

A FUNDAMENTAL RIGHT TO READ: READER PRIVACY PROTECTIONS IN THE U.S. CONSTITUTION

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Bookstore customers and library patrons typically expect their book purchases and book-borrowing habits to remain private, but what is the legal basis for this expectation and is it justified?

This Comment examines court decisions, readers' privacy scholarship, and First Amendment jurisprudence in search of a consistent answer. Although courts and scholars have taken different approaches in identifying a right to readers' privacy and what activity it encompasses, this Comment concludes that a right to reader privacy is fundamental under the First Amendment.

In the end, this Comment seeks to provide a simplified solution to the complex constitutional issues that can arise in light of the question posed above.

INTRODUCTION

Several years ago I was looking for a job out of college. Like many freshly graduated twenty-two-year-olds who had grown to love books in their four years of school, I decided to get a job at a bookstore, and I found myself working as a new bookseller at the Tattered Cover in Denver, Colorado. After spending a few days learning the archaic computer system and studying the maze-like layout of the store, Joyce Meskis, the owner, gathered the new employees to discuss a topic that was very important to her: reader privacy. Booksellers, she told us, have a special responsibility to protect the privacy of the book-buying public's reading choices. She explained that customers should feel comfortable purchasing whatever reading materials

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they want without fear that store employees will judge their choices as controversial or odd.

The Tattered Cover had several rules in place to protect customer privacy. One rule was particularly dramatic: never divulge a customer's book purchase records to anyone, including law enforcement officials with search warrants. Other rules were subtler: never comment on a customer's book purchase when completing a sale, for fear that such comments could stifle a customer's reading habits simply by making the customer aware that another person was privy to information that was possibly personal or embarrassing. Even positive comments were forbidden. After all, letting a customer know how much I enjoyed the novel placed conspicuously on top of her stack of books would soon turn awkward if the book underneath the novel was *A Parent's Guide for Suicidal and Depressed Teens*.¹

Of course, books *do* say quite a bit about their readers. Common sense suggests that a person who buys *A Parent's Guide for Suicidal and Depressed Teens* probably is the concerned parent of an emotionally troubled teenager. But people read books for an infinite variety of reasons, and drawing generalized conclusions from another's reading choices wrongly assumes that the most obvious reason is always the correct one. Granted, this problem does not seem as pressing when the person making the assumption is just some nosy stranger sitting next to you on the bus. However, when law enforcement officials are the ones drawing these potentially incorrect and damaging conclusions, the need for scrupulous protection of readers' privacy becomes more obvious, especially in an age where law enforcement officials have expanded powers to search and seize expressive materials.²

Reader privacy is an area of law on which there is little consensus. There seems to be universal agreement that there is some right to reader privacy,³ but courts have taken differ-

1. KATE WILLIAMS, *A PARENT'S GUIDE FOR SUICIDAL AND DEPRESSED TEENS: HELP FOR RECOGNIZING IF A CHILD IS IN CRISIS AND WHAT TO DO ABOUT IT* (1995).

2. See USA PATRIOT Act, Pub. L. No. 107-56, § 215(a)(1), 115 Stat. 272 (2001) (codified at 50 U.S.C. § 1861 (2006)) (allowing federal law enforcement officials to search and seize "any tangible things (including books, records, papers, documents, and other items) . . ."); *Patriot Act Elements Extended*, N.Y. TIMES, Feb. 24, 2010, available at http://www.nytimes.com/2010/02/25/us/politics/25brfs-PATRIOTACTEL_BRF.html (last visited Oct. 27, 2010).

3. See *Tattered Cover, Inc. v. City of Thornton*, 44 P.3d 1044, 1053 (Colo. 2002) ("[T]he First Amendment embraces the individual's right to purchase and

ent approaches to identifying the right, leading to different conceptions of exactly what the right is and what behavior it protects.⁴ Part I of this Comment examines a landmark Colorado case, *Tattered Cover, Inc. v. City of Thornton*.⁵ *Tattered Cover* illustrates the complex constitutional issues that can arise when First Amendment rights of free expression collide with Fourth Amendment privacy concerns in the context of searching and seizing expressive materials. Part II discusses the constitutional right to information privacy and how this concept could be expanded to encompass a more liberal understanding of reader privacy. Part III argues that both the *Tattered Cover* and information privacy approaches can be used to support a more general fundamental right to read. Recognizing this right would simplify a complex area of constitutional law and ensure that individuals will not be discouraged from taking important intellectual journeys that may be controversial, odd, or unpopular.

I. *TATTERED COVER, INC. V. CITY OF THORNTON*

On April 5, 2000, six police officers entered the Tattered Cover Bookstore in downtown Denver with a search warrant for a particular customer's book-purchase records.⁶ The store's owner, Joyce Meskis, refused to hand over the records because she was concerned that complying with the warrant would violate the customer's First Amendment and privacy rights.⁷ In a later interview, Meskis explained, "I know a challenge to the First Amendment when I see one, and I am not going to stand aside and let it happen."⁸

read whatever books she wishes to, without fear that the government will take steps to discover which books she buys, reads, or intends to read."); PAUL BLANSHARD, *THE RIGHT TO READ: THE BATTLE AGAINST CENSORSHIP* 3 (1955) (stating that "[t]he right to read is so well established in our nation that most Americans take it for granted" and that "[Americans] assume that every adult should have freedom of choice to read whatever he wants to read, whenever he wants to read it."). See generally *How Section 215 Threatens Reader Privacy*, CAMPAIGN FOR READER PRIVACY, <http://www.readerprivacy.org/info.jsp?id=2> (last visited Aug. 31, 2010).

4. See *infra* Parts I, II.

5. 44 P.3d 1044.

6. *Id.* at 1049–50.

7. *Id.*

8. Christopher Finan, *Joyce Meskis: Pushing Books and Free Speech*, HUM. RTS., Fall 2000, at 10, 11, available at <http://www.abanet.org/irr/hr/fall00/finan.html> (last visited Oct. 27, 2010).

As part of an ongoing drug investigation, the North Metro Task Force and a federal Drug Enforcement Administration agent were monitoring a trailer home in Adams County, Colorado, where they suspected someone was producing methamphetamine.⁹ Officer Randy Goin, the lead investigator in the case, obtained a search warrant for the trailer.¹⁰ Inside, he found a meth lab in the trailer's master bedroom, along with a small quantity of methamphetamine.¹¹ Because of the lab's location, the investigation centered on which suspect or suspects (there were four in all) had occupied the master bedroom.¹² Officer Goin seized two books with incriminating titles—*Advanced Techniques of Clandestine Psychedelic and Amphetamine Manufacture* and *The Construction and Operation of Clandestine Drug Laboratories*¹³—from the master bedroom, as well a Tattered Cover mailer that he suspected was used to deliver the books.¹⁴ Officer Goin hoped to connect the books to the bookstore's purchase records and confirm which suspect actually occupied the master bedroom and ran the lab.¹⁵

The Colorado Supreme Court concluded that the First Amendment interests at stake outweighed law enforcement's interest in effecting the search warrant.¹⁶ This Part begins with an explanation of the *Tattered Cover* balancing test. Next, this Part discusses the court's emphasis on the Colorado Constitution's free expression guarantees in developing its test.

