SUPREME COURT OF THE UNITED STATES

No. 09–530

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, ET AL., PETITIONERS *v.*
ROBERT M. NELSON ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[January 19, 2011]

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring in the judgment.

I agree with the Court, of course, that background checks of employees of government contractors do not offend the Constitution. But rather than reach this conclusion on the basis of the never-explained assumption that the Constitution requires courts to "balance" the Government's interests in data collection against its contractor employees' interest in privacy, I reach it on simpler grounds. Like many other desirable things not included in the Constitution, "informational privacy" seems like a good idea—wherefore the People have enacted laws at the federal level and in the states restricting the government's collection and use of information. But it is up to the People to enact those laws, to shape them, and, when they think it appropriate, to repeal them. A federal constitutional right to "informational privacy" does not exist.

Before addressing the constitutional issues, however, I must observe a remarkable and telling fact about this case, unique in my tenure on this Court: Respondents' brief, in arguing that the Federal Government violated the Constitution, does not once identify which provision of the Constitution that might be. The Table of Authorities contains citations of cases from federal and state courts,

federal and state statutes, Rules of Evidence from four states, two Executive Orders, a House Report, and even more exotic sources of law, such as two reports of the Government Accountability Office and an EEOC document concerning "Enforcement Guidance." And yet it contains not a single citation of the sole document we are called upon to construe: the Constitution of the United States. The body of the brief includes a single, fleeting reference to the Due Process Clause, buried in a citation of the assuredly inapposite *Lawrence* v. *Texas*, 539 U. S. 558 (2003), Brief for Respondents 42; but no further attempt is made to argue that NASA's actions deprived respondents of liberty without due process of law. And this legal strategy was not limited to respondents' filing in this Court; in the Ninth Circuit respondents asserted in a footnote that "courts have grounded the right to informational privacy in various provisions of the Constitution," Brief for Appellants in No. 07–56424, p. 25, n. 18, but declined to identify which ones applied here.

To tell the truth, I found this approach refreshingly honest. One who asks us to invent a constitutional right out of whole cloth should spare himself and us the pretense of tying it to some words of the Constitution. Regrettably, this Lincolnesque honesty evaporated at oral argument, when counsel asserted, apparently for the first time in this litigation, that the right to informational privacy emerged from the Due Process Clause of the Fifth Amendment. Tr. of Oral Arg. 28–29. That counsel invoked the infinitely plastic concept of "substantive" due process does not make this constitutional theory any less invented.

This case is easily resolved on the simple ground that the Due Process Clause does not "guarante[e] certain (unspecified) liberties"; rather, it "merely guarantees certain procedures as a prerequisite to deprivation of liberty." *Albright* v. *Oliver*, 510 U. S. 266, 275 (1994)

(SCALIA, J., concurring). Respondents make no claim that the State has deprived them of liberty without the requisite procedures, and their due process claim therefore must fail. Even under the formula we have adopted for identifying liberties entitled to protection under the faux "substantive" component of the Due Process Clause—that "the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition," *Washington* v. *Glucksberg*, 521 U. S. 702, 720–721 (1997) (internal quotation marks omitted)—respondents' claim would fail. Respondents do not even attempt to argue that the claim at issue in this case passes that test, perhaps recognizing the farcical nature of a contention that a right deeply rooted in our history and tradition bars the Government from ensuring that the Hubble Telescope is not used by recovering drug addicts.

The absurdity of respondents' position in this case should not, however, obscure the broader point: Our due process precedents, even our "substantive due process" precedents, do not support *any* right to informational privacy. First, we have held that the government's act of defamation does not deprive a person "of any 'liberty' protected by the procedural guarantees of the Fourteenth Amendment." *Paul* v. *Davis*, 424 U. S. 693, 709 (1976). We reasoned that stigma, standing alone, does not "significantly alte[r]" a person's legal status so as to "justif[y] the invocation of procedural safeguards." *Id.,* at 708–709. If outright defamation does not qualify, it is unimaginable that the mere disclosure of private information does.

