

# Constitutional Privacy Rights in the Private Workplace, Under the Federal and California Constitutions

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## I. Introduction

Private employees have diminished expectations of personal privacy in the modern workplace. Except where certain narrowly defined fundamental rights are implicated, private employees have little constitutional<sup>1</sup> protection for their privacy. This Note explores constitutional protections of privacy in the private workplace, based on either the federal or California Constitution.

Part II.A discusses the federal constitutional right to privacy based on modern substantive due process protections derived from the Fourteenth Amendment. Beginning with *Griswold v. Connecticut*<sup>2</sup> in 1965, the United States Supreme Court rediscovered substantive due process as a viable source of constitutional protection for fundamental liberty interests. The Court has applied modern substantive due process not to fundamental economic or contractual rights, but to more personal marital and procreational rights.<sup>3</sup> Modern substantive due process has been circumscribed both by narrow application to a few substantive rights based on traditional family relationships, and by balancing the individual's liberty interest against the government's interests. If a court considers the liberty interest among the few protected "fundamental" rights, the government must have a compelling interest the achievement of which necessitates the government's restriction of that liberty interest.<sup>4</sup>

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1. This Note addresses only constitutional privacy protections. Many common law and statutory protections are available as well.

For statutory provisions, see, e.g., Kurt H. Decker, *Employment Privacy Law for the 1990's*, 15 PEPP. L. REV. 551, 566-70 (1988); RICHARD F. HIXSON, *PRIVACY IN A PUBLIC SOCIETY: HUMAN RIGHTS IN CONFLICT* 184-229 (1987).

For common law protections, see, e.g., Decker, *supra*, at 570-73; George B. Trubow, *Information Law Overview*, 18 J. MARSHALL L. REV. 815 (1985); HIXSON, *supra*, at 52-70, 133-156; IRA MICHAEL SHEPARD ET AL., *WORKPLACE PRIVACY: EMPLOYEE TESTING, SURVEILLANCE, WRONGFUL DISCHARGE, AND OTHER AREAS OF VULNERABILITY* 25-37 (Bureau of Nat'l Affairs, Inc. 1989).

2. 381 U.S. 479 (1965).

3. For the pre-*Griswold* history of this evolution, see JOHN E. NOWAK ET AL., *CONSTITUTIONAL LAW* § 11.3, at 342-60 (3d ed. 1986 & Supp. 1988), and cases cited therein.

4. This is not an impossible standard for the government to meet: For example, in *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 516 (1989), and *Roe v. Wade*, 410 U.S. 113, 150-54 (1973), the Court found that the state's interest in protecting potential human life out-

Federal courts usually analyze workplace privacy rights not under the Fourteenth Amendment's strict substantive due process guarantees, but under the Fourth Amendment's lax guarantees against unreasonable search and seizure. Part II.B points out that this threshold choice of analytical framework generally determines the outcome in this substantive area.

Part II.C covers the federal "state action" requirement. Substantive due process rights under the federal constitution only exist against the government,<sup>5</sup> which must have acted or regulated in a way offensive to the protected rights. Part IV.A explains that the California constitutional privacy right, in contrast, needs no state action trigger. Although some of the state action doctrines apply to private employers acting in a governmental capacity or acting in concert with some governmental agency or official, the federal state action requirement sharply curtails the applicability of the Fourteenth Amendment's substantive due process protections to private employers.

Employees may rely on state constitutions to bridge gaps in federal constitutional protection, however, as addressed in part III. California is among several states that have explicit constitutional privacy rights, some linked with search and seizure clauses, and some standing independently. These state constitutional privacy rights provide invigorated protection to private employees seeking redress for invasions in the workplace.

Part III.B discusses federalism concerns. California has applied its privacy protections more liberally than the United States Supreme Court has applied comparable federal constitutional rights.<sup>6</sup> The Supreme Court has no constitutional objections to such discrepant applications.<sup>7</sup>

As with the federal courts' selection of a Fourth Amendment analysis for workplace privacy issues such as drug testing, instead of a Fourteenth Amendment due process analysis, the state court standard of review can determine outcomes. California appeals courts have split on

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weighs an adult woman's right to terminate her pregnancy, when the fetus becomes viable outside the womb.

5. See U.S. CONST. amend. XIV, § 1 (against state governments); U.S. CONST. amend. V (against the federal government). See, e.g., *Bolling v. Sharpe*, 347 U.S. 497 (1954), for incorporation of the Fourteenth Amendment's guarantees against state governments into the Fifth Amendment's Due Process Clause against the federal government.

6. Compare *Committee to Defend Reprod. Rights v. Myers*, 625 P.2d 779, 784-89 (Cal. 1981) (applying strict scrutiny to legislative restrictions on state funding for abortions, and overturning these restrictions) with *Webster*, 492 U.S. at 508-09 (reiterating that no constitutional right to government funding for abortions, even though government constitutionally cannot restrict right to have an abortion).

7. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980) (citing *Cooper v. California*, 336 U.S. 58, 62 (1967)); see William J. Brennan, *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 548 (1986). See *infra* text accompanying note 214, on independent state grounds.

this crucial issue, as detailed in part III.C. These courts have treated state constitutional privacy rights in the workplace with two distinct analytical approaches. Most courts test violations of the state right to privacy with strict scrutiny, but a state appeals panel recently developed a reasonableness/balancing test closer to that used with search and seizure provisions.<sup>8</sup>

As many individuals' social experiences become increasingly secularized and consequently centered around the workplace, concerns over balancing employers' interests in protecting their property and improving worker productivity, and employees' interests in personal privacy, demand innovative legal protections. Parts IV.B and C explore the respective interests of employers and employees. With increasing population and crowding in urban areas, privacy has become more precious and its absence more noticeable. The fundamentality of personal privacy in the Anglo-American cultural tradition may justify its increased protection, at a constitutional level, for which individuals need look increasingly to state constitutions. The federal constitution should also be brought up to date, with an explicit privacy right like that guaranteed in the California Constitution.

## II. Federal Constitutional Protections

### A. Modern Substantive Due Process

#### 1. *History of the Penumbral Privacy Right and Its Incorporation into the Fourteenth Amendment*

The federal constitution contains no explicit right to privacy. The Supreme Court has inferred a federal constitutional right to privacy from various Bill of Rights protections and from the basic guarantee of fairness that the Due Process Clause of the Fourteenth Amendment provides.<sup>9</sup> This right to privacy is actually more a right to personal autonomy than a right to keep certain information secret.<sup>10</sup> The substantive areas covered by the right, such as sexual and marital choices, are narrowly circumscribed both by traditional cultural values and by an exacting standard for what is fundamentally private.

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8. Compare *Luck v. Southern Pac. Transp. Co.*, 267 Cal. Rptr. 618 (Ct. App. 1990) (finding drug testing current employee without suspicion unconstitutional under CAL. CONST. art. I, § 1) with *Wilkinson v. Times Mirror Corp.*, 264 Cal. Rptr. 194 (Ct. App. 1989), *review denied*, 1989 Cal. App. LEXIS 1168 (1990) (finding drug testing job applicant without suspicion constitutional using mid-level review and following federal search and seizure models).

9. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965).

10. See *Whalen v. Roe*, 429 U.S. 589 (1977) (stating that government power over collection and distribution of data not necessarily protected by right to privacy); *United States v. Miller*, 425 U.S. 435 (1976) (holding that bank records, even of customers not involved in criminal activity, are fair game).

The landmark 1965 case *Griswold v. Connecticut*<sup>11</sup> invalidated state statutes that penalized both the use of contraceptives and the provision of any advice or assistance in using contraceptives.<sup>12</sup> The majority found "that specific guarantees in the Bill of Rights have penumbras, formed by emanations, . . . [that] create zones of privacy."<sup>13</sup> The Court located these penumbral zones between the lines of the First, Third, Fourth, Fifth, and Ninth Amendments,<sup>14</sup> which each shelter some individual zone from government intrusion.

Many First Amendment guarantees implicate personal autonomy. The First Amendment protects an individual's prerogative to express non-defamatory, non-obscene speech and to choose religious beliefs freely.<sup>15</sup> As *Griswold* pointed out,<sup>16</sup> the amendment has protected parents' right to choose schools for their children,<sup>17</sup> the right to study a language other than English in school,<sup>18</sup> and the right to voluntarily associate,<sup>19</sup> whether such association be political or not.<sup>20</sup> The First Amendment guards the sanctity of an individual's beliefs against coercion or censor,<sup>21</sup> even though the beliefs are not expressed in words.<sup>22</sup> The Free Exercise Clause protects religious beliefs, which the Constitution considers personal rather than civic.<sup>23</sup>

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11. 381 U.S. 479 (1965).

12. *Id.* at 480.

13. *Id.* at 484.

14. *Id.*

15. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . ." U.S. CONST. amend. I. The intricacies of defamation and obscenity jurisprudence are beyond the scope of this Note.

16. 381 U.S. at 482.

17. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

18. *Meyer v. Nebraska*, 262 U.S. 390 (1923).

19. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

20. *NAACP v. Button*, 371 U.S. 415 (1963).

21. *See, e.g., Rust v. Sullivan*, 111 S. Ct. 1759 (1991) (stating that decision turned on government funding of speech, not speech itself); *Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 444 (1983) (maintaining that doctors cannot be forced to tell patients about to have abortions that life begins at conception; such a statutory provision is "designed not to inform the woman's consent but rather to persuade her to withhold it altogether").

22. *Texas v. Johnson*, 491 U.S. 397 (1989) (explaining that flag burning is expressive conduct that implicates the First Amendment).

*Griswold's* reliance on the respect for privacy implied by the respect for speech is ironic, in that the Supreme Court has not limited speech protections by content the way it has privacy protections. *Compare* *National Gay Task Force v. Board of Educ.*, 729 F.2d 1270 (10th Cir. 1984) (disallowing a statute prohibiting homosexual teachers to talk about or advocate homosexuality), *aff'd*, 470 U.S. 903 (1985) *with* *Bowers v. Hardwick*, 478 U.S. 186 (1986) (upholding a statute aimed against actual homosexual activity between consenting adults). The Constitution protects the talk but not the action.

23. U.S. CONST. amend. I (Free Exercise Clause). *See* *Employment Div. v. Smith*, 110 S. Ct. 1595 (1990).

The Third Amendment's proscription of quartering troops in private homes, and the Fourth Amendment's protection of the sanctity of individuals' "persons, houses, papers, and effects," both contribute to the *Griswold* penumbral zones of privacy.<sup>24</sup> The Fifth Amendment's right against self-incrimination<sup>25</sup> places another aspect of personhood beyond government reach.

The *Griswold* majority used the Ninth Amendment to support the possibility of constitutional guarantees that are not explicit.<sup>26</sup> Justice Goldberg's concurrence emphasized that the amendment's allusion to non-enumerated rights indicates that the Constitution must allow for such rights, or the Ninth Amendment would serve no purpose.<sup>27</sup>

Justices Harlan and Goldberg initially located the source of the substantive right to privacy in the Due Process Clause of the Fourteenth Amendment, rather than in the majority's penumbras.<sup>28</sup> Their concurrences more readily admitted to constructing a new area of substantive due process. The majority, however, was openly leery of the repudiated *Lochner*<sup>29</sup> era of economic substantive due process, during which the Due Process Clause legitimized individual liberty at the expense of social justice.<sup>30</sup> Harlan and Goldberg did not need "penumbras" to find that the Connecticut statute violated, without due process of law, a fundamental liberty—the right to choose contraception. Harlan argued that due process protections will be more potent, and applicable to different unfair intrusions, if they remain general, fluid, and capable of future development.<sup>31</sup> That is, if due process is tied to general fairness rather than to more specific rights, it will serve as a broader, more malleable safeguard.

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24. U.S. CONST. amends. III, IV; *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965). Part II.B, *infra*, discusses the federal Fourth Amendment protections in detail.

25. "[N]or shall any person . . . be compelled in any criminal case to be a witness against himself . . . ." U.S. CONST. amend. V.

26. *Griswold*, 381 U.S. at 484. U.S. CONST. amend. IX: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

27. *Griswold*, 381 U.S. at 486-94 (Goldberg, J., concurring). Justice Stewart's dissent characterized the Ninth Amendment as a mere companion to the Tenth, but offered no satisfactory explanation for the Framers' redundancy. *Id.* at 529-30 (Stewart, J., dissenting).

28. *Id.* at 497-99 (Goldberg, J., concurring); *id.* at 500 (Harlan, J., concurring).

29. *Lochner v. New York*, 198 U.S. 45 (1905).

30. See *Griswold*, 381 U.S. at 482. The majority kept clear of "economic problems, business affairs, or social conditions," characterizing them as legislative territory. See also NOWAK ET AL., *supra* note 3, discussing the history of substantive due process.

31. *Griswold*, 381 U.S. at 500-01 (Harlan, J., concurring). "[T]he 'incorporation' doctrine may be used to restrict the reach of Fourteenth Amendment Due Process . . . . [T]he proper constitutional inquiry . . . is whether . . . the enactment violates basic values 'implicit in the concept of ordered liberty,' *Palko v. Connecticut*, 302 U.S. 319, 325 . . . . The Due Process Clause . . . stands . . . on its own bottom." *Id.* at 500. See also *Poe v. Ullman*, 367 U.S. 497 (1961) (Harlan, J., dissenting).

By 1973, in *Roe v. Wade*, the Court acquiesced to the Harlan/Goldberg analysis and no longer invoked penumbral zones of protection.<sup>32</sup> The *Roe* majority was comfortable with the right to privacy being a substantive due process right, located in the Fourteenth Amendment's guarantee: "[nor] shall any State deprive any person of life, liberty, or property, without due process of law."<sup>33</sup>

## 2. Privacy Under Equal Protection

Privacy cases have occasionally been decided on equal protection grounds. Unequal treatment of a class of people can trigger strict judicial scrutiny under the Fourteenth Amendment's Equal Protection Clause if a suspect class or a fundamental right is involved.<sup>34</sup> In constitutional privacy cases, the requirement that some identifiable class be treated unequally is seldom met. A privacy invasion that did affect a class was embodied in the statute overturned in *Eisenstadt v. Baird* that prohibited only unmarried persons from obtaining contraceptives.<sup>35</sup>

Chief Justice Stone's concurrence in *Skinner v. Oklahoma ex rel. Williamson*<sup>36</sup> pointed out a potential drawback to using equal protection rather than due process grounds when both are available: Equal protection raises a narrower objection because it invalidates the *inequality of application* of the complained-of statute or other action, not the statute or action itself. The statute in *Skinner* penalized only certain theft crimes with forced sterilization.<sup>37</sup> As Stone argued, the problem with the statute is its fundamentally unfair choice of penalties, not its unequal application

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32. *Roe v. Wade*, 410 U.S. 113, 153 (1973) (endorsing the "right to privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty . . . , as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people . . . ."); Mark Silverstein, Note, *Privacy Rights in State Constitutions: Models for Illinois?*, 1989 U. ILL. L. REV. 215, 223 (1989); Martha M. Ezzard, *State Constitutional Privacy Rights Post Webster—Broader Protection Against Abortion Restrictions?*, 67 DENV. U. L. REV. 401, 403 (1990).

33. See *supra* note 32; U.S. CONST. amend. XIV, § 1. Locating the constitutional right to privacy in the Fourteenth Amendment also exempts that right from the debate over incorporation of the Bill of Rights. Further discussion of the incorporation doctrine is beyond the scope of this Note.

34. For discussion on suspect classes, see, e.g., *Zablocki v. Redhail*, 434 U.S. 374 (1978) (married persons); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (unmarried persons). Cf. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (discussing criteria for suspect classes).

On fundamental rights, see, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967) (upholding the right to marry).

35. *Eisenstadt*, 405 U.S. at 454-55.

36. 316 U.S. 535, 544 (1942) (Stone, C.J., concurring).

37. Note that *Skinner* was a 1942 decision, well before the era of the Warren Court. Inexplicably, the Cruel and Unusual Punishment Clause, U.S. CONST. amend. VIII, was not offered as an alternate ground.

of this choice.<sup>38</sup> But under an equal protection analysis, the statute could be rejuvenated by merely making sterilization the penalty for *all* theft crimes, instead of eliminating sterilization as a punishment.

Another reason equal protection analysis rarely appears in right-to-privacy cases is that the Supreme Court has declined to recognize the indigent as a suspect class.<sup>39</sup> The abortion funding cases are illustrative.<sup>40</sup> Although a woman has a privacy right against government interference into a decision as fundamentally personal as whether to have an abortion, the same woman does *not* have an affirmative right to government funding for that abortion,<sup>41</sup> even if the woman's health is threatened.<sup>42</sup> That is, the government cannot constitutionally prevent poor women from having abortions, but it does not have to pay for them.<sup>43</sup> The contention that denying government funding effectively deprives poor women of access to abortions, has not persuaded the Supreme Court to find a denial of equal protection.<sup>44</sup>

### 3. *The Substantive Scope of the Federal Privacy Right*

The substantive areas that the federal constitutional right to privacy protects are limited by mainstream cultural values. For example, homosexual activity between consenting adults is not afforded the protection that heterosexual activity between consenting married adults is.<sup>45</sup> Justice Goldberg's *Griswold* concurrence stresses that the Court "must look to the 'traditions and [collective] conscience of our people' to determine whether a principle is 'so rooted [there] . . . as to be ranked as fundamen-

38. *Skinner v. Oklahoma*, 316 U.S. at 544 (Stone, C.J., concurring).

39. *See Dandridge v. Williams*, 397 U.S. 471 (1970).

40. *Rust v. Sullivan*, 111 S. Ct. 1759 (1991); *Harris v. McRae*, 448 U.S. 297 (1980); *Maher v. Roe*, 432 U.S. 464 (1977); *Ezzard*, *supra* note 32, at 403.