A. *The Tattered Cover Balancing Test*

In holding that *Tattered Cover* did not have to turn over the customer's book records, the court first explained that its decision vindicated both the rights of the bookstore and of the book-buying public in general.¹⁷ Then, the court noted its reasoning was grounded in both the First Amendment of the Unit-

9. *Tattered Cover*, 44 P.3d at 1048.

10. *Id.*

11. *Id.*

12. *Id.*

13. UNCLE FESTER, *ADVANCED TECHNIQUES OF CLANDESTINE PSYCHEDELIC & AMPHETAMINE MANUFACTURE* (1998); JACK B. NIMBLE, *THE CONSTRUCTION AND OPERATION OF CLANDESTINE DRUG LABORATORIES* (2d ed. 1994).

14. *Tattered Cover*, 44 P.3d at 1048–49.

15. *Id.* at 1049.

16. *Id.* at 1063.

17. *Id.* (“[W]e must consider not only the effect that our decision has on the expressive rights of the actual party to this case, the *Tattered Cover*, but to members of the general public as well.”).

ed States Constitution as well as Article II, Section 10 of the Colorado Constitution,¹⁸ both of which “safeguard the right of the public to buy and read books anonymously, free from governmental intrusion.”¹⁹

The court reasoned that this “freedom of speech” protects more than simply the right to speak freely, but includes protections for a wide spectrum of activities, including the right to receive information and ideas.²⁰ The court stated that “[w]hen a person buys a book at a bookstore, he engages in activity protected by the First Amendment because he is exercising his right to read and receive ideas and information.”²¹ Otherwise, the right to free expression would be meaningless if the right to receive the thoughts that someone else was free to express was not similarly protected.²² But the court went further, expressing the right in more affirmative terms: “Everyone must be permitted to discover and consider the full range of expression and ideas available in our ‘marketplace of ideas.’”²³ Additionally, fearful that any governmental inquiry into the book-

18. The two relevant provisions of the federal Constitution and the Colorado Constitution are worded differently, but express similar principles. *Compare* U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech . . .”), *with* COLO. CONST. art. II, § 10 (“No law shall be passed impairing the freedom of speech; every person shall be free to speak, write or publish whatever he will on any subject, being responsible for all abuse of that liberty; and in all suits and prosecutions for libel the truth thereof may be given in evidence, and the jury, under the direction of the court, shall determine the law and the fact.”).

19. *Tattered Cover*, 44 P.3d at 1051. The court’s reliance on the First Amendment instead of the Fourth Amendment has generated some criticism. *See* Jared N. Klein, Note, *The Right to Privacy in What You Read: The Fourth Amendment Implications of a Book Store Search*, 13 TEMP. POL. & CIV. RTS. L. REV. 361, 375 (2003) (arguing that a customer had no legitimate expectation of privacy under Fourth Amendment because the book was purchased solely “to educate the reader on the aspects of an illegal operation.”). The problem with Klein’s approach is that it invites law enforcement officials and courts to make value judgments about the substantive content of books themselves—a purely subjective endeavor dependent on the peculiarities of each individual decision-maker.

20. *Tattered Cover*, 44 P.3d at 1051 n.11 (citing *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 64–65 n.6 (1963) (“The constitutional guarantee of freedom of the press embraces the circulation of books as well as their publication.”); *Smith v. California*, 361 U.S. 147, 150 (1959) (“stating that ‘the free publication and dissemination of books and other forms of the printed word furnish very familiar applications’ of the First Amendment”); *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943) (“[The First Amendment] has broad scope This freedom embraces the right to distribute literature . . . and necessarily protects the right to receive it.”)); *see also infra* Part III.A.

21. *Tattered Cover*, 44 P.3d at 1052.

22. *Id.*

23. *See id.* (quoting *Lamont v. Postmaster Gen.*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring)).

buying habits of the public would “almost certainly chill their constitutionally protected rights,” the court emphasized the importance of anonymity.²⁴ To overcome the potential “chilling effects” that could arise from this loss of anonymity and to ensure that the government action at issue was sufficiently compelling to abrogate what it called a “fundamental Constitutional right,” the court announced a balancing test.²⁵

The *Tattered Cover* court’s balancing test has two prongs. First, there must be a compelling need for the information sought.²⁶ In determining whether this standard is met, courts may consider various factors, including whether there are reasonable alternative means of obtaining the information.²⁷ Second, the court must balance the law enforcement officials’ need for the bookstore records against the harms caused to constitutional interests.²⁸ To do this, a court may look to the law enforcement officials’ reasons for wanting the book records. If the law enforcement officials’ reasons are “unrelated” to the content of the book, then the harm would likely be minimal and a warrant would be approved.²⁹ Thus, the balancing test properly focuses the inquiry on the rights to free expression at stake, but the rights at stake are those guaranteed by the Colorado Constitution, not necessarily the U.S. Constitution.³⁰

B. *Tattered Cover and the Colorado Constitution*

At the outset, it is important to recognize that the *Tattered Cover* court grounded its holding in the Colorado Constitution and not the United States Constitution.³¹ The court stated

24. *Id.* at 1053; *see also* *United States v. Rumely*, 345 U.S. 41, 58 (1953) (Douglas, J., concurring) (“[F]ear will take the place of freedom in the libraries, book stores, and homes of the land. Through the harassment of hearings, investigations, reports, and subpoenas government will hold a club over speech and over the press.”). One commentator has argued that if citizens enjoy pure anonymity, crime, rudeness, and a general breakdown of accountability may be the price that society pays. *See* DAVID BRIN, *THE TRANSPARENT SOCIETY: WILL TECHNOLOGY FORCE US TO CHOOSE BETWEEN PRIVACY AND FREEDOM?* 245 (1998).

25. *Tattered Cover*, 44 P.3d at 1051.

26. *Id.* at 1057.

27. *Id.* at 1059.

28. *Id.*

29. *Id.*

30. *Id.* at 1054.