Second, respondents challenge the Government's *collection* of their private information. But the Government's collection of private information is regulated by the Fourth Amendment, and "[w]here a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that

Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims." *County of Sacramento* v. *Lewis*, 523 U. S. 833, 842 (1998) (internal quotation marks omitted; alteration in original). Here, the Ninth Circuit rejected respondents' Fourth Amendment argument, correctly holding that the Form 42 inquiries to third parties were not Fourth Amendment "searches" under *United States* v. *Miller*, 425 U. S. 435 (1976), and that the Fourth Amendment does not prohibit the Government from asking questions about private information. 530 F. 3d 865, 876–877 (2008). That should have been the end of the matter. Courts should not use the Due Process Clause as putty to fill up gaps they deem unsightly in the protections provided by other constitutional provisions.

In sum, I would simply hold that there is no constitutional right to "informational privacy." Besides being consistent with constitutional text and tradition, this view has the attractive benefit of resolving this case without resort to the Court's exegesis on the Government's legitimate interest in identifying contractor drug abusers and the comfortingly narrow scope of NASA's "routine use" regulations. I shall not fill the U. S. Reports with further explanation of the incoherence of the Court's "substantive due process" doctrine in its many manifestations, since the Court does not play the substantive-due-process card. Instead, it states that it will "assume, without deciding" that there exists a right to informational privacy, *ante*, at 1.

The Court's sole justification for its decision to "assume, without deciding" is that the Court made the same mistake before—in two 33-year-old cases, *Whalen* v. *Roe*, 429 U. S. 589 (1977), and *Nixon* v. *Administrator of General Services*, 433 U. S. 425 (1977).* *Ante*, at 11. But *stare*

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*Contrary to the Court's protestation, *ante*, at 11, n. 10, the Court's

decisis is simply irrelevant when the pertinent precedent assumed, without deciding, the existence of a constitutional right. "*Stare decisis* reflects a policy judgment that in most matters it is more important that the applicable rule of law be settled than that it be settled right." *State Oil Co.* v. *Khan*, 522 U. S. 3, 20 (1997) (internal quotation marks omitted). "It is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles." *Ibid.* (internal quotation marks omitted). Here, however, there *is* no applicable rule of law that is settled. To the contrary, *Whalen* and *Nixon* created an uncertainty that the text of the Constitution did not contain and that today's opinion perpetuates.

A further reason *Whalen* and *Nixon* are not entitled to *stare decisis* effect is that neither opinion supplied any coherent reason why a constitutional right to informational privacy might exist. As supporting authority, *Whalen* cited *Stanley* v. *Georgia*, 394 U. S. 557 (1969), a

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failure to address whether there is a right to informational privacy cannot be blamed upon the Government's concession that such a right exists, and indeed the Government's startling assertion that *Whalen* and *Nixon* (which decided nothing on the constitutional point, and have not been so much as cited in our later opinions) were "seminal"—*seminal!*—decisions. Reply Brief for Petitioner 22. We are not bound by a litigant's concession on an issue of law. See, *e.g.*, *Grove City College* v. *Bell*, 465 U. S. 555, 562, n. 10 (1984). And it should not be thought that the concession by the United States is an entirely self-denying act. To be sure, it subjects the Executive Branch to constitutional limitations on the collection and use of information; but the Privacy Act, 5 U. S. C. §552a (2006 ed. and Supp. III), already contains extensive limitations not likely to be surpassed by constitutional improvisation. And because Congress's power under §5 of the Fourteenth Amendment extends to the full scope of the Due Process Clause, see *City of Boerne* v. *Flores*, 521 U. S. 507 (1997), the United States has an incentive to give that Clause a broad reading, thus expanding the scope of federal legislation that it justifies. Federal laws preventing state disregard of "informational privacy" may be a twinkle in the Solicitor General's eye.

