decisions endeavors to make a distinction between the types of information being threatened and the level of scrutiny to be applied. If such an undertaking were made, courts might reasonably determine that a lesser form of scrutiny applies to certain, less-sensitive information, while heightened or strict scrutiny applies to other information—specifically, mental health records. Finally, these cases also fail to address whether the right applies to minors, and, if so, how it is to be applied. Fortunately, however, some guidance can be gleaned for the Supreme Court’s treatment of minors with regard to decisional privacy.¹³¹

¹²⁶ *See id.* at 134.

¹²⁷ *Id.* at 154 (“The reasonableness of such open-ended questions is illustrated by their pervasiveness in the public and private sectors.”).

¹²⁸ *See, e.g., id.* at 750 (The challenged questions on SF-85 and Form 42 are reasonable, employment-related inquiries that further the Government’s interests in managing its internal operations. SF-85’s “treatment or counseling” question is a follow-up question to a reasonable inquiry about illegal-drug use. In context, the drug-treatment inquiry is also a reasonable, employment-related inquiry.”); *see also* Skinner-Thompson, *supra* note 110, at 183 (“The Court emphasized the reasonableness of the government questionnaire no less than ten times in its opinion.”).

¹²⁹ *See* Nelson, 562 U.S. at 760 (“We reject the argument that the Government, when it requests job-related personal information in an employment background check, has a constitutional burden to demonstrate that its questions are “necessary” or the least restrictive means of furthering its interests. So exacting a standard runs directly contrary to *Whalen*. The patients in *Whalen*, much like respondents here, argued that New York’s statute was unconstitutional because the State could not “demonstrate the necessity” of its program. The Court quickly rejected that argument, concluding that New York’s collection of patients’ prescription information could “not be held unconstitutional simply because” a court viewed it as “unnecessary, in whole or in part.”) (internal citations omitted).

¹³⁰ *See id.*

¹³¹ *See infra* Part II.

II. THE CONSTITUTIONAL RIGHTS OF MINORS

The Supreme Court of the United States has offered some guidance in the protections given to minors under the Constitution.¹³² More specifically, the Court has looked at minors' rights in the context of abortion, freedom of speech, the right to counsel and other due process rights, among others.¹³³ In each of these situations, the Court has held that minors are entitled to Constitutional protections; however, in most cases the rights are abridged considerably.¹³⁴ Unfortunately in all cases heard by the Court, the issue was one of decisional privacy, and not informational privacy¹³⁵

A. Constitutional Protections Afforded to Minors: Decisional Privacy

The Supreme Court has applied constitutional rights to minors in numerous contexts.¹³⁶ However, in each of these instances, the Court was primarily concerned with minors' decisional privacy rights as opposed to their informational privacy rights.¹³⁷ Though not necessarily indicative of how the court would decide the present issue, the Court's varying approaches do provide some guidance. In some instances of decisional privacy, the Court has held that minors are entitled to some, but not all of the same constitutional protections as adults.¹³⁸ In other cases, minors' rights are abridged in a particular context, for example educational establishments.¹³⁹ Finally, in limited circumstances, the Supreme Court has applied constitutional protections to

¹³² See *infra* Section II.A.

¹³³ See *infra* Section II.A. Note that there are numerous other cases in which the Court has granted constitutional rights to minors. See *e.g.*, *Ingraham v. Wright*, 430 U.S. 651 (1977) (holding that corporal punishment of children in school violated a constitutionally protected liberty interest); *Breed v. Jones*, 421 U.S. 519 (1975) (applying the Double Jeopardy Clause to minors); *Goss v. Lopez*, 419 U.S. 565 (1975) (holding that children may not be deprived of particular property rights without due process). The cases included in this Note are simply illustrations of a wide body of jurisprudence.

¹³⁴ See *infra* Section II.A.

¹³⁵ See *infra* Part III.

¹³⁶ See *infra* Subsections II.A.1-3.

¹³⁷ See *infra* Subsections II.A.1-3.

¹³⁸ See *Bellotti v. Baird*, 443 U.S. 622 (1979).

¹³⁹ See *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

minors in precisely the same manner as it does to their adult counterparts.¹⁴⁰ The following cases provide some guidance on the varied rationale employed by the court.

1. *Due Process Rights and the Right to Counsel*: In re Gault

In 1967, the Court heard the case of Gerald Francis Gault, a fifteen-year old charged with being a delinquent and committed to a state institution for his offenses.¹⁴¹ Gault alleged that Arizona had denied him his due process rights in the proceedings that had resulted in his commitment.¹⁴² Gault was taken into custody after making prank calls of the “irritatingly offensive, adolescent, sex variety.”¹⁴³

In confronting whether Gault’s due process rights had been violated, the Court specifically addressed the right to counsel,¹⁴⁴ notice requirements,¹⁴⁵ Confrontation Clause issues and the right to cross-examine.¹⁴⁶ The Court acknowledged the various arguments made by the

¹⁴⁰ *See* In re Gault, 387 U.S. 1 (1967).

¹⁴¹ *See id.* at 4.

¹⁴² *Id.*

¹⁴³ *Id.* Note that Gault was under probation at that time for an earlier incident in which he was present when a friend stole a wallet. *See id.* At that time, no notice was given to Gault’s parents, who were both at work. *See id.* at 5. Only after searching on their own, did the family learn that Gault was in custody at the Children's Detention Home. *See id.* When they finally tracked their son down, the probation officer at the Home, Officer Flagg, informed them that there would be a hearing the next day. *See id.* On the date of the hearing Officer flag filed a petition with the court that was neither served on, nor seen, by the Gaults. *See id.*

At the subsequent hearing, the complainant was not present. *See id.* Moreover, no transcript, recording, memorandum, or “record of the substance of the proceedings was prepared.” *See id.* It appears that during the hearing, Gault supposedly stated that he had not made the comments, but had only dialed the number before passing the phone to his friend. *See id.* He was subsequently questioned by the judge who said he “would think about” the matter, before remanding Gault back to the Home. *See id.* at 6. Several days later Gault was released and his parent were given a handwritten note from Officer Flagg informing them of another hearing with the judge, set for a few days later. *See id.* (“There is no explanation in the record as to why he was kept in the Detention Home or why he was released. At 5 p.m. on the day of Gerald's release, Mrs. Gault received a note signed by Officer Flagg. It was on plain paper, not letterhead. Its entire text was as follows: ‘Mrs. Gault: Judge McGHEE has set Monday June 15, 1964 at 11:00 A.M. as the date and time for further Hearings on Gerald's delinquency ‘/s/ Flagg.’”).

At the next hearing, again the complainant was not present. *See id.* at 7. Mrs. Gault requested that she be present “so she could see which boy that done the talking, the dirty talking over the phone,” but the judge informed her that the complainant’s presence was not required. *Id.* In fact, at no time did the judge hear from the complainant regarding the matter. *See id.* At the conclusion of the hearing, Gault was committed to the State Industrial School “for the period of his minority (that is, until 21), unless sooner discharged by due process of law.” *Id.* at 7-8.

¹⁴⁴ *See id.* at 34-42.