31. *Id.* (“[B]ecause our state constitution provides more expansive protection of speech rights than provided by the First Amendment, it follows that the right to purchase books anonymously is afforded even greater respect under our Colorado Constitution than under the United States Constitution.”).

that Colorado's free expression protections were broader than those provided by the federal Constitution, reasoning that Colorado's affirmative grant of free expression rights provide more protection than the United States Constitution's negative grant of First Amendment rights.³² Therefore, under federal law, reader privacy protections are less robust than those in Colorado.

For example, in *Zurcher v. Stanford Daily*, the United States Supreme Court made clear that when expressive rights are implicated, a search warrant must comply with the particularity requirements of the Fourth Amendment with "scrupulous exactitude."³³ In *Zurcher*, law enforcement officials sought photographic evidence from a student newspaper pursuant to a search warrant that would help them identify demonstrators who had assaulted police officers during a political rally.³⁴ The newspaper challenged the warrant on First and Fourth Amendment grounds, arguing that police should be required to use a subpoena *duces tecum*—a subpoena to produce tangible evidence itself stated with sufficient particularity—instead of a generalized search warrant because of the important First Amendment interests at stake.³⁵ In rejecting this argument, the Supreme Court implied that First Amendment concerns can never entirely preclude the execution of a search warrant that complies with the Fourth Amendment. Specifically, the Court stated, "Properly administered, the preconditions for a warrant—probable cause, specificity with respect to the place to be searched and the things to be seized, and overall reasonableness—should afford sufficient protection against the harms that are assertedly threatened by warrants for searching newspaper offices."³⁶

The *Tattered Cover* court was concerned that beyond the "scrupulous exactitude" requirement the First Amendment to the United States Constitution "places no special limitation on the ability of the government to seize expressive materials un-

32. See *Bock v. Westminster Mall Co.*, 819 P.2d 55, 59 (Colo. 1991) ("[T]he second clause of Article II, Section 10 of [Colorado's] constitution . . . is an affirmative acknowledgement of the liberty of speech, and therefore of greater scope than that guaranteed by the First Amendment."); *Tattered Cover*, 44 P.3d at 1054 (citing U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . .")) (emphasis added).

33. 436 U.S. 547, 564 (1978).

34. *Id.* at 551.

35. *Id.* at 563.

36. *Id.* at 565.

der the Fourth Amendment.”³⁷ Although the court recognized that the Fourth Amendment provides significant privacy protections, it also noted that “there are occasionally situations where the Fourth Amendment simply does not go far enough.”³⁸ Moreover, in the context of seizing book purchase records from a bookstore, the requirement that the search warrant in question describe the expressive material to be seized with “scrupulous exactitude” can almost always be met, provided there is probable cause and the warrant describes the book specifically.³⁹

Under this approach, law enforcement officials could enter a bookstore with a warrant authorizing them to search and seize any book-purchase records relating to *The Anarchist Cookbook*.⁴⁰ In this example, assuming probable cause had been established, the book is certainly described with “scrupulous exactitude” because the seizure is limited to those records involving sales of a specific book and would allow law enforcement officials to seize any records of any person who purchased this specific book.⁴¹ Thus, so long as this test is met, federal law permits expressive materials to be seized without any further First Amendment limitations regardless of the substantial chilling effects to free expression that might result.⁴²

II. THE CONSTITUTIONAL RIGHT TO INFORMATION PRIVACY

Under the *Tattered Cover* approach, courts must balance a person’s First Amendment right to free expression with law enforcement’s interest in obtaining information. Although *Tattered Cover*’s balancing test provides readers with heightened privacy protection, it has limited applicability under federal law or outside Colorado.⁴³ But there is another line of constitutional jurisprudence from which a right to read can be inferred: the constitutional right to information privacy found in the due

37. *Tattered Cover*, 44 P.3d at 1055.

38. *Id.*

39. *Id.*

40. WILLIAM POWELL, *THE ANARCHIST COOKBOOK* (1971). The book contains, among other things, detailed instructions on how to manufacture different types of explosives.

41. *See Tattered Cover*, 44 P.3d at 1055.

42. *Id.*

43. *Id.* at 1054.

process clauses of the Fifth and Fourteenth Amendments.⁴⁴ This Part divides discussion of this right's applicability into two sections. The first section explains the Supreme Court decisions announcing the constitutional right to information privacy. The second section discusses the possibility of using the information privacy approach in the reader privacy context and the potential problems that are likely to result.

A. *The Supreme Court Framework*

The constitutional right to information privacy was announced in the Supreme Court's 1977 decision *Whalen v. Roe*.⁴⁵ *Whalen* involved a challenge to a New York statute that required the retention of all prescription drug records for dangerous drugs with legitimate medical purposes, such as opium and amphetamines, by the state Department of Health.⁴⁶ Before ultimately upholding the statute's constitutionality, the Court discussed the constitutional right of privacy in general: "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."⁴⁷

The Court's statement about the two types of constitutional privacy protections "split the constitutional jurisprudence on privacy law into two spheres."⁴⁸ decisional privacy, recognized

44. For an excellent and well-written argument that the doctrine of constitutional information privacy could be used to challenge Section 215 of the USA PATRIOT Act, see Michael J. O'Donnell, *Reading for Terrorism: Section 215 of the USA Patriot Act and the Constitutional Right to Information Privacy*, 31 J. LEGIS. 45 (2004). Indeed, much of this Comment's information privacy section is drawn in part from Mr. O'Donnell's article.

45. 429 U.S. 589, 605–06 (1977); O'Donnell, *supra* note 44, at 48. One commentator has questioned whether there is a constitutional right to information privacy at all. See Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 STAN. L. REV. 1193, 1230 n.157 (1998) (noting that "[a] right to information privacy has not been clearly established as a matter of federal constitutional law" and that *Whalen* is "[t]he closest the Court has come to finding such a right"). Further, the Sixth Circuit has seemingly disavowed the existence of such a right. *J.P. v. DeSanti*, 653 F.2d 1080, 1090 (6th Cir. 1981) ("[T]he Constitution does not encompass a general right to nondisclosure of private information.").

46. 429 U.S. at 592–93.

47. *Id.* at 598.