41. *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 509 (1989); *Maher v. Roe*, 432 U.S. 464. Note that this perceived absence of a fundamental right dictates the Court's use of a rational basis test rather than a compelling interest test. *See Harris v. McRae*, 448 U.S. 297.

42. *Harris v. McRae*, 448 U.S. 297.

43. In the criminal procedure context, the Supreme Court has used the opposite rationale, where the constitutional rights are explicit, to confirm an indigent defendant's absolute constitutional right to a lawyer. *Gideon v. Wainwright*, 372 U.S. 335 (1963). When the right to a lawyer becomes grounded in substantive due process rather than in an explicit right, however, the Court is less willing to grant the right. *Compare Ross v. Moffitt*, 417 U.S. 600 (1974) (extending right to counsel to first appeal, which is statutorily but not constitutionally guaranteed) *with Douglas v. California*, 372 U.S. 353 (1963) (maintaining that the right to counsel does not extend to second, discretionary appeals).

44. As discussed in part III *infra*, this is one of many areas in which California's constitution grants greater protection than its federal counterpart. *See Committee to Defend Reprod. Rights v. Myers*, 625 P.2d 779 (Cal. 1981).

45. For a discussion on consenting homosexual activity, see *Bowers v. Hardwick*, 478 U.S. 186 (1986); *see also* Rahel E. Kent, Comment, *Imposition of the Justices' Own Moral Choices—Bowers v. Hardwick*, 106 S. Ct. 2841 (1986), 9 WHITTIER L. REV. 115 (1987); Ira C. Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981, 988-89 (1979) (for modern substantive due process, the post-*Griswold* Court just picked different



tal.'<sup>46</sup> The rights judged fundamental by the Court center around decisions of marriage, procreation,<sup>47</sup> and cohabitation,<sup>48</sup> but only where the relationship(s) at issue are structured around the traditional nuclear family.<sup>49</sup>

A case's outcome depends on the level of scrutiny the court uses to evaluate the constitutionality of the privacy invasion. The court's choice of scrutiny level, in turn, depends on whether the privacy right at issue is fundamental. Classification of a right as fundamental triggers strict scrutiny, whereas a non-fundamental right is tested with a rational basis test.<sup>50</sup> If the court labels a right fundamental, the government must have a compelling interest to override the right, and the statute or act must be narrowly tailored to achieve that compelling interest.<sup>51</sup> A California court interpreted the Supreme Court's recent employment privacy cases as requiring a "clear, direct nexus . . . between . . . the employee's duty and the . . . feared violation" of public safety.<sup>52</sup>

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rights from the *Lochner* era; despite Court protestations, its deviation from *Lochner* substantive due process was no more basic than its content).

National Gay Task Force v. Board of Educ., 729 F.2d 1270 (10th Cir. 1984), *aff'd*, 470 U.S. 903 (1985), easily upheld less than strict scrutiny for discriminations based on sexual preference, under an equal protection analysis. *Id.* at 1273. But discriminations based on race are afforded the strictest scrutiny. *See* Loving v. Virginia, 388 U.S. 1 (1967).

For a discussion on consenting heterosexual activity, see, e.g., Roberts v. United States Jaycees, 468 U.S. 609 (1984); Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965).

46. *Griswold*, 381 U.S. at 493 (Goldberg, J., concurring) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).

47. *See, e.g.*, Planned Parenthood v. Danforth, 428 U.S. 52 (1976); Roe v. Wade, 410 U.S. 113, 152-53 (1973); *Griswold*, 381 U.S. at 486.

48. *See, e.g.*, Moore v. East Cleveland, 431 U.S. 494 (1977).

49. *See, e.g.*, Hodgson v. Minnesota, 110 S. Ct. 2926 (1990) (stressing the importance of keeping family together even though sometimes dysfunctional); Bowers v. Hardwick, 478 U.S. 186 (1986) (denying constitutional protection for consensual homosexual activity); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (rejecting privacy protection for right to live together). *Cf.* ALIDA BRILL, NOBODY'S BUSINESS: PARADOXES OF PRIVACY 121-42 (1990).

50. Webster v. Reproductive Health Servs., 492 U.S. 490, 516, 519 (1989). *See also* Harris v. McRae, 448 U.S. 297 (1980); Roe v. Wade, 410 U.S. 113; San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973); NOWAK ET AL., *supra* note 3, § 14.3, at 530-43.

Gender discrimination calls for a mid-level test, Craig v. Boren, 429 U.S. 190, 197 (1976), though that is beyond the scope of this Note. The level of scrutiny in federal Fourth Amendment analyses has been significantly relaxed, as discussed *infra* in part II.B.

51. *Rodriguez*, 411 U.S. at 40. For example, in abortion cases the state can regulate its interest in potential human life, which becomes compelling at the point of fetal viability. *Webster*, 492 U.S. 490; Roe v. Wade, 410 U.S. at 154-55. As for narrow tailoring, a state can establish mandatory medical procedures only if necessary for a woman's health and safety. Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416 (1983); Doe v. Bolton, 410 U.S. 179 (1973).

52. *Luck v. Southern Pac. Transp. Co.*, 267 Cal. Rptr. 618, 630-31 (Ct. App. 1990). This is a logical reading of *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989), and *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), because the compelling interest involved is ultimately public safety. But neither of these decisions explicitly calls for such a "clear, direct nexus."

Because of the narrow substantive scope of the federal constitutional right to privacy, the Supreme Court has analyzed issues of workplace privacy under the rubric of the Fourth Amendment rather than under substantive due process.<sup>53</sup>

## B. The Fourth Amendment

The jurisprudence of federal search and seizure cases has changed dramatically in the twenty-eight years between *Mapp v. Ohio* in 1961,<sup>54</sup> and *Skinner v. Railway Labor Executives' Association* and *National Treasury Employees Union v. Von Raab* in 1989.<sup>55</sup> In 1961, *Mapp* extended the protections of the Fourth Amendment and the exclusionary rule that enforces the amendment to state courts through the Fourteenth Amendment.<sup>56</sup> Current Fourth Amendment protections are subject to so many "special needs" exceptions<sup>57</sup> that employees cannot realistically look to this amendment for protection of their privacy.

In 1967, *Katz v. United States* ushered in the modern era of Fourth Amendment jurisprudence by severing its link to trespass onto tangible property. *Katz* declared that "the Fourth Amendment protects people, not places."<sup>58</sup>

Under *Katz*, to determine whether a search was reasonable, the court considers whether the government's action constituted a "search," and if so, whether that search was reasonable. The first prong focuses on the subject's reasonable expectation of privacy in the activity at issue: Someone talking loudly in a crowded elevator should not expect confidentiality, whereas someone talking in an enclosed phonebooth has good

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53. See, e.g., *Von Raab*, 489 U.S. 656; *Skinner*, 489 U.S. 602. *Katz v. United States*, 389 U.S. 347 (1967), and *Griswold v. Connecticut*, 381 U.S. 479 (1965), both allude to the overlap between constitutional privacy and Fourth Amendment protections, but *Katz*, 389 U.S. at 350, is careful to distinguish these areas.

54. 367 U.S. 643 (1961).

55. *Skinner*, 489 U.S. 602; *Von Raab*, 489 U.S. 656. See Harlin Ray Dean, Jr., Note, *National Treasury Employees Union v. Von Raab: The Fourth Amendment Hangs in the Balance*, 68 N.C. L. REV. 389, 401-02 (1990).

56. *Mapp*, 367 U.S. 643. See Brennan, *supra* note 7, at 540-41. Under the exclusionary rule, evidence obtained through an unconstitutionally unreasonable search is inadmissible.

57. See generally Gerald S. Reamey, *When "Special Needs" Meet Probable Cause: Denying the Devil Benefit of Law*, 19 HASTINGS CONST. L.Q. 295 (1991).