¹⁴⁵ *See id.* at 31-34.

¹⁴⁶ *See id.* at 42-58.

state, including the protections from disclosure of juvenile proceedings and incarcerations,¹⁴⁷ the benefits of an informal proceeding for minors,¹⁴⁸ and the argument that the state, as *parens patriae*, could deny the procedural due process to minors that would otherwise be available based on the “assertion that a child, unlike an adult, has a right ‘not to liberty but to custody.’”¹⁴⁹

The Court’s swift and austere response to these arguments speaks for itself:

Under our Constitution, the condition of being a boy does not justify a kangaroo court . . . Under traditional notions, one would assume that in a case like that of Gerald Gault, where the juvenile appears to have a home, a working mother and father, and an older brother, the Juvenile Judge would have made a careful inquiry and judgment as to the possibility that the boy could be disciplined and dealt with at home, despite his previous transgressions . . . The essential difference between Gerald's case and a normal criminal case is that safeguards available to adults were discarded in Gerald's case. The summary procedure as well as the long commitment was possible because Gerald was 15 years of age instead of over 18.¹⁵⁰

Accordingly, the Court held that minors—specifically juveniles accused of delinquency—have the right to counsel, the right to remain silent, the right against self-incrimination, the right to confront and cross-examine witnesses, and the right to notice of the

¹⁴⁷ See *id.* at 24 (“Beyond this, it is frequently said that juveniles are protected by the process from disclosure of their deviational behavior. As the Supreme Court of Arizona phrased it in the present case, the summary procedures of Juvenile Courts are sometimes defended by a statement that it is the law's policy ‘to hide youthful errors from the full gaze of the public and bury them in the graveyard of the forgotten past.’ This claim of secrecy, however, is more rhetoric than reality. Disclosure of court records is discretionary with the judge in most jurisdictions.”).

¹⁴⁸ See *id.* at 25-26 (“Further, it is urged that the juvenile benefits from informal proceedings in the court. The early conception of the Juvenile Court proceeding was one in which a fatherly judge touched the heart and conscience of the erring youth by talking over his problems, by paternal advice and admonition, and in which, in extreme situations, benevolent and wise institutions of the State provided guidance and help ‘to save him from downward career.’ Then, as now, goodwill and compassion were admirably prevalent. But recent studies have, with surprising unanimity, entered sharp dissent as to the validity of this gentle conception. They suggest that the appearance as well as the actuality of fairness, impartiality and orderliness—in short, the essentials of due process—may be a more impressive and more therapeutic attitude so far as the juvenile is concerned.”).

¹⁴⁹ *Id.* at 17. “Ultimately, however, we confront the reality of that portion of the Juvenile Court process with which we deal in this case. A boy is charged with misconduct. The boy is committed to an institution where he may be restrained of liberty for years. It is of no constitutional consequence—and of limited practical meaning—that the institution to which he is committed is called an Industrial School. The fact of the matter is that, however euphemistic the title, a ‘receiving home’ or an ‘industrial school’ for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time. His world becomes ‘a building with whitewashed walls, regimented routine and institutional hours.’ Instead of mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, state employees, and ‘delinquents’ confined with him for anything from waywardness to rape and homicide.” *Id.* at 27.

¹⁵⁰ *Id.* at 28-29

charges.¹⁵¹ The Court famously noted, “whatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone.”¹⁵² Though this holding has been both vehemently criticized¹⁵³ and ardently championed¹⁵⁴ over the years, forty years later, it remains the seminal case in juvenile due process rights. However, the Court has not always been so eager to grant such rights to minors.

2. *The First Amendment: Tinker v. Des Moines Independent Community School District*

Just two years after *Gault* was decided, the Court was faced with the task of determining minors’ First Amendment rights in the school setting.¹⁵⁵ In *Tinker v. Des Moines Independent Community School District*, the Supreme Court held that students, as citizens of the United States, are protected by the First Amendment right to free speech; however, the right is limited in the educational context.¹⁵⁶ Famously, the Court noted that “[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”¹⁵⁷

¹⁵¹ See *id.* at 33-34, 36, 47, 55, 56-57.

¹⁵² *Id.* at 87.

¹⁵³ See, e.g., See Martin Guggenheim, *The Right to Be Represented but Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U.L.Rev. 76, 76-77 (1984) (“Seventeen years ago, the United States Supreme Court held in *In re Gault* that juveniles accused of being delinquent have a constitutional right to court-assigned counsel. In the wake of *Gault*, many courts and commentators have argued that the Constitution requires counsel for children in other types of legal proceedings as well. Indeed, some commentators have even suggested that children have a constitutional right to counsel in all cases in which they are directly involved. In this Article, I will appraise this call for children’s counsel and suggest that the appointment of counsel is not the panacea its proponents believe it to be.”); see also Hafen, *supra* note 22 at 463 (“For the reasons stated in this article, when considering adoption of a “children’s right” to independently bring suit, courts and legislatures should keep in mind the valid reasons behind the presumption of children’s legal incapacity and the importance of parental participation in children’s decision making where there has been no finding of parental unfitness and there is no conflict of interest.”).

¹⁵⁴ See, e.g., Joanna S. Markman, *In Re Gault: A Retrospective in 2007: Is It Working? Can It Work?*, 9 BARRY L. REV. 123, 141 (2007) (“The principles and guaranteed rights set forth in *Gault* are essential to a fair determination of a child’s guilt and a just disposition of a child’s conduct . . . Just as it is important to ensure that the right perpetrator is punished, it is equally important that the rights set forth in *Gault* protect an innocent life from destruction by false or inflammatory accusations.”).

¹⁵⁵ For a more in-depth discussion of minors’ First Amendment rights, see KEVIN W. SAUNDERS, *SAVING OUR CHILDREN FROM THE FIRST AMENDMENT* (2003).

¹⁵⁶ 393 U.S. 503 (1969).

¹⁵⁷ *Id.* at 506.

The Court was faced with the question of whether the First Amendment rights of a group of students protesting the Vietnam War by wearing black armbands were violated when they were suspended for their actions.¹⁵⁸ In determining that their rights had, in fact been violated, the Court outlined the test to be applied when examining minors' First Amendment rights in the "school environment."¹⁵⁹ The Court held that under two circumstances speech was *not* protected: (1) speech that substantially disrupts the school environment¹⁶⁰ and (2) speech that reasonably leads to a forecast of substantial disruption.¹⁶¹

Though the court abridged students' First Amendment rights in the educational context, the Court was clear that it did not take this restriction lightly:

Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.¹⁶²

Thus, while the fundamental rights of minors may not always be on equal footing with those same rights in adults, the Court must respect that minors begin with the same rights of adults, and infringements of these rights must be supported by valid rationale. This premise was later utilized when the Court tackled the issue of minors and abortion.¹⁶³

¹⁵⁸ *See id.* at 504.

¹⁵⁹ *Id.* at 506 ("First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years.")

¹⁶⁰ *See id.* at 514 ("no disturbances or disorders on the school premises in fact occurred").

¹⁶¹ *See id.* ("the record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities").