First Amendment case protecting private possession of obscenity; the deservedly infamous dictum in *Griswold* v. *Connecticut*, 381 U. S. 479 (1965), concerning the "penumbra" of the First Amendment; and three concurring or dissenting opinions, none of which remotely intimated that there might be such a thing as a substantive due process right to informational privacy. 429 U. S., at 599, n. 25. *Nixon* provided even less support. After citing the observation in *Whalen* that "[o]ne element of privacy has been characterized as the individual interest in avoiding disclosure of personal matters," *Nixon*, *supra*, at 457 (quoting *Whalen*, *supra*, at 599; internal quotation marks omitted), it proceeded to conduct a straightforward *Fourth Amendment* analysis. It "assume[d]" that there was a "legitimate expectation of privacy" in the materials, and rejected the appellant's argument that the statute at issue was "precisely the kind of abuse that the Fourth Amendment was intended to prevent." *Nixon*, *supra*, at 457–458, 460. It is unfathomable why these cases' passing, barely explained reference to a right separate from the Fourth Amendment—an unenumerated right that they held to be *not* applicable—should be afforded *stare decisis* weight.

At this point the reader may be wondering: "What, after all, is the harm in being 'minimalist' and simply refusing to say that violation of a constitutional right of informational privacy can never exist? The outcome in this case is the same, so long as the Court holds that any such hypothetical right was not violated." Well, there is harm. The Court's never-say-never disposition does damage for several reasons.

1. It is in an important sense not actually minimalist. By substituting for one real constitutional question (whether there exists a constitutional right to informational privacy) a different constitutional question (whether NASA's background checks would contravene a right to informational privacy if such a right existed), the Court

gets to pontificate upon a matter that is none of its business: the appropriate balance between security and privacy. If I am correct that there exists no right to informational privacy, all that discussion is an exercise in judicial *maximalism*. Better simply to state and apply the law forthrightly than to hold our view of the law *in pectore*, so that we can inquire into matters beyond our charter, and probably beyond our ken.

If, on the other hand, the Court believes that there *is* a constitutional right to informational privacy, then I fail to see the minimalist virtues in delivering a lengthy opinion analyzing that right while coyly noting that the right is "assumed" rather than "decided." Thirty-three years have passed since the Court first suggested that the right may, or may not, exist. It is past time for the Court to abandon this Alfred Hitchcock line of our jurisprudence.

2. It harms our image, if not our self-respect, because it makes no sense. The Court decides that the Government did not violate the right to informational privacy without deciding whether there *is* a right to informational privacy, and without even describing what hypothetical standard should be used to assess whether the hypothetical right has been violated. As I explained last Term in objecting to another of the Court's never-say-never dispositions:

> "[The Court] cannot decide that [respondents'] claim fails without first deciding what a valid claim would consist of. . . . [A]greeing to or crafting a *hypothetical* standard for a *hypothetical* constitutional right is sufficiently unappealing . . . that [the Court] might as well acknowledge the right as well. Or [it] could avoid the need to agree with or craft a hypothetical standard by *denying* the right. But embracing a standard while being coy about the right is, well, odd; and deciding this case while addressing *neither* the standard *nor* the right is quite impossible." *Stop the Beach Re-*

nourishment, Inc. v. *Florida Dept. of Environmental Protection*, 560 U. S. ___, ___ (2010) (plurality opinion) (joined by ALITO, J.) (slip op., at 12–13).

Whatever the virtues of judicial minimalism, it cannot justify judicial incoherence.

The Court defends its approach by observing that "we have only the 'scarce and open-ended'" guideposts of substantive due process to show us the way." *Ante*, at 11, n. 10. I would have thought that this doctrinal obscurity should lead us to provide *more* clarity for lower courts; surely one vague opinion should not provide an excuse for another.