58. *Katz v. United States*, 389 U.S. 347, 351 (1967), reviewed the admissibility of evidence obtained by bugging a public phonebooth. Prior to *Katz*, this evidence would have been outside the amendment's scope because the defendant's property was not searched and because the evidence consisted of intangible communications (phone conversations about bookmaking). *Id.* at 351-53. *Katz* dispensed with the trespass linkage, thus effectively opening up private land—for example, to air searches—and closing off many searches on public land that previously had not triggered Fourth Amendment protection. *Id.* See Silverstein, *supra* note 32, at 220-21.

reason to expect it.<sup>59</sup> If the subject had a reasonable expectation of privacy the intrusion is classified as a "search" and the court moves to the second prong to resolve whether the search was objectively reasonable and hence permissible. In assessing the second prong, the court looks to the Fourth Amendment's requirements of probable cause and a valid warrant<sup>60</sup> except in specific instances when hot pursuit or other emergency was involved, when the subject had consented to the search, or when the search was performed immediately incident to an arrest.<sup>61</sup> The absence of a warrant was determinative in *Katz*, although the Warren Court all but said the phonebooth bugging would have been reasonable otherwise.<sup>62</sup>

Under current Fourth Amendment analysis, the initial inquiry into whether there was a search protected by the amendment is still based on the subject's reasonable expectation of privacy. For example, in the 1989 pair of drug testing cases, *Skinner* and *Von Raab*, the Court held that collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable, especially because it implicates bodily integrity.<sup>63</sup> *Von Raab* upheld suspicionless, warrantless drug testing of U.S. Customs employees applying for jobs that entailed interdiction of illegal drugs or carrying a weapon.<sup>64</sup> The *Skinner* Court also found suspicionless, warrantless drug testing constitutional because compelling safety interests outweighed railroad workers' Fourth Amendment privacy interests.<sup>65</sup>

To satisfy its initial inquiry in the *seizure* context, the Court must find that the person was restrained in such a way that a reasonable person in those circumstances would not feel free to leave.<sup>66</sup> The restraint must also be effective; a defendant who ran from a shouting, pursuing police officer was not actually "seized" until the officer tackled him.<sup>67</sup> In the workplace, an employee's "normal" restraint of not being able to

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59. 389 U.S. at 355-58; see also Lisa Brunn, Comment, *Privacy and the Employment Relationship*, 25 HOUS. L. REV. 389 (1988). Justice Harlan's concurrence in *Katz* originally proposed the two-prong analysis: Subjectively, did the searchee expect to be acting in private; and if so, was that expectation objectively reasonable? *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

60. The Fourth Amendment to the United States Constitution reads in part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . ."

61. *Katz*, 389 U.S. at 357-58; see *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 635 (1989) (Marshall, J., dissenting).

62. *Katz*, 389 U.S. at 354-57.

63. *Skinner*, 489 U.S. at 616-17; *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989).

64. *Von Raab*, 489 U.S. 656.

65. *Skinner*, 489 U.S. 602.

66. *INS v. Delgado*, 466 U.S. 210, 216 (1984).

67. *California v. Hodari D.*, 111 S. Ct. 1547, 1550-52 (1991).

leave during working hours is not a seizure.<sup>68</sup>

The second *Katz* prong has been transformed in the past twenty-four years. *Katz* found, in the Fourth Amendment, bright-line requirements of probable cause and a warrant for most searches.<sup>69</sup> In the criminal and administrative contexts, these requirements have been superseded by weak, subjective balancing that offers little protection and in some cases allows searches and seizures without even individualized suspicion, let alone probable cause or a warrant.<sup>70</sup> By 1989, a government allegation of some "special need" or compelling interest, which need not be very specific, was enough to eliminate the warrant and probable cause requirements.<sup>71</sup> Justice Marshall's *Skinner* dissent<sup>72</sup> lamented that the Court majority had now come full circle by finding a "special need" that obviated a warrant in each of the Fourth Amendment's four categories: one's person, house, papers, and effects.<sup>73</sup>

In *Skinner* and *Von Raab*, the government employer's special needs for drug testing without a warrant were as follows: The delay of obtaining a warrant might result in the loss of evidence because the metabolites that drug tests identify might have passed through an employee's system by the time he or she was finally tested; and the administrative complexity of obtaining a warrant was "unwieldy."<sup>74</sup> Marshall's dissent in *Skinner* showed that a warrant is still eminently practical. He contended that drug testing entails two separate searches. The first is the bodily intrusion to take the sample, and the second is the testing of the sample, which can reveal extremely personal medical and other informa-

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68. *Delgado*, 466 U.S. at 218 ("Ordinarily, when people are at work their freedom to move about has been meaningfully restricted, not by the actions of law enforcement officials, but by the workers' voluntary obligations to their employers.").

69. *Katz v. United States*, 389 U.S. 347, 357-58 (1967).

70. For treatment of searches, see, e.g., *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 624 (1989) (employee drug testing); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665-66 (1989) (employee drug testing); *O'Connor v. Ortega*, 480 U.S. 709, 722-23 (1987) (search by employer of employee's office for work-related non-investigatory reasons); *Camara v. Municipal Court*, 387 U.S. 523 (1967) (upholding administrative searches without probable cause, and warrant need only be presented if searchee so requests).

For a discussion of seizures, see *Michigan Dept. of State Police v. Sitz*, 110 S. Ct. 2481 (1990) (holding suspicionless stops at sobriety checkpoints constitutional).

71. "'A special need [for the evidence], beyond the normal need for law enforcement,' makes the 'requirement' of probable cause 'impracticable.'" *Skinner*, 489 U.S. at 619 (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987), which quoted *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985)); *Von Raab*, 489 U.S. at 666; *O'Connor v. Ortega*, 480 U.S. at 722. The Court shifts to a balancing analysis, weighing the government's need for the information or physical evidence, against the subject's privacy interests. See generally Reamey, *supra* note 57.

72. *Skinner*, 489 U.S. at 636-37 (Marshall, J., dissenting).

73. Person: *Skinner*, 489 U.S. at 613-14.

House: *Griffin v. Wisconsin*, 483 U.S. 868 (1987).

Papers: *O'Connor v. Ortega*, 480 U.S. 709 (1987).

Effects: *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

74. *Skinner*, 489 U.S. at 623-24.

tion. He conceded that the delay argument may overcome the warrant requirement on the *first* search—taking the sample; but he pointed out that such samples can easily be preserved until a proper warrant is obtained for the *second* search—the actual testing.<sup>75</sup>

*Von Raab* assessed the intrusiveness of a U.S. Customs Service drug-testing program for candidates for three job categories: front-line drug interdiction positions, positions that carry a gun, and positions working with classified information. The Court found the last class too broad, but upheld the former two, balancing the government's compelling interests against the employee's privacy interests.<sup>76</sup> The Customs Service had compelling interests in preventing drug use, and more specifically, in preventing users from receiving promotions; in maintaining public confidence in "front-line interdiction personnel . . . [with] unimpeachable integrity and judgment"; in impeding employee corruption such as taking bribes or stealing; and in ensuring the effectiveness, and hence safety, of drug-using and non-using employees alike.<sup>77</sup> In contrast, the Court believed that jobs that entail carrying weapons or working with intelligence bring "a diminished expectation of privacy" with them; that procedural safeguards such as no direct observation of the employee's urination and a two-test requirement to check accuracy minimized the intrusion; that employees had sufficient notice because anyone applying for a designated position knew in advance that the process included a drug test; and that only specified drug metabolites were tested for and the employee need not reveal legitimate drug use unless required to explain a positive test.<sup>78</sup>

*Von Raab* and *Michigan Department of State Police v. Sitz* essentially condone the balancing approach in all civil search and seizure contexts, even without individual suspicion and even when the search is as intrusive as forced urination and drug testing.<sup>79</sup> With non-criminal, administrative searches, whether the Court's leniency is limited to heavily

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75. *Id.* at 642-43 (Marshall, J., dissenting).

76. *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 668-78 (1989).

77. *Id.* at 669-70.

78. *Id.* at 668-74. *See INS v. Delgado*, 466 U.S. 210, 218 (1984) (employees have reduced expectations of privacy on job).

79. For a discussion of search context, see *Von Raab*, 489 U.S. 656; Dean, *supra* note 55, at 397-401. For a discussion of seizure, see *California v. Hodari D.*, 111 S. Ct. 1547, 1549 n.1 (1991) (stating that only a hunch needed—less than *Terry* reasonable suspicion requirement); *Michigan Dept. of State Police v. Sitz*, 110 S. Ct. 2481, 2488 (1990) (upholding sobriety checkpoint stops without any suspicion).

In its [*Skinner* and *Von Raab*] decisions upholding mass, suspicionless drug-testing of certain employees in particular safety-sensitive jobs, the Court stressed that the drug tests were not conducted for ordinary law enforcement purposes, but instead were elements of administrative schemes designed to promote public safety and enforceable only by job-related sanctions. In contrast, the roadblock inspections upheld in *Sitz* were directed at core, classical law enforcement aims: seeking evidence to use in arresting and prosecuting individuals who violate the laws that criminalize driving while intoxicated.

regulated industries is an open question.<sup>80</sup>

As Marshall argued in his *Skinner* dissent,<sup>81</sup> drug testing does not uncover “current impairment” that might affect an employee’s job performance, but rather tests for recent use. A positive result might indicate drug use at a non-job-related party on a Friday night, for instance, and the employee might be perfectly functional long before Monday morning. The majority opined that *any* use could indicate on-the-job use.<sup>82</sup> However, an employer’s compelling interest in an employee’s drug use should extend only as far as that use affects the employee’s performance for that employer.<sup>83</sup> Beyond that legitimate scope, a rule is not tailored narrowly enough to achieve only that compelling interest.

*Skinner* approved statutory drug testing for railroad employees involved in an accident. As in *Von Raab*, the Court found the testing minimally intrusive because direct observation of urination was not mandated, though it was recommended, and because the testing was to be performed by an independent medical service in a clinical setting.<sup>84</sup> Although the government could “learn certain private medical facts that an employee might prefer not to disclose,” the Court found this innocuous in the absence of any showing that the government actually did anything improper with those facts.<sup>85</sup> Because the railroad industry was heavily regulated, its employees should have reduced expectations of privacy.<sup>86</sup> The majority rejected the alternative method for spotting drug use—relying on supervisors to observe intoxication—speculating that by

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Nadine Strossen, *Michigan Department of State Police v. Sitz: A Roadblock to Meaningful Judicial Enforcement of Constitutional Rights*, 42 HASTINGS L.J. 285, 286 (1991).