¹⁶² *Id.* at 511.

¹⁶³ *See infra* Subsection II.A.3.

3. *Abortion*: Bellotti v. Baird

In 1979, the Court tackled the always-controversial subject of abortion and what rights, if any, a minor had to one.¹⁶⁴ Specifically, the Court analyzed the constitutionality of a Massachusetts law requiring parental notice and consent for an unmarried minor seeking an abortion in the state.¹⁶⁵ The statute in question provided for opportunity to seek permission to abort via judicial review, *if* the parents first denied consent.¹⁶⁶ Notably, the statute subjected physicians performing abortions absent parental consent to criminal penalties.¹⁶⁷ The plaintiffs were William Baird, founder and director of Parents Aid Society, Inc. (Parents Aid), Gerald Zupnick, M. D., a doctor who performed abortions at Parents Aid, and an unmarried minor who was pregnant and wanting to obtaining an abortion without informing her parents.¹⁶⁸

The Court, in addressing how constitutional rights are afforded to minors, stated, “A child, merely on account of his minority, is not beyond the protection of the Constitution.”¹⁶⁹ However, the Court noted that “the status of minors under the law is unique in many respects.”¹⁷⁰ The Court stated that a balancing of the state’s interests, parental interests, and those of the minor

¹⁶⁴ See Bellotti v. Baird, 443 U.S. 622 (1979).

¹⁶⁵ See *id.* at 625. The language of the statute in question read:

If the mother is less than eighteen years of age and has not married, the consent of both the mother and her parents [to an abortion to be performed on the mother] is required. If one or both of the mother's parents refuse such consent, consent may be obtained by order of a judge of the superior court for good cause shown, after such hearing as he deems necessary. Such a hearing will not require the appointment of a guardian for the mother. If one of the parents has died or has deserted his or her family, consent by the remaining parent is sufficient. If both parents have died or have deserted their family, consent of the mother's guardian or other *626 person having duties similar to a guardian, or any person who had assumed the care and custody of the mother is sufficient. The commissioner of public health shall prescribe a written form for such consent. Such form shall be signed by the proper person or persons and given to the physician performing the abortion who shall maintain it in his permanent files.

MASS. GEN. LAWS ANN., ch. 112, § 12S (West Supp.1979).

¹⁶⁶ See *id.*

¹⁶⁷ See *id.*

¹⁶⁸ See *id.* at 626.

¹⁶⁹ See *id.* at 633.

¹⁷⁰ *Id.* “Viewed together, our cases show that although children generally are protected by the same constitutional guarantees against governmental deprivations as are adults, the State is entitled to adjust its legal system to account for children's vulnerability and their needs for ‘concern, . . . sympathy, and . . . paternal attention.’” *Id.* at 635.

“requires that constitutional principles be applied with sensitivity and flexibility to the special needs of parents and children.”¹⁷¹ The Court listed three reasons that justify applying different constitutional rights to children: (1) “the peculiar vulnerability of children;” (2) “their inability to make critical decisions in an informed, mature manner;” and (3) “the importance of the parental role in childrearing.”¹⁷²

Ultimately, in applying its own balancing test between the State’s interests,¹⁷³ those of the parents,¹⁷⁴ and those of the unmarried pregnant minor,¹⁷⁵ and utilizing the three reasons set forth above, the Court held that the law placed an undue burden on a minor seeking an abortion and was thus unconstitutional.¹⁷⁶ The Court observed that, unlike denying a minor the right to marry—which results in a postponement of the decision—denying a pregnant minor the right to abort effectively removes the choice altogether.¹⁷⁷ The Court noted that in this case, the lasting

¹⁷¹ *Id.* at 634.

¹⁷² *Id.*

¹⁷³ *See id.* at 635 (“Second, the Court has held that the States validly may limit the freedom of children to choose for themselves in the making of important, affirmative choices with potentially serious consequences. These rulings have been grounded in the recognition that, during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.”).

¹⁷⁴ *See id.* at 637 (“Third, the guiding role of parents in the upbringing of their children justifies limitations on the freedoms of minors.”).

¹⁷⁵ *See id.* at 639 (“With these principles in mind, we consider the specific constitutional questions presented by these appeals. In § 12S, Massachusetts has attempted to reconcile the constitutional right of a woman, in consultation with her physician, to choose to terminate her pregnancy as established by *Roe v. Wade*, and *Doe v. Bolton*, with the special interest of the State in encouraging an unmarried pregnant minor to seek the advice of her parents in making the important decision whether or not to bear a child.”) (internal citations omitted).

¹⁷⁶ *See id.* at 647-48 (“We conclude, therefore, that under state regulation such as that undertaken by Massachusetts, every minor must have the opportunity—if she so desires—to go directly to a court without first consulting or notifying her parents. If she satisfies the court that she is mature and well enough informed to make intelligently the abortion decision on her own, the court must authorize her to act without parental consultation or consent. If she fails to satisfy the court that she is competent to make this decision independently, she must be permitted to show that an abortion nevertheless would be in her best interests. If the court is persuaded that it is, the court must authorize the abortion. If, however, the court is not persuaded by the minor that she is mature or that the abortion would be in her best interests, it may decline to sanction the operation.”).

¹⁷⁷ *See id.* at 642 (“The pregnant minor’s options are much different from those facing a minor in other situations, such as deciding whether to marry. A minor not permitted to marry before the age of majority is required simply to postpone her decision. She and her intended spouse may preserve the opportunity for later marriage should they continue to desire it. A pregnant adolescent, however, cannot preserve for long the possibility of aborting, which effectively expires in a matter of weeks from the onset of pregnancy.”).

consequences to the woman in question were not mitigated by her status as a minor.¹⁷⁸ In fact, the consequences could be heightened by the woman’s young age.¹⁷⁹ Therefore, the Court held that absent some sort of judicial bypass mechanism, whereby the minor can seek leave from the court directly and *without* consent of her parents—who could easily impede the minor’s access to the court should they wish to prevent the abortion—such parental notice and consent statutes failed the heightened undue burden test applied to abortion.¹⁸⁰

It is important to note that not all of the justices agreed with the majority holding. In his concurrence, Justice Stevens argued that giving the veto power to a judge—which would have violated an adult woman’s right to an abortion in this case—also violated the pregnant minor’s constitutional rights.¹⁸¹ Justice Stevens relied heavily on the right to privacy in his reasoning, ultimately arguing that the judicial hearing bypass mechanism would subject the minor to public scrutiny that would be in direct juxtaposition with her right to privacy.¹⁸²

Moreover, though the Court was primarily concerned with decisional privacy in this case, it did foreshadow the issue of informational privacy and recognized that it was one aspect of the case.¹⁸³ The court repeatedly noted the importance of confidentiality regarding the decision to abort.¹⁸⁴ Though no explicit acknowledgement was made, the Court hinted at the fact that a minor might have a privacy interest not just in the decision, but also in the information regarding that decision.¹⁸⁵

¹⁷⁸ *See id.*

¹⁷⁹ *See id.* (“Indeed, considering her probable education, employment skills, financial resources, and emotional maturity, unwanted motherhood may be exceptionally burdensome for a minor.”).