48. O'Donnell, *supra* note 44, at 49; accord *Cantu v. Rocha*, 77 F.3d 795, 806 (5th Cir. 1996) ("The right to privacy consists of two inter-related strands . . ."); Elbert Lin, Comment, *Prioritizing Privacy: A Constitutional Response to the In-*

in *Griswold v. Connecticut*,⁴⁹ and informational privacy, recognized in *Whalen*.⁵⁰ Thus, the *Griswold* privacy interest encompasses a right to make decisions regarding “matters relating to marriage, procreation, contraception, family relationships, and child rearing and education,”⁵¹ and the *Whalen* privacy interest can be defined as “the right not to have an individual’s private affairs made public by the government.”⁵² Although the *Whalen* Court found that the statute threatened to impair the plaintiffs’ interests in the “nondisclosure of private information” and could discourage certain persons from getting the medications they needed because of fear that private information could be disseminated to the public, the Court upheld the statute largely because of security measures in place to prevent public disclosure.⁵³

The Supreme Court next took up the issue of information privacy when it decided *Nixon v. Administrator of General Services*.⁵⁴ *Nixon* involved a federal statute that allowed archivists to seize and screen President Nixon’s presidential papers for permanent archival purposes.⁵⁵ Although the great bulk of the papers related to President Nixon’s official duties as president—and were thus presumptively public and less worthy of privacy protection—President Nixon alleged that the papers also included “extremely private communications” with his family, his lawyers, and his clergyman.⁵⁶

The Supreme Court upheld the law but in doing so implicitly recognized the right to information privacy it had announced in *Whalen*: “the privacy interest asserted by [Nixon] is weaker than that found wanting in the recent decision of *Whalen v. Roe*”⁵⁷ Moreover, the Court explicitly confirmed that the right to information privacy exists even for persons who lead highly public lives, stating that “[the Court] may agree with [Nixon] that . . . public officials . . . are not wholly without

ternet, 17 BERKELEY TECH. L.J. 1085, 1094 (2002) (noting that *Whalen* separated the constitutional right to privacy “into at least two interests”).

49. 381 U.S. 479 (1965) (recognizing “right to marital privacy” to invalidate statute prohibiting use of contraceptives).

50. O’Donnell, *supra* note 44, at 49.

51. Paul v. Davis, 424 U.S. 693, 713 (1976).

52. United States v. Westinghouse Elec. Corp., 638 F.2d 570, 577 (3d Cir. 1980).

53. *Whalen v. Roe*, 429 U.S. 589, 600–03 (1977).

54. 433 U.S. 425 (1977).

55. *Id.* at 429.

56. *Id.* at 459.

57. *Id.* at 458.

constitutionally protected privacy rights in matters of personal life unrelated to any acts done by them in their public capacity.”⁵⁸ Some courts have viewed this passage as the most authoritative statement recognizing a right to information privacy.⁵⁹ However, whether this right extends to book records requires a discussion of what types of information typically receive constitutional protection.

B. Does the Right to Information Privacy Extend to Book Records?

The Supreme Court decisions recognizing a right to information privacy provide little guidance because of the minimal amount of reasoning contained within them. Thus, lower courts have developed this strand of Supreme Court jurisprudence and in some cases have greatly expanded upon it.⁶⁰ For book-buying and library-borrowing records to fit into the doctrinal framework of information privacy, it is important to first address what types of information the constitutional right to information privacy usually protects. Typically, cases upholding a right to information privacy examine the nature of the information sought and must, as a threshold matter, decide whether the information is truly “private.”⁶¹ Although courts often treat this inquiry perfunctorily by summarily asserting the private nature of certain types of information without much

58. *Id.* at 457.

59. See *Kimberlin v. U.S. Dep’t of Justice*, 788 F.2d 434, 438 (7th Cir. 1986) (stating flatly that the Supreme Court in *Whalen* recognized a constitutional interest in avoiding disclosure of personal matters); *Plante v. Gonzalez*, 575 F.2d 1119, 1134 (5th Cir. 1978) (“The Supreme Court has clearly recognized that the privacy of one’s personal affairs is protected by the Constitution.”); see also *O’Donnell*, *supra* note 44, at 49 n.35 (referring to *Plante* decision as “particularly generous reading” of *Nixon*).

60. See, e.g., *Martinelli v. Denver Dist. Court*, 612 P.2d 1083, 1091 (Colo. 1980) (stating that a court must undertake “tripartite balancing inquiry” when the right to information privacy is invoked). For an argument that the *Whalen* and *Nixon* decisions can be properly interpreted as leaving to the lower federal and state courts the responsibility to more fully develop information privacy law, see DANIEL J. SOLOVE & MARC ROTENBERG, *INFORMATION PRIVACY LAW* 189 (2003). See also *Anderson v. Romero*, 72 F.3d 518, 522 (7th Cir. 1995) (stating that the *Whalen* Court’s announcement of constitutional right to information privacy was “very vague . . . perhaps deliberately so”) (emphasis added).

61. See, e.g., *Nilson v. Layton City*, 45 F.3d 369, 372 (10th Cir. 1995) (noting that for information to receive constitutional protection it must be “highly personal or intimate”); *Mangels v. Pena*, 789 F.2d 836, 839 (10th Cir. 1986) (stating that determining whether information is private for constitutional purposes depends on information’s “intimate or otherwise personal nature”).

analysis,⁶² three basic categories of protected information have emerged.

First, private medical records have typically received strong protection.⁶³ Second, private financial records have also typically received protection.⁶⁴ Third, some cases suggest that a right to information privacy is stronger when a decisional privacy interest under the *Griswold* line of cases is also implicated by the information sought.⁶⁵ Although an informational privacy right relating to book-buying and library-borrowing records has not been explicitly recognized,⁶⁶ there are persuasive reasons why book records deserve the same protection that medical and financial records typically receive.

The information sought must be “highly personal or intimate” to be under the umbrella of constitutional protection.⁶⁷ In determining whether information is private for constitutional purposes, courts must consider two factors: (1) whether an individual has a legitimate expectation of privacy in certain information, and (2) the type of information involved.⁶⁸

62. See, e.g., *Anderson v. Blake*, 469 F.3d 910, 914 (10th Cir. 2006) (holding woman possessed constitutional right to information privacy in video depicting her rape because video “depicts the most private of matters”); *Denius v. Dunlap*, 209 F.3d 944, 956 (7th Cir. 2000) (“In this Circuit, the right [of information privacy] clearly covers medical records and communications.”).

63. See, e.g., *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 577 (3d Cir. 1980) (“There can be no question that an employee’s medical records, which may contain *intimate facts of a personal nature*, are well within the ambit of materials entitled to privacy protection.”) (emphasis added).

64. See, e.g., *Plante*, 575 F.2d at 1136 (determining that a constitutional right to information privacy covers financial information); *Denius*, 209 F.3d at 958 (stating that some types of financial information are entitled to protection under federal constitutional right to information privacy).

65. See, e.g., *Bloch v. Ribar*, 156 F.3d 673, 684 (6th Cir. 1998) (holding the constitutional right to non-disclosure of certain information requires showing that interest at stake implicates “a fundamental right or [a right] implicit in the concept of ordered liberty”).