80. In *New York v. Burger*, 482 U.S. 691 (1987), the Court upheld the constitutionality of administrative inspections of auto junkyards, even for evidence of criminal activity (stolen cars and parts). *Id.* at 716. Pervasive regulation of the industry effectively put junkyard operators on notice of such searches and obviated warrants. *Id.* at 711. Thus, warrantless administrative searches without individual suspicion did not violate the owners’ reasonable expectations of privacy.

The distinction between administrative and criminal searches is blurred because administrative searches usually seek evidence of crimes. Employee drug testing could be called administrative, but its results have criminal implications. The Supreme Court encourages this overlap by relying on criminal search precedents in its administrative search cases. For example, *Burger*, *id.* at 702, relies on *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (upholding search of student’s purse for drugs) for its “special needs” analysis. *See also Burger*, 482 U.S. at 724-25 (Brennan, J., dissenting) (majority’s distinction between administrative and criminal is illusory because the only evidence sought in the searches at issue is that of crimes).

81. *Skinner v. Railway Labor Executives’ Ass’n*, 489 U.S. 602, 635 (1989) (Marshall, J., dissenting).

82. *Skinner*, 489 U.S. at 631-32.

83. The need for a compelling interest to outweigh a fundamental privacy right is discussed in *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989); *Roe v. Wade*, 410 U.S. 113, 155 (1973); *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 40 (1973).

84. *Skinner*, 489 U.S. at 625.

85. *Id.* at 626 n.7.

86. *Id.* at 627. *See Dean, supra* note 55, at 392.

the time such an observation was made, the damage would be done.<sup>87</sup> The Court thought that the compelling public interests of obliterating drug use and preventing accidents would be best served by suspicionless testing, especially where even an accident might not lead to individualized suspicion.<sup>88</sup>

The *Skinner* majority endorsed the deterrence rationale for suspicionless testing, arguing that the threat of testing will not chill drug use unless its timing is unforeseen.<sup>89</sup> Justice Stevens's concurrence disagreed with this point only: Stevens observed that an employee hardly goes to work expecting a crash and consequent drug test, and that if the danger of an accident and personal safety has not already deterred the employee from using drugs, the specter of job loss probably would not either.<sup>90</sup> Justice Marshall's dissent punctuated Stevens's latter point with a wonderful analogy: "Under the majority's deterrence rationale, people who skip school or work to spend a sunny day at the zoo will not taunt the lions because their truancy or absenteeism might be discovered in the event they are mauled."<sup>91</sup>

Justice Scalia, often wary about the Court's delving into politics, takes the majority to task in his *Von Raab* dissent, for permitting the Customs Service to use drug testing purely to set an example that the government is "getting tough on drugs" by cleaning up its own front line.<sup>92</sup> He counters that the only examples the government is setting are that the "end justifies the means" and that the government's image has priority over its citizens' civil liberties.<sup>93</sup> Both Scalia and Marshall warn that the antidrug bandwagon<sup>94</sup> threatens to flatten important constitutional protections. "Precisely because the need for action against the drug scourge is manifest, the need for vigilance against unconstitutional excess is great. History teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to

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87. *Skinner*, 489 U.S. at 629-30. This is a rather specious observation, since the testing the *Skinner* majority approved was to take place *after* accidents.

88. *Id.* at 628-30.

89. *Id.* See also *Michigan Dept. of State Police v. Sitz*, 465 U.S. 444 (1990).

90. *Skinner*, 489 U.S. at 634 (Stevens, J., concurring). Robert Berkeley Harper, *Has the Replacement of "Probable Cause" with "Reasonable Suspicion" Resulted in the Creation of the Best of All Possible Worlds?*, 22 AKRON L. REV. 13, 37-39 (1988), argues that the public's interests in law enforcement and protection of police should not extend to situations where there is no longer any immediate danger or to investigations of past crimes.

91. *Skinner*, 489 U.S. at 653 (Marshall, J., dissenting).

92. *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, at 686-87 (1989) (Scalia, J., dissenting).

93. *Id.* Justice Scalia "think[s] it obvious that this justification is unacceptable; that the impairment of individual liberties cannot be the means of making a point; that symbolism, even symbolism for so worthy a cause as the abolition of unlawful drugs, cannot validate an otherwise unreasonable search." *Id.*

94. See *id.* at 668; *Florida v. Bostick*, 111 S. Ct. 2382, 2389 (1991) (Marshall, J., dissenting).

endure."<sup>95</sup>

The majority's new balancing approach is beholden to political currents because of its inherent subjectivity.<sup>96</sup> A primary goal of the probable cause and warrant requirements is objectivity; potential searchees are protected from over-zealous police, prosecutors, or employers by "detached scrutiny by a neutral magistrate."<sup>97</sup> Not only will absence of a bright line provide no guidance to police or employers, but it may also reduce the precedential value of decisions based on fact-specific balancing.<sup>98</sup> The Court's reasoning in *Skinner* and *Von Raab* attests to the potential distortions of the balancing approach, which is nebulous<sup>99</sup> and speculative.<sup>100</sup>

The logic of these cases is also internally inconsistent. As Marshall points out in *Skinner*,<sup>101</sup> in the majority's initial determination that urine tests constitute a search (the first prong), it finds urination an extremely private area in our culture, one discussed only in "euphemisms if . . . at all."<sup>102</sup> Then in its analysis of the search's reasonableness (the second prong), the majority characterizes even the suggested observation of employee urination as a "minimal intrusion."<sup>103</sup> This inconsistency illustrates that, in general, Fourth Amendment balancing is a far more lenient analysis than the strict scrutiny required for fundamental rights under substantive due process.

### C. The State Action Requirement

The major obstacle to applying a federal constitutional privacy right in the private workplace is the state action requirement. Both the Fifth and Fourteenth Amendments' Due Process Clauses limit only the actions

95. *Skinner*, 489 U.S. at 635 (Marshall, J., dissenting).

96. See Dean, *supra* note 55, at 403-05; Harper, *supra* note 90, at 37, 41-43. Cf. Reamey, *supra* note 57, at 330-39 (discussing drug-war politics and the judiciary as the allegedly apolitical branch).

97. *Katz v. United States*, 389 U.S. 347, 356 (1967). See also Harper, *supra* note 90, at 41-43.

For administrative searches of company premises, the Supreme Court has allowed a neutrally devised plan, for selecting which companies will be searched, to substitute for individualized probable cause. *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978). This, however, is a different issue from employers' searches of employees, which would fit into the line of cases represented by *New Jersey v. T.L.O.*, *Skinner*, and *Von Raab*.

98. Dean, *supra* note 55, at 406-07.

99. *Skinner*, 489 U.S. at 639-41 (Marshall, J., dissenting).

100. See *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 683 (1989) (Scalia, J., dissenting).

101. *Skinner*, 489 U.S. at 652 (Marshall, J., dissenting).

102. *Id.* at 617 (quoting the *Von Raab* appellate decision, 816 F.2d 170, 175 (5th Cir. 1987)).

103. *Id.* at 621-27.



of government, not of private entities.<sup>104</sup> The Fourth and Fifth Amendments, like the rest of the original Bill of Rights, directly circumscribe conduct by the federal government alone, although both have been applied to actions by state governments through the Fourteenth Amendment's Due Process Clause.<sup>105</sup> As for implicit or constructed privacy rights, substantive due process rights are inferred from the Fourteenth Amendment's clause, "nor shall any *State* deprive any person of life, liberty, or property, without due process of law."<sup>106</sup>

The policy rationales that underlie the state action requirement for federal constitutional rights<sup>107</sup> are federalism and individualism. Justice Harlan's concurrence in *Peterson v. Greenville* articulates the latter clearly:

Freedom of the individual to choose his associates or his neighbors, to use and dispose of his property as he sees fit, to be irrational, arbitrary, capricious, even unjust in his personal relations are things all entitled to a large measure of protection from governmental interference. This liberty would be overridden, in the name of equality, if the . . . [Fourteenth] Amendment were applied to governmental and private action without distinction.<sup>108</sup>

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104. *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 191 (1988); *Blum v. Yaretsky*, 457 U.S. 991, 1002 (1982); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 156 (1978); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349 (1974); *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948); Richard I. Lehr & David J. Middlebrooks, *Work-Place Privacy Issues and Employer Screening Policies*, 11 EMPLOYEE REL. L.J. 407, 408 (1985).

In addition, for federal jurisdiction not based on diversity of citizenship, a litigant must show (1) that a federal right was violated or a federal question raised, and (2) that some level of government was involved or that the private actor acted under color of state or federal law. See *Parratt v. Taylor*, 451 U.S. 527, 535 (1981); *Flagg Bros.*, 436 U.S. at 155; David R. Cochran, Note, *The Privacy Expectation: A Comparison of Federal and California Constitutional Standards for Drug Testing in Amateur Athletics*, 17 HASTINGS CONST. L.Q. 533, 536 (1990). The government entity involved can be local, state, or federal.