¹⁸⁰ *See id.* at 647-48.

¹⁸¹ *See id.* at 655 (Stevens, J., concurring).

¹⁸² *See id.*

¹⁸³ *See id.* at 631, 645 (majority opinion).

¹⁸⁴ *See id.* at 645 (“The proceeding need not be brought in the minor's name and steps may be taken, by impoundment or otherwise, to preserve confidentiality as to the minor and her parents.”).

¹⁸⁵ *See id.* at 631, 645.

Though the Supreme Court has addressed exactly how and to what degree certain privacy interests are applied to minors, many questions have been left unanswered. In particular, the Court has yet to address the question of informational privacy as applied to minors. Though some guidance can be gleaned from landmark decisions such as *Gault*, *Bellotti* and *Tinker*, especially in terms of privacy issues involving decision-making abilities, these cases do not definitively answer the question of whether the Court would afford full informational privacy rights to minors in the context of health care records. Instead, we must look to how lower courts have decided the matter more generally.

III. INFORMATIONAL PRIVACY AS APPLIED TO MINORS

Though a relatively new inquiry, lower courts have grappled with the issue of the informational privacy right of minors.¹⁸⁶ In weighing these matter courts have split on the issue of whether minors should be afforded the same informational privacy rights as adults.¹⁸⁷ On one side, courts have held that in the context of minors, the heightened scrutiny applied to privacy issues for adults is inappropriate, and a lesser form of scrutiny is more appropriate.¹⁸⁸ Conversely, other courts have held that the informational privacy rights of minors are entitled to the same protections as is given to adults.¹⁸⁹ Unfortunately, most of the cases deal specifically with information relating to sexual autonomy and sexual health care, as opposed to answering the question more broadly.¹⁹⁰ Moreover, given the lack of a clear standard of review for adults in the same context, it is unclear precisely what treating minors as adults truly means under the current law.¹⁹¹

¹⁸⁶ See *infra* Section III.A.

¹⁸⁷ See *infra* Sections III.A-B.

¹⁸⁸ See *infra* Section III.A.

¹⁸⁹ See *infra* Section III.B

¹⁹⁰ See *infra* Sections III.A-B.

¹⁹¹ See *supra* Part III.

A. The Tenth Circuit Approach: Minors Have Inferior Informational Privacy Rights

In 2006, the Tenth Circuit addressed the issue left unanswered by the Supreme Court—whether minors have the same informational privacy rights as adults under the Constitution—in *Aid for Women v. Foulston*.¹⁹² The case involved a Kansas statute that required doctors, educators, and others in similar positions to report to the state whenever they have “‘reason to suspect’ injury to a minor resulting from . . . sexual abuse.”¹⁹³ Because of an opinion issued by the Kansas Attorney General deeming any sexual activity by a minor under the age of sixteen as “injurious” to them, the statute essentially required the aforementioned professionals to report to the state any time they suspected a minor under sixteen of engaging in sexual activity.¹⁹⁴

In deciding the issue, the court acknowledged that minors do possess informational privacy rights.¹⁹⁵ However, the court held that the informational privacy rights were “diminished” in this case because of the facts that the infringement affected minors whose rights are “not as strong” as adults.¹⁹⁶ Ultimately, the court declined to apply strict scrutiny, instead opting for a “different and less rigorous” test.¹⁹⁷ The court noted three important factors to be weighed: (1) the state’s strong interest in enforcing its criminal laws, (2) the state’s “strong *parens patriae* interest in protecting the best interests of minors”, and (3) the state’s interest in promoting public health, “particularly the health of minors.”¹⁹⁸ The court concluded that the

¹⁹² 441 F.3d 1101 (10th Cir. 2006).

¹⁹³ *Id.* at 1106.

¹⁹⁴ *See id.*

¹⁹⁵ *See id.* at 1116 (“We agree with the district court’s initial determination that minors do possess a right to informational privacy. That is, the fact that they are minors does not foreclose them from constitutional privacy protection . . . This circuit has not yet determined whether the right of informational privacy extends to minors; we now conclude that it does.”).

¹⁹⁶ *See id.* at 1120 (“Minors’ privacy rights in personal sexual activity are not as strong as adults’ rights would be. Thus, the privacy interests in this case are diminished.”).

¹⁹⁷ *See* Mitch Maio, Statute Note, *When Two Rights Make A Wrong: How Utah’s Mandatory Reporting And Rape Crisis Counselor Confidentiality Statutes Combine To Hurt Mature Minors*, 8 J. L. & FAM. STUD. 265, 271 n. 46 (2006). The court instead applied a balancing test. *See Aid for Women*, 441 F.3d at 1119.

¹⁹⁸ *See id.* at 1119.

plaintiffs had not adequately proven that “the balance would weigh in their favor,” and vacated the lower court’s decision in their favor.¹⁹⁹

The Tenth Circuit’s analysis and holding is exemplary of the approach taken by courts aiming to foreshorten the informational privacy rights of minors. In finding their rights to be diminished, the court applies a balancing test with the vestiges of rational basis review and easily finds that the state’s interests outweigh those of the minors.²⁰⁰ However, a greater number of circuits have found that a minor possesses the same informational privacy rights as their adult counterparts.²⁰¹

B. The Third Circuit: Minors’ Informational Privacy Rights on Equal Footing as Adults

In 2000, in *Gruenke v Seip*, the Third Circuit was faced with the issue of whether a high school swim coach had violated a student’s informational privacy when her pregnancy was disclosed and shared with school officials.²⁰² The coach in question, Michael Seip, had made unrelenting inquiries as to whether the student was pregnant—ultimately forcing her to disclose

¹⁹⁹ *See id.* at 1119, 1120.

²⁰⁰ *See id.* at 1119.

²⁰¹ *See* Helen L. Gilbert, Comment, *Minors' Constitutional Right to Informational Privacy*, 74 U. CHI. L. REV. 1375, 1388-89 (2007) (“Both the Third and Ninth Circuits acknowledge no difference in the informational privacy rights of minors and adults; they simply apply their informational privacy jurisprudence to minors with little thought to minors' special status. On the other end of the spectrum, the Tenth Circuit treats minors' informational privacy claims quite differently than similar claims brought by adults—it holds minors' rights to a less rigorous level of scrutiny.”).