66. See O’Donnell, *supra* note 44, at 52.

67. *Nilson v. Layton City*, 45 F.3d 369, 372 (10th Cir. 1995). Other courts have expressed the “highly personal or intimate” concept in similar ways. See *Nunez v. Pachman*, 578 F.3d 228, 232 (3d Cir. 2009) (stating that right to information privacy extends to “highly personal” information); *Denius*, 209 F.3d at 957 (stating that medical information may be protected by Constitution because of its “intimate and personal nature”).

68. See *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 465 (1977); *Denius*, 209 F.3d at 957 (“The Supreme Court has discussed the existence and extent of constitutional protection for confidential information in terms of the type of information involved and the reasonable expectation that that information would remain confidential.”) (citing *Nixon*, 433 U.S. at 465).

1. A Legitimate Expectation of Privacy

Book-buying and library-borrowing records deserve constitutional protection if there is a legitimate expectation that the information will remain confidential while in the state's possession.⁶⁹ An individual's expectation of privacy is legitimate if established social norms safeguard a particular type of information from being made public.⁷⁰ Case law, readers' privacy statutes, and the feelings of society-at-large may point to whether these established social norms exist.⁷¹

The strong language in *Tattered Cover* demonstrates that at least one court seriously considers an individual's reading habits to be private: "[the state constitution] protect[s] an individual's *fundamental right* to purchase books anonymously, free from governmental interference."⁷² Similarly, in *In re Grand Jury Subpoena to Kramerbooks & Afterwords, Inc.*, the U.S. District Court for the District of Columbia held that the government must meet strict scrutiny when defending subpoenas to a bookstore for customers' book-purchase records.⁷³ At issue was Independent Prosecutor Kenneth Starr's attempt to obtain Monica Lewinsky's book-purchase records.⁷⁴ Specifically, Starr wanted to know whether Lewinsky had purchased

69. See *Mangels v. Pena*, 789 F.2d 836, 839 (10th Cir. 1986).

70. *Hill v. Nat'l Collegiate Athletic Ass'n*, 865 P.2d 633, 655 (Cal. 1994) (noting that a "reasonable" expectation of privacy is founded on "broadly based and widely accepted community norms"). Although the *Hill* court analyzed a state constitutional provision guaranteeing individuals a right to privacy, the court discussed information privacy law in substantially the same terms as federal courts do when construing *Whalen*. See also *Smith v. Maryland*, 442 U.S. 735, 740 (1979) (stating that an individual's expectation of privacy in the Fourth Amendment context is reasonable if society is prepared to recognize it as such) (citing *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)); *Nixon*, 433 U.S. at 457–58 (discussing Nixon's right to information privacy under *Whalen* and citing *Katz* when stating Nixon had a legitimate expectation of privacy in certain information).

71. *Flanagan v. Munger*, 890 F.2d 1557, 1571 (10th Cir. 1989) (discussing prior cases, the existence of privacy statutes, and "deeply rooted notions" of personal interests protected by the Constitution to determine whether expectation of privacy was legitimate) (citing *Mangels*, 789 F.2d at 839); *Hill*, 865 P.2d at 654–55 (noting that established social norms can be determined by looking at, among other things, case law, statutes, and the "habits of . . . neighbors and fellow citizens") (quoting RESTATEMENT (SECOND) OF TORTS § 652D, cmt. c (1977)); see also O'Donnell, *supra* note 44, at 52–58 (discussing case law, privacy statutes, and society's feeling-at-large).

72. See *Tattered Cover, Inc. v. City of Thornton*, 44 P.3d 1044, 1047 (Colo. 2002) (emphasis added).

73. 26 Media L. Rep. (BNA) 1599, 1601 (D.D.C. 1998).

74. *Id.* at 1599.

Vox,⁷⁵ a novel by Nicholson Baker that chronicles an intimate and graphically sexual telephone conversation.⁷⁶ In holding that the government would have to overcome strict scrutiny, the court stated that “[t]he bookstores and Ms. Lewinsky have persuasively alleged a chilling effect on their First Amendment rights.”⁷⁷ From these two cases, one commentator has inferred that courts as a whole likely “will strongly protect the privacy of individuals who do not wish their book purchases” or library-borrowing records to be made public.⁷⁸

In a more recent case involving a popular online book purveyor, a court refused to uphold a subpoena that would have required Amazon.com to turn over the names of many of the customers who had purchased books through its website from a prolific seller of used books.⁷⁹ Specifically, the subpoena directed Amazon.com to produce the identities of 120 customers who had bought used books from a person suspected of evading his taxes.⁸⁰ The court allowed the government to access book records of only those customers who affirmatively and voluntarily chose to provide their book-buying information. The court stressed that doing otherwise would likely cause countless customers to abandon online book buying, as book-buyers would have a non-speculative and rational basis to fear ending up on some sort of politically motivated “enemies list.”⁸¹ *Amazon.com* suggests that the *Tattered Cover* and *Kramerbooks* courts’ reasoning applies with equal force to books purchased over the Internet.

Moreover, congressional action to protect readers’ privacy reflects strong support for protecting the privacy of an individual’s reading choices.⁸² For instance, the Freedom to Read Protection Act was introduced to address readers’ privacy concerns in the wake of Patriot Act legislation.⁸³ Additionally, the Library, Bookseller, and Personal Records Privacy Act was introduced to “protect privacy by limiting the access of the Government to library, bookseller, and other personal records for

75. NICHOLSON BAKER, *VOX* (1992).

76. *Id.*; O’Donnell, *supra* note 44, at 54 n.80.

77. *Kramerbooks*, 26 Media L. Rep. (BNA) at 1600.

78. O’Donnell, *supra* note 44, at 55.

79. *In re Grand Jury Subpoena to Amazon.com Dated August 7, 2006*, 246 F.R.D. 570, 573 (W.D. Wis. 2007).

80. *Id.* at 571.

81. *Id.* at 573.

82. O’Donnell, *supra* note 44, at 55.

83. Freedom to Read Protection Act of 2003, H.R. 1157, 108th Cong. (2003).

foreign intelligence and counterintelligence purposes.”⁸⁴ Although the existence of privacy legislation does not necessarily mean that the information warrants constitutional protection,⁸⁵ the presence of privacy statutes suggests that strong support exists for characterizing book-buying and library-borrowing records as private.⁸⁶

Further, readers’ privacy issues are generally important to the book-conscious members of society. For example, impassioned grassroots movements by the country’s booksellers and librarians to protect reader privacy have sprung, in large part, from fear over law enforcement’s increased powers to collect book-buying and library-borrowing information.⁸⁷ More fundamentally, a commonly shared notion seemingly exists among Americans that “living in the land of the free means that it’s none of the government’s business what books people are reading.”⁸⁸

2. The “Type” of Information at Issue

Even if a person purchasing or borrowing a book has a reasonable expectation that that information will remain private, case law demonstrates that only certain types of information are truly “private” for constitutional purposes.⁸⁹ As discussed above, courts generally find three types of information inherently “private” for constitutional purposes: (1) medical records; (2) financial records; and (3) information that if publicly disclosed would implicate or affect the exercise of some decisional privacy right under *Griswold*.⁹⁰ Obviously, book-buying or book-borrowing records are not medical or financial records. However, there is a credible argument that information regard-

84. Library, Bookseller, and Personal Records Privacy Act, S. 1507, 108th Cong. (2003).

85. See *Flanagan v. Munger*, 890 F.2d 1557, 1571 (10th Cir. 1989) (“The presence of privacy statutes and regulations may inform our judgment concerning the scope of the constitutional right to privacy. However, such local acts, standing alone, fall far short of the kind of proof necessary to establish a broadly recognized, reasonable expectation of privacy which has been identified by precedent.”).