105. *Benton v. Maryland*, 395 U.S. 784 (1969) (applying double jeopardy prohibition in state courts); *Malloy v. Hogan*, 378 U.S. 1 (1964) (applying right against self-incrimination in state courts); *Mapp v. Ohio*, 367 U.S. 643 (1961) (applying Fourth Amendment protections and the exclusionary rule applied in state courts).

The Grand Jury Clause of the Fifth Amendment, however, has not been incorporated and applies only in federal court. *Hurtado v. California*, 110 U.S. 516 (1984); Brennan, *supra* note 7, at 545.

106. U.S. CONST. amend. XIV, § 1 (emphasis added). On applicability to the *federal* government, see *supra* note 5 and accompanying text.

In contrast, violations of California's state constitutional privacy rights are actionable without any government involvement. See *Luck v. Southern Pac. Transp. Co.*, 267 Cal. Rptr. 618 (Ct. App. 1990); *Porten v. University of San Francisco*, 134 Cal. Rptr. 839 (Ct. App. 1976). Part IV.A *infra* discusses the lack of a state action requirement for the California constitutional privacy right.

107. The Thirteenth Amendment is the exception: The prohibition of slavery can be enforced without any government involvement. U.S. CONST. amend. XIII.

108. *Peterson v. Greenville*, 373 U.S. 244, 250 (1963) (Harlan, J., concurring). Justice Harlan was alluding to equal protection, but the same freedom from government oversight

The state action requirement also guards states' rights. In addition to allowing private actors liberty unfettered by government, it aims to allow state and local governments, rather than the federal government, to police their own citizens. Basic federalism allows for regional latitude.<sup>109</sup>

The most obvious category of state action is direct action by government officials such as a state university official<sup>110</sup> or a sheriff.<sup>111</sup> The Supreme Court rejected plaintiffs' direct-action theory of state action in *Blum v. Yaretsky*.<sup>112</sup> Plaintiff Medicaid recipients claimed that their transfers from high-care facilities to lower-care facilities, without advance notice or chance for their input, violated their due process rights under the Fourteenth Amendment.<sup>113</sup> The Court did not consider their transfers state actions because the pivotal acts that resulted in their transfers were discretionary medical judgments by private doctors, rather than the resulting changes in plaintiffs' benefits by government bureaucrats.<sup>114</sup>

Government applications of statutes, regulations, decisional law, legal remedies, and theories of relief are state actions.<sup>115</sup> For example, the Court analyzed *Skinner* under the Fourth Amendment because federal regulations compelled compliance with railroad safety guidelines, and though drug testing was not explicitly mandated, "the Government's encouragement, endorsement, and participation" in the testing was active.<sup>116</sup> The regulations also preempted state law and collective bargaining contracts, and allowed test results to be sent to federal railroad authorities.<sup>117</sup> Thus, the Court found that a private railroad's performance of drug tests was state action.<sup>118</sup>

Where private action is mandated or strongly coerced by state law, that private action is state action, because the government in effect "has removed that decision from the sphere of private choice."<sup>119</sup> The Afri-

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underlies the state action requirement for federal due process rights. See, e.g., *Tarkanian*, 488 U.S. at 191.

109. *Peterson*, 373 U.S. at 250 (Harlan, J., concurring); *Tarkanian*, 488 U.S. at 191.

110. See *Tarkanian*, 488 U.S. 179; Henry C. Strickland, *The State Action Doctrine and the Rehnquist Court*, 18 HASTINGS CONST. L.Q. 587, 598 (1991).

111. See, e.g., *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969); Strickland, *supra* note 110, at 598.

112. *Blum v. Yaretsky*, 457 U.S. 991 (1982).

113. *Id.* at 994-96.

114. *Id.* at 1005.

115. See Strickland, *supra* note 110, at 599-606.

Courts also require scienter: When a private entity acts under color of state law, it must know of the law, or its action is not state action. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 156 (1978).

116. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 615-16 (1989).

117. *Id.* at 615.

118. *Id.* at 615-16.

119. *Peterson v. Greenville*, 373 U.S. 244, 248 (1963). See Strickland, *supra* note 110, at 619-20; *Lehr & Middlebrooks*, *supra* note 104, at 408; *Cochran*, *supra* note 104, at 536.

can-American plaintiffs in *Peterson* were refused service at a privately owned lunch counter, in South Carolina in 1960, because a city ordinance required segregation of local eating facilities by race.<sup>120</sup> The ordinance compelled the restaurant manager's action, so the Fourteenth Amendment's Equal Protection Clause applied to the otherwise private action.<sup>121</sup>

The mere existence of a statute or regulation is not sufficient for a finding of state action: The statute must be coercive or leave the private actor at best a limited escape.<sup>122</sup> In *Flagg Brothers, Inc. v. Brooks*, defendant warehouse sought to exercise defendant's lien on plaintiff's household goods—without, according to plaintiff, giving proper notice.<sup>123</sup> Plaintiff claimed due process and equal protection infringements, asserting that the state statute permitting the warehouse to exercise the lien rendered defendant's action a state action.<sup>124</sup> The Court rejected this theory because defendant had several remedial options other than using the lien statute. Thus, the government had not coerced defendant's action.<sup>125</sup> Justice Stevens's dissent argued that the majority's dividing line for statutory potency, drawn at "permits but does not compel," was artificial and could encourage governments to duck liability for such infringements by delegating their authority.<sup>126</sup> He worried that deserving plaintiffs deprived of their property without notice, would also be deprived of a federal remedy,<sup>127</sup> and that the majority was turning its back on the reasoned fairness underlying decisions such as *Fuentes v. Shevin*,<sup>128</sup> which provided government oversight of replevin activity to protect otherwise defenseless plaintiffs.<sup>129</sup>

The "joint participation" theory of the 1961 case *Burton v. Wilmington Parking Authority*<sup>130</sup> marked the apex of the Supreme Court's stretching of state action. Since then, *Jackson*,<sup>131</sup> *Blum*,<sup>132</sup> and *Tarkanian*<sup>133</sup> have signaled an unequivocal retrenchment.<sup>134</sup> The defendant in *Burton*, a private restaurant concession in a government park-

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120. *Peterson*, 373 U.S. at 245-48.

121. *Id.* at 246-48.

122. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 164 (1978); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350 (1974); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 176-77 (1972).

123. *Flagg Bros.*, 436 U.S. at 151-53.

124. *Id.* at 153, 157.

125. *Id.* at 160.

126. *Id.* at 170 (Stevens, J., dissenting).

127. *Id.* (Stevens, J., dissenting).

128. *Id.* at 178-79 (Stevens, J., dissenting); see *Fuentes v. Shevin*, 407 U.S. 67 (1972).

129. *Flagg Bros.*, 436 U.S. at 175 (Stevens, J., dissenting).

130. 365 U.S. 715 (1961). See Strickland, *supra* note 110, at 623-26.

131. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974).

132. *Blum v. Yaretsky*, 457 U.S. 991.

133. *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179 (1988).

134. Strickland, *supra* note 110, at 656-59, sees emerging support from Justice O'Connor's middle wing of the Supreme Court for the symbiosis theory of *Burton*. Strickland's prediction

ing facility, discriminated on the basis of race.<sup>135</sup> The concession was leased from the government, was on government land, and thus enjoyed tax-exempt status.<sup>136</sup> It was patronized mostly by government employees.<sup>137</sup> The government entity paid for its heat, gas, and repairs.<sup>138</sup> The record showed that the government had had difficulty financing the parking and retail facility, which was vital to alleviation of downtown traffic congestion, and the facility's continued existence was heavily dependent on rents from retailers such as defendant.<sup>139</sup> The Court characterized the restaurant's discrimination as a state action because the cumulative effect of all these ties created a sufficiently symbiotic relationship.<sup>140</sup>

The Rehnquist Court has retreated from earlier extensions of state action theories such as *Burton*.<sup>141</sup> *Blum v. Yaretsky*<sup>142</sup> exemplifies this shift away from enforcing federal constitutional protections against ostensibly private actors. In *Blum*, plaintiff Medicaid recipients brought a class action against government-regulated nursing care facilities, for transfers without notice or patient input, from high-care to lower-care facilities.<sup>143</sup> Government financial support of the private facilities was contingent on government-dictated assessments of patients' health; if patients deserving less care were kept on at the higher-care facilities, the money would be withdrawn.<sup>144</sup> The state provided clear economic disincentives for contrary assignments.<sup>145</sup> The complained-of transfers would not have been ordered *but for* government regulations.<sup>146</sup> Despite these seemingly coercive state influences, the Court found no state action because the transfers were ordered pursuant to the medical opinions of private doctors.<sup>147</sup> Justice Brennan argued in dissent that the doctors in fact scored patients on a state-prescribed scale with precise measurements requiring minimal discretion<sup>148</sup>; that the state closely scrutinized

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is well presented, but neither *Tarkanian* nor the appointment of Justices Souter and Thomas strengthens it.

135. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 716 (1961).

136. *Id.* at 718-20.

137. *Id.* at 724.

138. *Id.* at 720.

139. *Id.* at 715-17, 723-24.

140. *Id.* at 724-26. See Strickland, *supra* note 110, at 623; Lehr & Middlebrooks, *supra* note 104, at 408.

141. 365 U.S. 715 (1961). Justice Brennan stated in his *Blum* dissent that "[t]he degree of interdependence between the State and the nursing home is far more pronounced than it was between the State and the private entity in [*Burton*]." *Blum v. Yaretsky*, 457 U.S. 991, 1028 (1982) (Brennan, J., dissenting).

142. *Blum*, 457 U.S. 991.

143. *Id.* at 993-94. See *supra* notes 112-14 and accompanying text.

144. *Id.* at 1009-10.

145. *Id.* at 1009-11.

146. *Id.* at 1008.

147. *Id.*

148. *Id.* at 1020-21 (Brennan, J., dissenting).

the process of review and assignment, for cost-containment reasons<sup>149</sup>; and that the state administrative body “ha[d] the final say” on transfer decisions.<sup>150</sup> Brennan’s dissent was persuasive here: With ninety percent of the facilities’ patients on Medicaid,<sup>151</sup> it is difficult to accept that the supposedly independent doctors felt no pressure and ignored the source of their paychecks. The joint participation and “degree of interdependence” was greater in *Blum* than in *Burton*.<sup>152</sup>

*Tarkanian* offered an analogous interrelationship between the private National College Athletic Association (NCAA) and a state university, the University of Nevada at Las Vegas (UNLV), whose star coach was charged with recruitment violations.<sup>153</sup> The majority declined to enforce plaintiff coach’s federal due process rights, because the NCAA’s disciplinary recommendation was not a state action.<sup>154</sup> The Court felt that the state university had not delegated its power over its employee to the private NCAA; that the NCAA had no direct authority over Coach Tarkanian; and that UNLV’s interest in keeping its popular coach was in fact adverse to the NCAA’s aim of suspending him.<sup>155</sup>

The *Tarkanian* Court passed up a chance to resurrect the *Burton* theory. The NCAA is *the* primary collegiate league; although UNLV technically had a choice to quit the league and keep Coach Tarkanian, the choice was not unfettered. Leaving the NCAA would radically alter the school’s athletic program and no doubt would significantly reduce alumni contributions. As far as adversity between UNLV and the NCAA, it is more plausible that UNLV realized that plaintiff coach’s highly publicized recruitment violations meant that he had to go, but the university was relieved to have the NCAA do its dirtywork, thereby mitigating any alumni outcry. The *Tarkanian* dissent stresses the quasi-contractual relationship between the NCAA and UNLV: UNLV adopted NCAA rules and investigative procedures, abided by NCAA findings, and implemented—willingly or not—the NCAA’s suspension recommendation.<sup>156</sup> Again, the “cumulative effect” could have been characterized as joint action.

An alternative to the “symbiosis” theory is the “government function” theory of state action. The government function theory does not involve actual government action, but rather an exclusively governmental activity performed by a private actor.<sup>157</sup> For example, in *Marsh v.*

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149. *Id.* at 1014-18 (Brennan, J., dissenting).

150. *Id.* at 1022-25 (Brennan, J., dissenting).

151. *Id.* at 1011, *id.* at 1027 (Brennan, J., dissenting).

152. *Id.* at 1027-28 (Brennan, J., dissenting).

153. National Collegiate Athletic Ass’n v. Tarkanian, 488 U.S. 179, 181-83 (1988).

154. *Id.* at 199.

155. *Id.* at 194-98.

156. *Id.* at 199-203 (White, J., dissenting).

157. See Strickland, *supra* note 110, at 627-33.

*Alabama* a company town restricted free speech rights potentially enforceable through the Fourteenth Amendment.<sup>158</sup> Since the private company itself was responsible for all municipal functions such as roads, sewer systems, and police, the Court found the company restrictions to be state actions.<sup>159</sup> Running an election was another private action that qualified as a state action because of its uniquely governmental character.<sup>160</sup>

The Supreme Court has more recently been reluctant to use the government function theory. The Court declined to apply this theory to a private shopping center in *Lloyd v. Tanner*<sup>161</sup> or to a private electrical utility in *Jackson v. Metropolitan Edison Co.*<sup>162</sup> The *Jackson* majority felt that the government had not really granted defendant utility a monopoly, but that defendant enjoyed a "natural monopoly." Thus, no vicarious government action was evident.<sup>163</sup> Justice Marshall's dissent asserted that although electricity production is a natural monopoly where competition would greatly complicate service, competition might still arise if permitted by the state; though initial entry costs are high, providing electricity has a sufficiently guaranteed, "inelastic market . . . to attract competitive investment."<sup>164</sup> More generally, Marshall contended that providing electricity is quintessentially and "traditionally identified with the State through universal public regulation or ownership . . . ."<sup>165</sup> Electricity is like roads or sewers: a public entitlement in a modern, urban society.

The more liberal wing of the Court has taken an expansive view of the government function, arguing that exercising liens and providing electrical service are normally, though not always, government activities.<sup>166</sup> A policy that government should in fairness afford a constitutional remedy for fundamental deprivations underlies this position. Marshall stated in *Jackson* that sacrifices should be expected from an otherwise private company that acts in a governmental capacity.<sup>167</sup> This vision of increased private responsibility runs counter to the *laissez-faire*

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158. *Marsh v. Alabama*, 326 U.S. 501, 504-05, 509 (1946).

159. *Id.* at 505-08.

160. *Terry v. Adams*, 345 U.S. 461 (1953).

161. *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972).

162. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974).

163. *Id.* at 351-53.

164. *Id.* at 367 (Marshall, J., dissenting). The success of U.S. Sprint and MCI in long-distance telephone markets would seem to bear Marshall out.

165. *Id.* at 371 (Marshall, J., dissenting).

166. *See id.* at 372 (Marshall, J., dissenting); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 167-68, 171-74 (1978) (Marshall, J., and Stevens, J., dissenting separately); Strickland, *supra* note 110, at 649-53.

167. "[I]f private companies wish to enter the field, they will have to surrender many of the prerogatives normally associated with private enterprise and behave in many ways like a governmental body." *Jackson*, 419 U.S. at 372 (Marshall, J., dissenting).

individualism articulated in Harlan's *Peterson* concurrence that the federal constitution should not interfere with private activity.<sup>168</sup>

In sum, the Supreme Court has addressed federal constitutional protections of workplace privacy primarily under the Fourth Amendment. The Court's current balancing analysis allows searches without probable cause, warrants, and/or individualized suspicion. A more potent right to personal autonomy stems directly from the Due Process Clause, but the Court has applied this protection sparingly to a narrow band of heterosexual marital and procreation rights. Invasion of private employees' privacy thus largely lacks a federal constitutional remedy.

The state action requirement also limits application of the Fourteenth Amendment to private employers. For either a due process or a Fourth Amendment violation to be actionable, the employer's conduct must be statutorily compelled, or more interwoven with a state entity than the care facilities were in *Blum*, or as inherently governmental as the company town in *Marsh*. If special needs exceptions to the Fourth Amendment do not derail a federal constitutional privacy action against a private employer, the state action requirement will.

### III. California State Constitutional Privacy Protections

#### A. An Explicit Constitutional Privacy Right and Its Advantages

##### 1. *An Explicit and Self-Executing Right*

California is one of ten states with an explicit privacy right in its state constitutions.<sup>169</sup> Some states have recognized implied constitutional privacy rights<sup>170</sup> analogous to the federal penumbral right first in-

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168. *Peterson v. Greenville*, 373 U.S. 244, 250 (1963) (Harlan, J., concurring). See *supra* text accompanying note 108.

The concept also conflicts with the Bad Samaritan Rule deeply rooted in the Anglo-American legal system. Under the Bad Samaritan Rule, one's only legal obligation to strangers is to avoid harming them; one has no affirmative duty to them unless one is in some legally recognized special relationship to them. Thus, the men who walked by the injured person in the biblical parable, before the Good Samaritan happened by, would not be legally liable. This is, of course, only a general principle to which many exceptions and qualifications exist.

169. See Ezzard, *supra* note 32, at 403; Silverstein, *supra* note 32, at 216. The ten states are: Alaska (ALASKA CONST. art. I, § 22 (1972)); Arizona (ARIZ. CONST. art. II, § 8 (1910)); California (CAL. CONST. art. I, § 1 (1972, 1974)); Florida (FLA. CONST. art. I, §§ 12, 23 (1981)); Hawaii (HAW. CONST. art. I, §§ 6, 7 (1968, 1978)); Illinois (ILL. CONST. art. I, §§ 6, 12 (1970)); Louisiana (LA. CONST. art. I, § 5 (1974)); Montana (MONT. CONST. art. II, § 10 (1972)); South Carolina (S.C. CONST. art. I, § 10 (1971)); Washington (WASH. CONST. art. I, § 7 (1889)).