²⁰² 225 F3d 290 (3rd Cir. 2000).

her pregnancy.²⁰³ Seip then discussed the matter with the school guidance counselor, his assistant coaches, and a doctor.²⁰⁴

In analyzing the issue, the court applied no special limitations because Leah was a minor, but rather it analyzed the issue just as it would for an adult.²⁰⁵ The court applied a two-part test, first asking whether the information fell within the “contours of the recognized right of one to be free from disclosure of personal matters”—ultimately finding that it absolutely did.²⁰⁶ Next, the court queried whether the students’ informational privacy outweighed the state’s interests in seeking disclosure of the information, again finding that the school’s public health concerns were outweighed by Leah’s informational privacy interests.²⁰⁷

Notably, the Ninth Circuit also makes no distinction in its analysis of informational privacy where minor’s rights are at issue.²⁰⁸ Though only a few circuits have actually confronted the matter, the majority of them have decided that minors should be treated the same as adults when it comes to informational privacy.²⁰⁹ Although certainly not conclusive on the matter, this trend among lower courts might be indicative of a potential holding from the Supreme Court of

²⁰³ *See id.* at 295-96 (“In January of 1997, Michael Seip, the varsity swim coach, began to suspect that Leah was pregnant. At swim practice, Seip observed that Leah was often nauseated, made frequent trips to the bathroom, and complained about having a low energy level. In addition, Leah’s body was “changing rapidly.” In February of 1997, Seip asked his assistant swim coach, Kim Kryzan, who also had observed the changes in Leah’s behavior and physical appearance, to approach Leah to discuss the possibility that Leah was pregnant. Although the exact content of this discussion is not clear, Leah refused to volunteer any information; she denied that she was pregnant and refused to acknowledge she had had sex with her boyfriend. Shortly after the discussion between Leah and Kim Kryzan, Seip approached Leah and attempted to discuss sex and pregnancy with her. When questioned by Seip, Leah again emphatically denied that she was pregnant.”). The coach then went so far as to procure a pregnancy test for Leah to take. *See id.* at 296.

²⁰⁴ *See id.* at 302-03; *see also* Gilbert, *supra* note 201, at 1389-90 (“The court barely mentions that the plaintiff is a minor, and evaluates her claim as it does any other: first, determining that pregnancy status falls within the scope of the right to privacy and second, finding that the student’s privacy interest outweighs the state’s interest in disclosure.”).

²⁰⁵ *See id.* at 295-96.

²⁰⁶ *Id.* at 302-03.

²⁰⁷ *See id.* at 303 (“While the preservation of this right must be balanced with factors such as concerns for public health in the work environments, Leah’s version of the facts satisfies this test.”) (internal citations omitted).

²⁰⁸ *See, e.g.,* *In re Crawford*, 194 F.3d 954, 959 (9th Cir. 1999); *Doe v. Attorney Gen. of United States*, 941 F.2d 780, 796 (9th Cir. 1991); *see also* Cullitan, *supra* note 102, at 429 (“the Ninth Circuit also applies a balancing test and does not manipulate the test to account for minors”).

²⁰⁹ *See* Cullitan, *supra* note 102, at 429.

the United States. However, it is important to note that all circuits, even those who have applied the right broadly to minors, have failed to inquire as to whether minors have unique privacy interests, ones that might warrant *added* protection in the form of strict scrutiny.²¹⁰

IV. THE SOLUTION

The right to privacy should be afforded to minors; however, limitations on this right are warranted under certain circumstances in the case of decisional privacy.²¹¹ Yet, because informational privacy rights do not raise the same concerns as decisional privacy rights, the Supreme Court should extend the full protections of the Constitution where such rights are concerned.²¹² In fact, given the unique privacy interests of minors, the Court should go even farther, and hold that even though it is not applied to cases for adults, strict scrutiny review is appropriate in some instances of minors' informational privacy infringements.²¹³ Even if the Court was hesitant to make such a comprehensive finding, one scenario not deserving of a limited application of the right to informational privacy is in the context of mental health care information.²¹⁴ Infringements of informational privacy in this context pose a twofold danger, as harm can result to the minor not just from actual disclosure, but also from mere threat of disclosure.²¹⁵ As such, it is deserving of the highest level of protection—strict scrutiny.²¹⁶

A. Not All Information Is Created Equal

With regard to decisional privacy issues pertaining to minors, the Supreme Court has never applied a bright-line-rule, stating that minors either possess or do not possess the full

²¹⁰ See Cullitan, *supra* note 102, at 432 (“All three circuits that have analyzed children's informational privacy have neglected to address minors' distinct interests in informational privacy. Minors are “affected acutely by the threat of disclosure of their personal matters,” as fears of disclosure may prevent them from seeking medical attention or expressing themselves.”).

²¹¹ See *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977).

²¹² See, e.g., *See Bellotti v. Baird*, 443 U.S. 622, 634 (1979).

²¹³ See *infra* Sections IV.A-C.

²¹⁴ See *infra* Sections IV.A-C.

²¹⁵ See *infra* Subsection IV.C.2-3.

²¹⁶ See *infra* Sections IV.B-D.

spectrum of constitutional rights. Instead, the Court has embraced a categorical approach, “accord[ing] different levels of constitutional protection to the different types of children's rights.”²¹⁷ While the Court has not given minors unlimited discretion and authority in all circumstances, it has balanced their interests with those of their parents and the state, and granted discretion under limited conditions.²¹⁸ There is a persuasive argument to make for a categorical approach—one that applies differencing levels of review depending on the type of information involved—in the present inquiry.²¹⁹

This Note argues that the categorical distinction should be made on the basis of chilling conduct.²²⁰ Where the threat of disclosure alone would deter a minor from engaging in behavior not otherwise prohibited by law, an offending law must be subject to strict scrutiny. On the other hand, where the harm stems only from disclosure and the threat of such has no effect on the minor, then the Court may choose to apply a lesser form of scrutiny.²²¹ In the case of laws infringing on mental health care information, the mere potential for disclosure is enough to affect a minor’s decision regarding whether or not to seek treatment, and they should therefore be subject to strict scrutiny.²²²

1. *What Information is Actually Protected?*

The lower courts have wrestled with the issue of precisely what information is protected under informational privacy. The result is split among circuits—however, one interpretation has

²¹⁷ See Hafen, *supra* note 22, at 442.

²¹⁸ See *id.* (“For instance, the Supreme Court has given no constitutional protection to a child's right to exercise unlimited discretion in all situations, unfettered by parental or state involvement in the decisionmaking process; however, the Supreme Court has granted children the right to choose in some limited circumstances, such as state regulation of abortion;⁷⁸ and the Supreme Court has given constitutional status to some procedural rights of protection.⁷⁹ This hierarchy of constitutional treatment of children's rights acknowledges that limitations on the child's discretion by the parents and the state are required in some circumstances.”).

²¹⁹ See Skinner-Thompson, *supra* note 110, at 204-22.

²²⁰ See Gilbert, *supra* note 201, at 1404-05.

²²¹ This Note does not seek to answer what that standard would be.

²²² See *infra* Subsection IV.B.4.

garnered the majority of the circuits' support. The first group has found information to be protected *only* if it involves a fundamental right or constitutionally protected liberty interest.²²³ The Sixth Circuit utilizes this approach, holding that informational privacy is to be construed narrowly and that “the right to informational privacy will be triggered only when the interest at stake relates to ‘those personal rights that can be deemed ‘fundamental’ or ‘implicit in the concept of ordered liberty.’”²²⁴ A second approach—that employed by the Eighth Circuit—has found that informational privacy protects both matters pertaining to fundamental rights, as well as those concerning “highly personal medical or financial information.”²²⁵

Most other circuits, on the other hand, interpret the right far more broadly.²²⁶ These courts are not concerned with whether the information implicates a fundamental right, but rather, whether the person has a reasonable expectation of privacy with regard to the information at issue.²²⁷ These courts apply a two part-test in determining whether the information is protected.²²⁸ The first part asks whether the individual has a legitimate expectation of privacy in the information in question.²²⁹ The second part asks whether the information is personal enough to warrant privacy protection.²³⁰

Thus, depending on the jurisdiction, certain information may or may not be protected by

²²³ See Gilbert, *supra* note 201, at 1382.