86. O’Donnell, *supra* note 44, at 55.

87. *Id.* at 56. See also CAMPAIGN FOR READER PRIVACY, <http://www.readerprivacy.org/index.jsp> (last visited Sept. 14, 2010).

88. See *In re Grand Jury Subpoena to Amazon.com Dated August 7, 2006*, 246 F.R.D. 570, 573 n.1 (W.D. Wis. 2007).

89. See, e.g., *Denius v. Dunlap*, 209 F.3d 944, 955–56 (7th Cir. 2000) (discussing, and ultimately concluding, that the right to confidentiality does not cover *all* confidential information but only information relating to “certain matters”).

90. See *supra* Part II.B.

ing an individual's book purchasing or borrowing history implicates a decisional privacy right.

In *Denius v. Dunlap*, the Seventh Circuit concluded that financial information implicated a Whalen privacy right because "confidential financial information may implicate substantial privacy concerns and impact *other fundamental rights*."⁹¹ An individual who buys or borrows a book about abortion, for instance, may think twice about purchasing or borrowing the book if that information might be collected and potentially disclosed to the public.⁹² Thus, because the information may be publicly disclosed, the lack of privacy protections may chill a person's fundamental right to make decisions about abortion.⁹³

At first glance, the *Griswold* decisional privacy argument seems to require that the topic of the book at issue be somehow specifically related to a *Griswold* privacy interest—such as the right to make reproductive choices—for the information to be considered private. Obviously, it would be logistically impossible for individuals, libraries, booksellers, law enforcement officials, and the courts to make this determination.⁹⁴ However, if collection and public distribution of bookstore records may chill the exercise of a person's First Amendment right to free expression, then bookstore and library records necessarily implicate a *Whalen* information privacy interest because the fundamental right to free expression is always lurking in the background. In fact, the *Tattered Cover* court grounded its holding in this very notion: because law enforcement's collection of booksellers' records may chill an individual's First Amendment right to free expression, the bookseller's records

91. 209 F.3d at 958 (emphasis added).

92. See, e.g., *Gruenke v. Seip*, 225 F.3d 290, 303 (3d Cir. 2000) (holding that a student's right to information privacy could be violated when a swimming coach demanded that she take a pregnancy test without taking appropriate steps to ensure that the result remained confidential). Although the *Gruenke* court did not use the Seventh Circuit's "other fundamental rights" rule from *Denius*, fear of public disclosure of a pregnancy would likely implicate the student's fundamental right to make decisions involving her pregnancy that was recognized in *Roe v. Wade*, 410 U.S. 113 (1973).

93. See *Wade*, 410 U.S. at 153.

94. Further, the analysis would require a subjective assessment about what a book is "about" and whether it implicates a specific fundamental right. How-to books about "saving" one's marriage would likely get privacy protection (because of the Supreme Court's recognition of a limited fundamental "right to marry" in *Loving v. Virginia*, 388 U.S. 1 (1967)), but would a book critical of or concerned with the marriage relationship, such as John Updike's *Couples* be entitled to similar protection?

were entitled to heightened privacy protection.⁹⁵ Thus, based on an individual's fundamental right to free expression, records kept by booksellers and libraries may implicate a *Whalen* information privacy interest.

Although the *Whalen* approach seems convincing, it has its problems. As one court put it, the *Whalen* right only "prohibits the disclosure of information," not its collection.⁹⁶ Arguably, law enforcement officials would still be free to collect book-buying and library-borrowing records, so long as this information is not publicly disseminated, despite the potential chilling effects on free expression this practice would create.⁹⁷ Further, the *Whalen* information privacy approach is confusing, and courts have difficulty defining any "standard" to apply consistently.⁹⁸ More fundamentally, courts evaluate government disclosure of personal information using balancing tests that are far less demanding than strict scrutiny,⁹⁹ ultimately leaving concerned readers with the same problem: not enough privacy.

III. A FUNDAMENTAL RIGHT TO READ

Readers' privacy is a subject on which there is general consensus that some "right" is at issue, but there is little consensus on "where" or "how" to find or define the scope of the right.¹⁰⁰ Although the *Tattered Cover* balancing approach adopts a standard more akin to strict scrutiny when evaluating seizures of expressive materials,¹⁰¹ its holding is grounded in state law, giving the case limited applicability outside Colorado.¹⁰² Further, relying on the constitutional doctrine of infor-

95. See *Tattered Cover, Inc. v. City of Thornton*, 44 P.3d 1044, 1055–56 (Colo. 2002).

96. *Norris v. Bd. of Educ.*, 797 F. Supp. 1452, 1466 (S.D. Ind. 1992).

97. See O'Donnell, *supra* note 44, at 60–61 (responding to this issue and arguing that the distinction between collection and disclosure is "hazy").

98. See *Norris*, 797 F. Supp. at 1466 (referring to constitutional right of privacy as "elusive and amorphous"); *Hill v. Nat'l Collegiate Athletic Ass'n*, 865 P.2d 633, 651 (Cal. 1994) (noting that federal right of privacy is "without any coherent legal definition or standard").

99. See, e.g., *James v. City of Douglas, Ga.*, 941 F.2d 1539, 1544 (11th Cir. 1991) (noting that government officials cannot disclose constitutionally protected private information unless government "demonstrates a legitimate state interest in disclosure"); see also *Hill*, 865 P.2d at 651 ("[T]he federal courts have generally applied balancing tests that avoid rigid 'compelling interest' or 'strict scrutiny' formulations.").

100. See *supra* Parts I.B, II.B.

101. *Tattered Cover, Inc. v. City of Thornton*, 44 P.3d 1044, 1057 (Colo. 2002).