The Court observes that I have joined other opinions that have assumed the existence of constitutional rights. *Ibid.* It is of course acceptable to reserve difficult constitutional questions, so long as answering those questions is unnecessary to coherent resolution of the issue presented in the case. So in *Cruzan* v. *Director, Mo. Dept. of Health,* 497 U. S. 261, 279–280 (1990), we declined to decide whether a competent person had a constitutional right to refuse lifesaving hydration, because—under a constitutional standard we laid out in detail—such a right did not exist for an incompetent person. In *Herrera* v. *Collins,* 506 U. S. 390, 417–418 (1993), we declined to decide whether it would be unconstitutional to execute an innocent person, because Herrera had not shown that he was innocent. In *New York State Club Assn., Inc.* v. *City of New York,* 487 U. S. 1, 10–15 (1988), we declined to decide whether there was a constitutional right of private association for certain clubs, because the plaintiff had brought a facial challenge, which would fail if the statute was valid in many of its applications, making it unnecessary to decide whether an as-applied challenge as to some clubs could succeed. Here, however, the Court actually *applies* a constitutional informational privacy standard without

giving a clue as to the rule of law it is applying.

3. It provides no guidance whatsoever for lower courts. Consider the sheer multiplicity of unweighted, relevant factors alluded to in today's opinion:

- It is relevant that the Government is acting "in its capacity 'as proprietor' and manager of its 'internal operation.'" *Ante*, at 12. Of course, given that we are told neither what the appropriate standard should be when the Government is acting as regulator nor what the appropriate standard should be when it is acting as proprietor, it is not clear *what* effect this fact has on the analysis; but at least we know that it is *something*.
- History and tradition have some role to play, *ante*, at 13–14, but how much is uncertain. The Court points out that the Federal Government has been conducting investigations of candidates for employment since the earliest days; but on the other hand it acknowledges that extension of those investigations to employees of contractors is of very recent vintage.
- The contract employees are doing important work. They are not mere janitors and maintenance men; they are working on a $568 million observatory. *Ante*, at 15. Can it possibly be that the outcome of today's case would be different for background checks of lower-level employees? In the spirit of minimalism we are never told.
- Questions about drug treatment are (hypothetically) constitutional because they are "reasonable," "useful," and "humane." *Ante*, at 16–17 (internal quotation marks omitted). And questions to third parties are constitutional because they are "appropriate" and "pervasiv[e]." *Ante*, at 18–19. Any or all of these adjectives may be the hypothetical standard by which violation of the hypothetical constitutional right to "informational privacy" is evaluated.

- The Court notes that a "'statutory or regulatory duty to avoid unwarranted disclosures' *generally* allays these privacy concerns," *ante*, at 20 (emphasis added), but it gives no indication of what the exceptions to this general rule might be. It then discusses the provisions of the Privacy Act in detail, placing considerable emphasis on the limitations imposed by NASA's routine-use regulations. *Ante*, at 21–23. From the length of the discussion, I would bet that the Privacy Act is necessary to today's holding, but how much of it is necessary is a mystery.

4. It will dramatically increase the number of lawsuits claiming violations of the right to informational privacy. Rare will be the claim that is supported by none of the factors deemed relevant in today's opinion. Moreover, the utter silliness of respondents' position in this case leaves plenty of room for the possible success of future claims that are meritless, but slightly less absurd. Respondents claim that *even though* they are Government contractor employees, and *even though* they are working with highly expensive scientific equipment, and *even though* the Government is seeking only information about drug treatment and information from third parties that is standard in background checks, and *even though* the Government is liable for damages if that information is ever revealed, and *even though* NASA's Privacy Act regulations are very protective of private information, NASA's background checks are unconstitutional. Ridiculous. In carefully citing *all* of these factors as the basis for its decision, the Court makes the distinguishing of this case simple as pie.

In future cases filed under 42 U. S. C. §1983 in those circuits that recognize (rather than merely hypothesize) a constitutional right to "informational privacy," lawyers will always (and I mean *always*) find some way around today's opinion: perhaps the plaintiff will be a receptionist

or a janitor, or the protections against disclosure will be less robust. And oh yes, the fact that a losing defendant will be liable not only for damages but also for attorney's fees under §1988 will greatly encourage lawyers to sue, and defendants—for whom no safe harbor can be found in the many words of today's opinion—to settle. This plaintiff's claim has failed today, but the Court makes a generous gift to the plaintiff's bar.

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Because I deem it the "duty of the judicial department to say what the law is," *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803), I concur only in the judgment.