²²⁴ See Bloch v. Ribar, 156 F.3d 673, 684 (6th Cir. 1998) (quoting J.P. v. DeSanti, 653 F.2d 1080, 1090 (6th Cir.1981)). “Unlike many other circuits, this court has narrowly construed the holdings of *Whalen* and *Nixon* to extend the right to informational privacy only to interests that implicate a fundamental liberty interest.” See *id.* at 683–84. In its analysis, the court employs a two-part test. See *id.* The first step asks whether “the interest at stake must implicate either a fundamental right or one implicit in the concept of ordered liberty.” See *id.* The second step involves a balancing of “the government's interest in disseminating the information” “the individual's interest in keeping the information private.” See *id.*

²²⁵ See Alexander v Pepper, 993 F2d 1348, 1350-51 (8th Cir. 1993).

²²⁶ See Gilbert, *supra* note 201, at 1382 (“The other circuits interpret the constitutional right to informational privacy more broadly, holding that it protects personal information that need not implicate fundamental liberties.”).

²²⁷ See *id.* (“The other circuits interpret the constitutional right to informational privacy more broadly, holding that it protects personal information that need not implicate fundamental liberties. These courts first decide if the party alleging an invasion of privacy has a legitimate expectation of privacy in the information in question.”).

²²⁸ See, e.g., Fado v Coon, 633 F2d 1172, 1175-76 (5th Cir. 1981).

²²⁹ See *id.*: see also Gilbert, *supra* note 201, at 1382.

²³⁰ See Fado, 633 F2d at 1175-76; see also Gilbert, *supra* note 201, at 1382.

the right to informational privacy. Undoubtedly, this discrepancy created by the differing approaches taken by the circuits is an issue deserving of the Court's immediate attention. However, it must be noted that even in light of the disagreement among courts, every single circuit agrees on one thing—that informational privacy does not protect information that is a matter of public record.²³¹

Notably, health care information would likely meet the inquiry raised under all of the aforementioned approaches. First, under the Sixth Circuit approach, medical decisions—including mental health care—likely fall within the fundamental right to privacy, as stated by the *Cruzan* Court.²³² Secondly, under the broader Eighth Circuit Approach, mental health care information meets the standard as it implicates both fundamental rights as well as “highly personal medical . . . information.”²³³ Finally, under the broadest approach taken by the majority of the circuits, mental health care information absolutely falls within information to which an individual has and expectation of privacy.²³⁴ Medical information, topped perhaps only by sexual information, is lauded the most sensitive of personal information.²³⁵ Therefore, in this situation an individual has the highest expectation of privacy.²³⁶

B. Categorizing the Infringement Based on “Chilling” Conduct

Since mental health records most certainly fall within the realm of information meant to be protected, the next question then becomes *how protected?* As noted above, this Note argues that the distinction should be based on whether the mere threat of disclosure of information

²³¹ See Gilbert, *supra* note 201, at 1382.

²³² See *supra* Subsection I.C.2; see also *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990).

²³³ See *Alexander v Peffer*, 993 F2d 1348, 1350-51 (8th Cir. 1993).

²³⁴ See *supra* note 226 and accompanying text.

²³⁵ See Alison M. Jean, Note, *Personal Health and Medical Information: The Need for More Stringent Constitutional Privacy Protection*, 37 Suffolk U. L. Rev. 1151, 1151 (2004) (discussing the “extreme sensitivity of the information contained in an individual's private medical file”).

²³⁶ See *id.* at 1170 (“[A]n individual trusts in the confidentiality of all identifiable medical information when visiting a health care provider or pharmacy.”).

would chill conduct.²³⁷ If the information is so sensitive that an individual, particularly a minor, would alter their conduct to avoid the creation of such information, then laws allowing for disclosure must be subject to strict scrutiny. Mental health care records absolutely meet this standard.

1. *Harm from Disclosure Only*

In certain instances, it is the disclosure of personal information alone that causes the minor harm. For example, a minor wishing to keep her financial records private from a potential employer²³⁸ falls within these parameters. The disclosure of these types of information presents a singular harm, stemming from the actual disclosure alone.²³⁹ This is because “there is no relationship between disclosure of information and ensuing conduct” in these instances.²⁴⁰ A minor would not alter her financial habits simply because of a threat of disclosure at a later job application. However, if the information were *actually* disclosed, harm could come to the minor.

These cases are not meant to be trivialized. They raise important concerns and should likewise receive protection from the Court. However, they are distinct from the next category in that the harm stems from only from the violation of informational privacy. The next category of information presents a twofold harm that implicates other rights, both fundamental and otherwise.²⁴¹

2. *Harm from Mere Threat of Disclosure*

Other information, such as medical information, presents another danger—where the threat of disclosure of such information exists, the minor may alter their conduct accordingly.²⁴²

²³⁷ See Gilbert, *supra* note 201, at 1403.

²³⁸ See, e.g., *Walls v City of Petersburg*, 895 F.2d 188, 194 (4th Cir 1990).

²³⁹ See Gilbert, *supra* note 201, at 1403.

²⁴⁰ See *id.*

²⁴¹ See *infra* Subsection IV.B.3.

²⁴² Note that in many circumstances disclosure of such information is barred under federal statutes such as the Americans with Disabilities Act (ADA), the Health Insurance Portability and Accountability Act (HIPAA), and the

For example, in the context of abortion, a minor's choice to seek an abortion through a judicial bypass proceeding might be affected by the potential for disclosure.²⁴³ The minor may choose to forego the bypass option because of the fear that a record of the proceeding will become available to others, including her own parents, in the future. Under such circumstances there will be an “unacceptable danger of deterring” the minor from exercising her choice to obtain an abortion.²⁴⁴

It has been proposed that the motivation behind laws where the threat of disclosure alone is enough to chill a minor’s conduct is precisely that—an intentional curbing of conduct “indirectly through information gathering.”²⁴⁵ Helen Gilberts warns of such dangers: “Overall, courts should be wary of limiting minors' general right to informational privacy due to the state's ability to regulate minors' conduct, as the link between informational privacy and conduct can be quite attenuated and such regulation through information gathering may chill other positive behaviors.”²⁴⁶ Seeking mental health care is just the kind of positive behavior that Gilbert warns will be affected.