102. *Id.* at 1054.

mation privacy to find a right to readers' privacy is a difficult task, as it requires squeezing readers' privacy into a framework that has been traditionally used to keep private only limited categories of personal information: those involving medical issues, money, or sex.¹⁰³ Although the decisional privacy law argument is convincing, there is a simpler route to the same result. A right to reader privacy, under which persons may read books free from the possibility of government intervention, should be recognized as a fundamental right in itself.¹⁰⁴

This Part begins with a broad examination of the right to receive information and ideas that the Supreme Court first enunciated in *Martin v. City of Struthers*,¹⁰⁵ and expounded upon in *Board of Education, Island Trees Union Free School District No. 26 v. Pico*, a case in which the Supreme Court invalidated a school board's removal of "objectionable" books from the school library.¹⁰⁶ This Part concludes by arguing that a distinct fundamental right to reader privacy arises from the right to receive information and ideas, whereby any governmental action that may infringe on this right would be subject to strict scrutiny.

A. *The First Amendment and the Right to Receive Ideas*

Although the First Amendment brings to mind the rights of individuals to make their views known to the public,¹⁰⁷ the First Amendment also protects a more solitary activity: the right of individuals to receive information.¹⁰⁸ This aspect of the First Amendment protects those of us who may have no inclination to make our views known to the world, but would rather silently sample the many viewpoints that others make available to us.¹⁰⁹

103. See *Eagle v. Morgan*, 88 F.3d 620, 625 (8th Cir. 1996) (noting that courts are "reluctant to expand" the right to information privacy beyond traditional categories of information considered "extremely personal").

104. See *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943) ("The right of freedom of speech . . . has broad scope. . . . This freedom embraces the right to distribute literature . . . and necessarily protects the right to receive it.").

105. See *Martin*, 319 U.S. at 143.

106. 457 U.S. 853, 863 (1982).

107. See, e.g., *Cohen v. California*, 403 U.S. 15, 26 (1971).

108. See *Stanley*, 394 U.S. at 564.

109. See Marc Jonathan Blitz, *Constitutional Safeguards for Silent Experiments in Living: Libraries, the Right to Read, and a First Amendment Theory for*

The Supreme Court first explicitly recognized the First Amendment right to receive information in *Martin v. City of Struthers*.¹¹⁰ In *Martin*, the Court relied on the right to receive information in striking down a city ordinance making illegal any door-to-door solicitation for handing out pamphlets or leaflets.¹¹¹ The Court recognized that the ordinance was, in effect, substituting the judgment of the community for that of the individual homeowner.¹¹² However, by implicitly recognizing the right to receive information, the Court described the right as stemming necessarily from the right to distribute the literature in the first place.¹¹³

In *Stanley v. Georgia*, the Court expanded the right, stating that the “right to receive information and ideas, regardless of their social worth . . . is *fundamental* to our free society.”¹¹⁴ In *Stanley*, law enforcement officials found three reels of “obscene” eight-millimeter film while searching the apartment of a man suspected of illegal “bookmaking activity.”¹¹⁵ In striking down the obscenity law, the Court recognized the defendant’s “right to read or observe what he pleases—the right to satisfy his intellectual and emotional needs in the privacy of his own home.”¹¹⁶ Read broadly, *Stanley* supports two propositions. First, the Constitution protects an individual’s right to read or observe what he or she pleases, free from governmental intervention. Second, privacy rights are necessarily implicated when expressive materials such as books or films are searched and seized by law enforcement officials.¹¹⁷

Both *Martin* and *Stanley* involved laws that the Supreme Court held violated the First Amendment because those laws interfered with an individual’s “right to read . . . what he pleas-

an Unaccompanied Right to Receive Information, 74 UMKC L. REV. 799, 876 (2006).

110. 319 U.S. at 143.

111. *Id.* at 149.

112. *Id.* at 143–44.

113. *Id.* at 146–47 (“Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that . . . it must be fully preserved.”).

114. 394 U.S. 557, 564 (1969) (emphasis added).

115. *Id.* at 558.

116. *Id.* at 565.

117. *See id.* (“If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men’s minds.”).

es.”¹¹⁸ In *Pico*, the Court’s plurality opinion expanded the scope of that right, applying it in the public school context and to students,¹¹⁹ a group the Court has repeatedly held to possess only limited constitutional rights,¹²⁰ especially in the free speech context.¹²¹

In September 1975, in Long Island, New York, the seven members of the Island Trees School Board attended a conference sponsored by a conservative organization called Parents of New York United (“PONYU”).¹²² There, the board members heard a speech about controlling textbooks and library books in the public schools and obtained a list of books that PONYU decided were inappropriate for high school students.¹²³ After the conference, the board members decided to examine the school’s library to see if any of the objectionable books could be found there.¹²⁴ The Board members entered the school at night to ensure the building was empty so they could search the library freely.¹²⁵ Steven Pico, the student who led the opposition to the Island Trees School Board’s decision to remove the books, recalls what transpired:

Now please don’t ask me why book banners feel more comfortable working during the night . . . I guess they decided that that is how censors should act. So, they had the janitor unlock the library, proceeded to go through the card catalog, and found that our district had eleven of the books on that list.¹²⁶

After the books were removed and the litigation made its way up to the Supreme Court, the Court concluded that the School Board, by removing the books, had impermissibly in-

118. *Id.* at 565; see also *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (“The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, *the right to read* . . .”) (emphasis added).

119. See *Bd. of Educ. v. Pico*, 457 U.S. 853, 863 (1982).

120. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986) (“[T]he constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.”).

121. See, e.g., *Morse v. Frederick*, 551 U.S. 393, 397 (2007); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988); *Fraser*, 478 U.S. at 683.

122. *Pico*, 457 U.S. at 856.

123. *Id.*

124. *Id.*

125. HERBERT N. FOERSTEL, BANNED IN THE U.S.A.: A REFERENCE GUIDE TO BOOK CENSORSHIP IN SCHOOLS AND PUBLIC LIBRARIES 12 (1994).

126. Steven Pico, *An Introduction to Censorship*, SCH. LIBR. MEDIA Q., Winter 1990, at 84.

fringed on the students' constitutional rights to receive information and ideas.¹²⁷ What makes *Pico* unusual is that it involved the right to receive information and ideas in a unique context: the public schools. Although the Supreme Court has recognized that teachers and students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,”¹²⁸ the Court has also stated that students do not possess the same rights to free expression that adults do, mainly because of the unique circumstances of the school environment.¹²⁹ Thus, after *Pico*, the right to receive information and ideas may be even more firmly entrenched as a constitutional principle than *Martin* and *Stanley* suggest.

B. *The Right to Receive as a Distinct Right*

Despite courts' recognition of the “right to receive information and ideas,”¹³⁰ the right has generally been understood as being the “mirror image” of the First Amendment right to free expression—the speaker speaks, the listener listens. In other words, the right to receive information is simply a necessary corollary to make the expression complete. Justice Brennan summarized this concept succinctly in *Pico*: “[T]he right to receive ideas follows ineluctably from the *sender's* First Amendment right to send them.”¹³¹

This mirror image conception of the First Amendment is intuitively attractive. After all, the right to free expression would be worth little if the government were free to regulate how someone receives someone else's free expression. But by framing the right to receive ideas as following necessarily from someone else's free expression, the mirror image concept suggests that the listener's interest in receiving information is necessarily subservient to the speaker's interest in making his or her views known.

But the right to receive information and ideas is also a distinct concept that is fundamentally different from the right to

127. *Pico*, 457 U.S. at 872.

128. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

129. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986).

130. *See, e.g., Stanley v. Georgia*, 394 U.S. 557, 564 (1969).

131. *Pico*, 457 U.S. at 867 (stating that the right to receive information is “an inherent corollary of the rights of free speech and press”); *Stanley*, 394 U.S. at 565 (stating that “[i]f the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch”).

make one's ideas known to the world. This right allows both those without the confidence to make their views publicly known and those with no viewpoint at all to develop a unique viewpoint.¹³² This chance for intellectual exploration and individual self-examination free from fear of government interference is exactly what the First Amendment is meant to provide:

The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion. In this field, every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for [the people].¹³³

Courts likely have hesitated to construe the right to receive too liberally because the murky distinction between speech and expressive conduct could lead to any number of creative arguments subjecting government regulation of nearly anything to heightened scrutiny.¹³⁴ For instance, in *Zemel v. Rusk*, an individual argued that the government's refusal to issue him a visa allowing him to travel to Cuba infringed on his right to receive information because he could not travel to Cuba and gather a first-hand account of the place.¹³⁵ In rejecting this claim, the Supreme Court stressed that there are few restrictions on action that "could not be clothed by ingenious argument in the garb of decreased data flow."¹³⁶ However, this problem seems easily avoided by restricting the right to receive to only those materials that traditionally have been protected by the First Amendment. Thus, a right to read books would be protected because it necessarily implicates a right to free speech, as would the right to attend a political rally to hear the speeches of political candidates. However, a right to experi-

132. See Blitz, *supra* note 109, at 803.

133. *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring).

134. Blitz, *supra* note 109, at 812 ("The problem with recognizing such a speech-independent right to receive is that it would give individuals . . . immunity from virtually all government regulation of *action as well as speech*.").

135. 381 U.S. 1, 16 (1965). Although *Zemel* was decided before *Pico*, the plaintiff's First Amendment argument was essentially a "right to receive" argument. See *id.*

136. *Id.* at 17.

ment with LSD would not.¹³⁷ After all, courts have to grapple with hazier distinctions than this.¹³⁸

Although this argument necessarily encapsulates the mirror image conception of the First Amendment, simply recognizing the right as a distinct form of First Amendment free expression independent of the right to free speech more accurately addresses the privacy issues at stake when one receives information in a bookstore or a library. Further, recognizing a fundamental right to read would simplify a complex area of constitutional law that has forced some courts to engage in fact-specific balancing tests, weighing the individual's First Amendment rights against the government's interest in obtaining information. Although the *Tattered Cover* court eventually concluded that the First Amendment interests at stake were weighty enough to justify subjecting the state's action to strict scrutiny,¹³⁹ recognition of a distinct right to receive would achieve substantially the same result without the legal acrobatics that were necessary to get there. Thus, if anything, a fundamental right to read simplifies a complex area of constitutional law while recognizing two distinct rights: a "right to read" and a right to privacy.¹⁴⁰

CONCLUSION

From the Supreme Court's pronouncements in *Martin* and *Stanley* that the First Amendment necessarily encompasses the "right to receive information and ideas," the basis for a fundamental right to read books free from government interference was born.¹⁴¹ Pragmatically, developing a jurisprudence that involves this fundamental right to read would avoid what has troubled courts in other cases involving readers' privacy issues—namely, the balancing tests used to weigh the First and Fourth Amendment interests at stake, and the inherent difficulties of determining the type of information that deserves heightened privacy protection. Instead, the fundamental right to read would require that laws and other governmental ac-

137. See Blitz, *supra* note 109, at 812–13 (citing John B. Attanasio, Review Essay, *The Genetic Revolution: What Lawyers Don't Know*, 63 N.Y.U. L. REV. 662, 701 (1988)).

138. See, e.g., *supra* Part II.B. (discussing how courts struggle figuring out what "types" of private information are truly "private").

139. *Tattered Cover, Inc. v. City of Thornton*, 44 P.3d 1044, 1058 (Colo. 2002).

140. See *Stanley v. Georgia*, 394 U.S. 557, 565 (1969).

141. See *id.* at 564.

tions that may chill the exercise of this right meet strict scrutiny.

Courts that rely on the First Amendment to discuss readers' privacy typically consider the intellectual journey theory to be the most relevant when discussing the issue.¹⁴² Generally, it is thought that if the government is capable of discovering someone's reading habits and there is a possibility that this information will be publicly disclosed, an individual is less likely to take important intellectual journeys that may be considered controversial, abnormal, or odd.¹⁴³ Although these risks and the subsequent chilling effect that accompanies them are not to be discounted, there is another function of privacy that is particularly important to readers' rights. The right to privacy's function is not only to protect the presumptively innocent from true but damaging information, but also to protect the *actually* innocent from damaging conclusions drawn from misunderstood information.¹⁴⁴ It is too easy for a stranger to come to a damaging conclusion from misunderstood information, just as it is too easy for a law enforcement official to come to a damaging conclusion about someone because of the books he or she reads.¹⁴⁵

The First Amendment ensures that debate on public issues should remain "uninhibited, robust, and wide-open."¹⁴⁶ The first step in the public debate requires that individuals be allowed to explore whatever topics may be of intellectual interest to them in the first instance and that these intellectual journeys be completely anonymous and free from the possibility of governmental intervention.

142. See *United States v. Rumely*, 345 U.S. 41, 57 (Douglas, J., concurring) ("The subtle, imponderable pressures of the orthodox lay hold. Some will fear to read what is unpopular, what the powers-that-be dislike."); *Tattered Cover*, 44 P.3d at 1050.

143. See *Tattered Cover*, 44 P.3d at 1050; *National Coalition of Authors Urges Rejection of Google Book Search Deal*, AMERICAN CIVIL LIBERTIES UNION (Sept. 8, 2009), available at <http://www.aclu.org/free-speech/national-coalition-authors-urges-rejection-google-book-search-deal>.

144. JEFFREY ROSEN, *THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA* 8–9 (2000).

145. See *supra* Part II.A.

146. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).