B. Mental Health Records and the Threat of Disclosure

Mental health care records of minors must be given unique and magnified protection. In this instance, as described above, the potential harm is twofold. Here, actual disclosure of the information may harm the minor in myriad ways, from affecting employment prospects to

Family Educational Rights and Privacy Act (FERPA). This note is concerned with intrusions that are able to circumvent the protections under these laws. One example can be found in state bar applications across the country. *See, e.g.*, Kathryn Jones, Comment, *Fitness Determinations for Texas Bar Applicants as the Texas Board of Law Examiners Continues to Tip-Toe Around the Americans with Disabilities Act*, 17 TEX. TECH. ADMIN. L.J. 325 (2016). The questions on these applications are carefully worded in order to circumvent the ADA standards that would otherwise forbid them. *See id.*

²⁴³ *See* Gilbert, *supra* note 201, at 1403.

²⁴⁴ *See* Thornburgh v American College of Obstetricians & Gynecologists, 476 US 747, 767-68 (1986), overruled in part on other grounds by Planned Parenthood v Casey, 505 US 833, 882 (1992); *see also* Gilbert, *supra* note 201, at 1403.

²⁴⁵ *See* Gilbert, *supra* note 201, at 1403.

²⁴⁶ *See id.*

preventing admission to a state bar.²⁴⁷ However, it is the harm stemming from the threat of disclosure that makes mental health care records deserving of added protections.²⁴⁸

As noted by the Supreme Court, “an intrusion on that expectation [of privacy] may have adverse consequences because it may deter patients from receiving needed medical care.”²⁴⁹ Numerous studies have shown that minors are especially affected by the threat of disclosure of their health care records.²⁵⁰ Moreover, this is an area in which minors’ “particular vulnerabilities,” to use the language of the *Bellotti* Court,²⁵¹ are especially evident. In fact, minors are more likely than their adult counterparts to forgo treatment because of privacy concerns.²⁵² Furthermore, this threat is still harmful—even when treatment *is* sought—as it infects the doctor-patient relationship, making the minor “less likely to reveal sensitive information to her health care provider.”²⁵³

Both the primary harm from actual disclosure and the secondary harm caused by threat of disclosure elevate the importance of informational privacy in the context of mental health records. However, courts thus far have failed to properly consider the latter and acknowledge that “even if the actual risk of disclosure is low, the fear of disclosure may change minors’ behavior for the worse.”²⁵⁴ For the foregoing reasons, the Supreme Court must provide guidance.

²⁴⁷ See, e.g., Gail Edson, Comment, *Mental Health Status Inquiries on Bar Applications: Overbroad and Intrusive*, 43 U. KAN. L. REV. 869 (1995).

²⁴⁸ See Gilbert, *supra* note 201, at 1407.

²⁴⁹ *Ferguson v. City of Charleston*, 532 US 67, 78 n 14 (2001).

²⁵⁰ See *id.* (“minors are particularly sensitive to the threat of disclosure of their personal information”); see also Tina L. Cheng, et al, *Confidentiality in Health Care: A Survey of Knowledge, Perceptions, and Attitudes Among High School Students*, 269 JAMA 1404 (1993) (discussing how adolescent behavior in the context of health care is greatly influenced by privacy concerns).

²⁵¹ *Bellotti v. Baird*, 443 U.S. 622, 634 (1979).

²⁵² See Gilbert, *supra* note 201, at 1407.

²⁵³ See *id.* at 1407-08.

²⁵⁴ See *id.* at 1397.

Given the real dangers of mental health and the growing suicide rates among minors,²⁵⁵ the need for informational privacy for minors is crucial to ensuring their safety. Absent strict scrutiny, laws may infringe on the right informational privacy rights of minors without adequate justification from the government. Such laws will then deter minors from seeking mental health care—for fear their most private information will become public—resulting in them not receiving the care they so desperately need.²⁵⁶ The result of applying strict scrutiny will be that only the most necessary and narrowly tailored laws will survive and the threat of disclosure from unsubstantiated laws will be greatly reduced.

C. Strict Scrutiny for the Mental Health Information of Minors: An Application

Like all proposals, in theory this thesis may be workable, but what about in fact? An analysis of a current law infringing on minors' rights to informational privacy in the context of mental healthcare is, therefore, helpful. One such infringement, already noted above, comes from state bar admission applications.²⁵⁷

State bars associations throughout the country often require disclosure of mental health care information and this disclosure is typically a requirement for admission.²⁵⁸ In fact, over 90% of state bar associations currently require disclosure of mental health care information.²⁵⁹ This requirement is authorized by the National Conference of Bar Examiners.²⁶⁰ One example can be found in the Michigan Bar Application.²⁶¹ Question 54 asks the following of applicants:

²⁵⁵ SUICIDE AT A GLANCE, CDC, <https://www.cdc.gov/violenceprevention/pdf/suicide-datasheet-a.pdf>.

²⁵⁶ See *supra* notes 23-30 and accompanying text.

²⁵⁷ See *supra* note 242 and accompanying text.

²⁵⁸ See *supra* Jones, note 242 at 869.

²⁵⁹ See *id.* (“As authorized by state supreme courts, state bar associations or other court-sanctioned entities serve as the evaluators and administrators of the certification process. Current applicants for admission to the Bar are required to answer a series of inquiries meant to detect possible flaws of character or fitness. Over ninety percent of these applications include questions concerning an applicant's history of mental illness.”).

²⁶⁰ See *id.*

²⁶¹ *Character and Fitness Investigations*, NATIONAL CONFERENCE OF BAR EXAMINERS, <http://www.ncbex.org/character-and-fitness/jurisdiction/mi> (last visited Apr. 23, 2017).

- a) Have you *ever* had, been treated or counseled for, or refused treatment or counseling for, a mental, emotional, or nervous condition which permanently, presently or chronically impairs or distorts your judgment, behavior, capacity to recognize reality or ability to cope with ordinary demands of life?
- b) Have you *ever* had, been treated or counseled for, or refused treatment or counseling for, a mental, emotional, or nervous condition which permanently, presently or chronically impairs your ability to exercise such responsibilities as being candid and truthful, handling funds, meeting deadlines, or otherwise representing the interest of others?²⁶²

The language of the questionnaire would require disclosure of mental health care information, regardless of the age at which the treatment was sought.²⁶³ Again, the harm from such questionnaires is twofold. Firstly, an applicant may be denied admission to the bar if, as a minor, they sought mental health care treatment. This harm stems from the actual disclosure.²⁶⁴ Secondly, a minor who wishes to become a lawyer later in life, and knowing of the mental health disclosure requirements, may not seek help in order to avoid any blemishes on his or her application. This harm stems from the simple threat of disclosure.²⁶⁵

If the requirement were challenged and strict scrutiny were the standard of review in place, the analysis would be as follows. First, the court would need to determine whether the state had a compelling purpose underlying the disclosure.²⁶⁶ One can imagine several purposes that would qualify as compelling—for example, the purpose of ensuring the competency of practicing attorneys in order to safeguard the justice system at large. If the state’s purpose was deemed to be compelling, the next question would be whether the requirement was a “narrowly tailored to further that interest.”²⁶⁷ It is here that the requirement would likely be struck down due to overinclusiveness.²⁶⁸ While the interest in protecting the justice system is great, it can

²⁶² *See id.* (emphasis added).

²⁶³ *See id.*

²⁶⁴ *See supra* Subsection IV.B.1.

²⁶⁵ *See supra* Subsection IV.B.1.

²⁶⁶ *See* Winkler, note 63, at 800.

²⁶⁷ *See id.*

²⁶⁸ *See id.* at 800-801.

hardly be argued that requiring information regarding mental health from minority is *necessary*. The same question, limited to treatment sought in adulthood, would easily respond to the state's interest in safeguarding the system from those who would abuse it. This less restrictive alternative would necessarily mean that the requirement is overinclusive.²⁶⁹ Therefore, under strict scrutiny analysis, bar admission questionnaires seeking mental health information dating back to the age of minority would likely be struck down as overinclusive.

Though this is just a single hypothetical example, the purpose is to show how the proposal would be applied in practice. Although in this instance, the requirement would likely be struck down, in many other cases one can imagine a compelling government interest and a suitably narrowly tailored law that would pass strict scrutiny analysis.²⁷⁰ That is to say, this proposal does not seek to encourage an absolute ban on seeking information regarding the mental health care of minors, but rather it just asks that they be given greater protections so that only necessary infringements are allowed.

D. Counterarguments

The argument that minors' informational privacy rights should be extended to include mental health care information and subjected to strict scrutiny is not without criticism. The first and most obvious reaction will be those waiving the slippery slope flag—fearing that this extension will inevitably lead to strict scrutiny for *all* information related to minors.²⁷¹ The next

²⁶⁹ See Winkler, note 63, at 800-01.

²⁷⁰ The Family Educational Rights and Privacy Act (FERPA) is one example. See *Family Educational Rights and Privacy Act (FERPA)*, U.S. DEPT. OF EDUCATION, <https://www2.ed.gov/policy/gen/guid/fpco/ferpa/index.html?src=rn> (last visited April 23, 2017). FERPA gives parents certain rights with respect to their children's education records. These rights transfer to the student when he or she reaches the age of 18 or attends a school beyond the high school level. Students to whom the rights have transferred are "eligible students." *Id.* The Health Insurance Portability and Accountability Act of 1996 (HIPAA) is another example. *How Does the HIPAA Privacy Rule Ppply to Minors?*, HIPAA, <https://www.hipaahelpcenter.com/privacy/how-does-hipaa-privacy-rule-apply-to-minors>. Under this statute, a parent is granted "access to their children's medical records." See *id.*

²⁷¹ See *infra* Subsection IV.D.1.

argument, that used by opponents of decisional privacy for minors, is that minors lack capacity under the law and, therefore, should not be entitled to such constitutional privacy rights.²⁷²

However, upon closer examination, neither of these criticisms withstands.

1. *Where Does it End? Affording Minors Too Many Rights*

The most obvious and frequently cited argument against expanding constitutional rights to minors is the slippery slope argument.²⁷³ This argument holds that if strict scrutiny is applied to minors' informational privacy in the context of health care, it necessarily follows that the courts will eventually expand the protection to cover all information. While this is not necessarily the automatic result, nonetheless, the categorical distinctions outlined above prevent that outcome.²⁷⁴ By placing health care information on unique footing and detailing its worthiness of such protections, there is no danger that courts will interpret a potential Supreme Court holding as a directive with regard to all information. By stressing the need for added protection only where the threat of disclosure alone could chill otherwise legal conduct,²⁷⁵ as in the case of mental health records, the Court would make it clear that no such unlimited application should be construed.

2. *What About Capacity?*

Throughout history, children have not been considered full persons under the law.²⁷⁶ One example is found in the notion of capacity. Minors are presumed incapacitated for purposes of

²⁷² See *infra* Subsection IV.D.2.

²⁷³ See, e.g., Catherine J. Ross, *An Emerging Right for Mature Minors to Receive Information*, 2 U. Pa. J. Const. L. 223, 273 (1999) (“I recognize that for many readers the scenario of children successfully challenging their parent's educational choices resembles a cliff, rather than just a slippery slope, over which the entire concept of parental supervision will plummet.”).

²⁷⁴ See *infra* Subsections IV.B.1-2.

²⁷⁵ See *infra* Subsection IV. B.2.

²⁷⁶ See Hafen, *supra* note 22, at 438. (“For example, minors under a certain age generally cannot validly contract, marry, and, despite a contrary trend, sue or be sued.”).

contract law, nulling decisions and contracts entered into prior to the age of maturity.²⁷⁷ Though a seemingly harsh result, the rationale for the presumption is similar to those involving constitutional protections for minors.

The obvious fundamental reason for the presumption of incapacity (and consequent minority status of children) is that immature children, which all children are at some point, are incapable of exercising reasoned judgment about what is best for them. For this reason, parents ordinarily have the responsibility to make decisions on their child's behalf. In other words, children do not have the capacity to make certain important decisions regarding their own welfare.²⁷⁸

This rationale, largely touted for restricting minors' decisional rights, is likely to be raised in the present scenario. However, these concerns that are so central the Court's analysis of decisional privacy rights, have no bearing on informational privacy. Whether the underlying conduct giving rise to the need for informational privacy is constitutional is an entirely separate inquiry—one that rightfully engages in the discussion of capacity. However, informational privacy is wholly distinct from decisional privacy rights.²⁷⁹ The right to informational privacy does not require or even suggest an analysis of the minor's capacity.²⁸⁰ Capacity would concern only the underlying decisions, and not the protection of the information concerning them. Critics concerned with capacity can rest easy, as this concern is wholly encompassed by the Court's review of decisional privacy cases.²⁸¹

CONCLUSION

In an age when courts continuously grapple with the uncertainty surrounding the Constitutional protections afforded to minors, there is a need for clear and absolute direction

²⁷⁷ *See id.*

²⁷⁸ *See id.* at 438-39.

²⁷⁹ *See Cullitan*, supra note 102, at 424 (“*Bellotti* involved a minor's right to independently decide whether or not to have an abortion--which would fall under the *Carey* framework discussed above, and not the framework informational privacy. The right to informational privacy does not necessitate an analysis of whether the minor has the capacity to make a decision.”).

²⁸⁰ *See id.*

²⁸¹ *See, e.g., Bellotti v. Baird*, 443 U.S. 622 (1979).

from the Supreme Court of the United States.²⁸² Without such a directive, courts will continue to inconsistently apply the right to informational privacy to minors—allowing the right in some cases, while holding it does not exist in others.²⁸³ Because of the extremely sensitive nature of the information at issue, and the twofold harm that exists from actual disclosure and threat of disclosure,²⁸⁴ the Court must apply strict scrutiny review when examining laws that infringe on a minor’s right to informational privacy in the context of mental health care information.²⁸⁵ In doing so, the Court would address the growing concerns surrounding mental health care stigma,²⁸⁶ allowing minors to access the care they need without fear of disclosure.

²⁸² See *supra* Part II.

²⁸³ See *supra* Part III (discussing the split among lower courts as to how minors are to be treated in claims regarding informational privacy).

²⁸⁴ See *supra* Subsections IV.B.1-2.

²⁸⁵ See *supra* Section IV.B.

²⁸⁶ See Katner, *supra* note 28, at 525 (discussion the stigma surrounding mental health as a barrier to actual care).