This Note will review only California's constitutional privacy right in order to remain a manageable length, and because California's explicit right offers most of what an explicit federal right, which the Note will propose, could offer.

170. See Nan Feyler, *The Constitutional Right to Privacy*, 14 N.Y.U. REV. L. & SOC. CHANGE 973, 981 n.75 (1986).

voked in *Griswold*.<sup>171</sup>

California's explicit privacy right is "inalienable."<sup>172</sup> Article I, Section 1 states in part: "All people are by nature free and independent and have inalienable rights. Among these are . . . pursuing and obtaining safety, happiness, and privacy."<sup>173</sup> Black's Law Dictionary defines inalienable rights as "[r]ights which are not capable of being surrendered or transferred without the consent of the one possessing such rights."<sup>174</sup>

Unlike the federal penumbral privacy right, California's explicit privacy guarantee is "self-executing."<sup>175</sup> To state a federal question and thereby gain federal subject matter jurisdiction, a plaintiff needs a statutory vehicle on which to premise the action. A state or federal statute itself can be the state action needed for a federal claim.<sup>176</sup> California privacy rights need no such statutory vehicle.<sup>177</sup> Even if California's privacy right were not explicit, state governmental powers, unlike federal powers, are not restricted to those that are constitutionally enumerated.<sup>178</sup>

## 2. *Advantages to Protection at a Constitutional Level*

Several advantages accrue from protecting privacy at a constitutional level. Only the most fundamental rights are protected constitutionally. A broad, inclusive constitutional provision can change more flexibly with social mores than a narrow, well-defined statutory provision. The constitutional provision will preempt a statutory one. Finally, constitutions are more difficult to change than statutes or common law precedent.

When a voter initiative added California's explicit privacy right to its constitution in 1972, the language in the ballot arguments for its passage unequivocally endorsed a broad and fundamental right:

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171. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965). See *supra* part II.A. For example, New Jersey identified a "right of personality" in its state constitution, N.J. CONST. art. I, § 1, that embraced Karen Ann Quinlan's right not to exist indefinitely in a mindless "vegetative" state, and permitted her father to disconnect her life-support system. *In re Quinlan*, 355 A.2d 647 (N.J.), cert. denied, 429 U.S. 922 (1976).

172. *Luck v. Southern Pac. Transp. Co.*, 267 Cal. Rptr. 618, 625 (Ct. App. 1990). For implications to state constitutional independence, see *infra* note 204 and accompanying text; for implications to absence of state action requirement, see *infra* note 277 and accompanying text.

173. CAL. CONST. art. I, § 1.

174. BLACK'S LAW DICTIONARY 759 (6th ed. 1990).

175. *White v. Davis*, 533 P.2d 222, 234 (Cal. 1975); *Cutter v. Brownbridge*, 228 Cal. Rptr. 545, 549 (Ct. App. 1986); *Porten v. University of San Francisco*, 134 Cal. Rptr. 839, 842 (Ct. App. 1976).

176. *Peterson v. Greenville*, 373 U.S. 244 (1963); see *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 726-27 (1961) (Stewart, J., concurring).

177. *People v. Blair*, 602 P.2d 738, 746 (Cal. 1979).

178. See U.S. CONST. amend. IX; *State v. Gunwall*, 720 P.2d 808, 815 (Wash. 1986).



The elevation of the right to be free from invasions of privacy to constitutional stature was apparently intended to be an expansion of the privacy right. The election brochure argument states: "The right to privacy is much more than 'unnecessary wordage.' It is *fundamental* to any free society. . . . This simple amendment will extend various court decisions on privacy to insure protection of our basic rights."<sup>179</sup>

A constitutional provision generally trumps a contrary statutory or common law provision.<sup>180</sup> The California privacy right supersedes a contrary statute.<sup>181</sup> California courts have labelled the constitutional privacy right fundamental and more far-reaching than common law privacy rights.<sup>182</sup>

Constitutional rights can be broader than statutory rights, and more malleable and elastic for future social developments. This is crucial for privacy rights, which are intimately connected to technological developments, population increases and density, urbanization, and concentration and centralization of information. The U.S. Supreme Court, in *Burton*, alluded to the intentional "imprecision" of the Fourteenth Amendment, which "was necessary if the right were to be enjoyed in the variety of individual-state relationships which the Amendment was designed to embrace."<sup>183</sup>

One could argue that if a right such as privacy is truly fundamental, it would not change over time. In fact, only privacy's manifestations and its social contexts develop historically, while the right itself remains constant.

Constitutional provisions are more difficult to eliminate, once enacted. Voters can amend the California Constitution by initiative, but the legislature cannot amend it statutorily.<sup>184</sup> Initiative measures are

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179. *Porten*, 134 Cal. Rptr. 839, 841-42 (emphasis added). See also *Soroka v. Dayton Hudson Corp.*, 1 Cal. Rptr. 2d 77, 82 (Ct. App. 1991).

When California courts need to examine the Framers' intentions about a constitutional provision, the courts infer these intentions from ballot arguments. See *infra* note 284 and accompanying text.

On the fundamentality of privacy, see generally Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890); BRILL, *supra* note 49, at xii ("We believe it an inherent, perhaps an inviolable, right to define for ourselves what can be known or revealed, and to whom, and to choose what we want to hide, or to veil, from public scrutiny."); but see generally HIXSON, *supra* note 1 (Privacy is not a natural right but one bestowed by the state. Over-pursuit of privacy is selfish and anti-communitarian.).

180. U.S. CONST. amend. XIV. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-77 (1803).

181. *Cutter v. Brownbridge*, 228 Cal. Rptr. 545, 550 (Ct. App. 1986).

182. *E.g.*, *id.* at 549.

183. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961).

184. *Raven v. Deukmejian*, 801 P.2d 1077, 1080 (Cal. 1990).

Amendment of the federal constitution requires ratification by the legislatures of three quarters of the states. U.S. CONST. art. V.

constitutionally limited by the single-subject rule,<sup>185</sup> which mandates that initiatives have some "common concern" or "discernible common thread" to which all their detailed proposals are "reasonably germane."<sup>186</sup>

Revising rather than merely amending the state constitution requires either a constitutional convention plus subsequent voter ratification, or "legislative submission of the measure to the voters."<sup>187</sup> To ascertain whether proposed constitutional changes are revisions or amendments, the changes are assessed quantitatively and qualitatively.<sup>188</sup> Article I, Section 24 of the California Constitution states in part, "Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution."<sup>189</sup> Proposition 115 would have conformed criminal rights to federal constitutional levels.<sup>190</sup> The state supreme court unanimously blocked 115's proposed conformity change to Article I, Section 24,<sup>191</sup> because it was qualitatively "devastating" in reducing all criminal rights protections to federal levels, and thereby usurping state court independence.<sup>192</sup> That a conservative supreme court, historically unsympathetic to criminal rights, rejected this conformity revision, attests to the flexibility of the state constitutional amendment process.

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185. CAL. CONST. art. II, § 8(d); *Raven*, 801 P.2d at 1083.

186. *Raven*, 801 P.2d at 1083; *Brosnahan v. Brown*, 651 P.2d 274, 279 (Cal. 1982); *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 583 P.2d 1281, 1290 (Cal. 1978). The California Supreme Court upheld both of the so-called Victims' Bill of Rights initiatives—Proposition 8 in *Brosnahan* and Proposition 115 in *Raven* (as discussed later, one provision of 115 was held unconstitutional, but the rest was upheld)—using a loose version of this "reasonably germane" test to find that all the specific provisions could be grouped under a common label such as criminal rights, and thus the propositions passed the single-subject rule. Justice Mosk dissented persuasively in *Raven* that Proposition 115 is exactly the sort of "grab-bag" the single-subject rule was aimed at preventing, because of voter confusion and the "log-rolling" effect, where clauses that would not have passed independently are tacked on as riders to a winning initiative. Mosk disparaged the majority's common label analysis, pointing out that if a label is broad enough, anything can fit under it; he believed the "reasonably germane" inquiry should consider interrelationships among the provisions, which in Proposition 115 covered topics as disparate as joinder, torture, and voir dire.

187. CAL. CONST. art. XVIII, §§ 1, 2; *Raven*, 801 P.2d at 1085.

188. *Raven*, 801 P.2d at 1086.

189. CAL. CONST. art. I, § 24; *Raven*, 801 P.2d at 1086.

190. *Raven*, 801 P.2d at 1086. Florida passed a similar conformity amendment in 1982, which linked the state's privacy protections, especially against unconstitutional search and seizure, to "the Fourth Amendment . . . as interpreted by the United States Supreme Court." The exclusionary rule was likewise conformed to the federal standard. FLA. CONST. art. I, §§ 12 (search and seizure), 23 (right "to be let alone") (1982).

191. *Raven*, 801 P.2d at 1086-88.

192. *Id.* The court found the revision to Article I, Section 24 quantitatively minor, since it affected only one section of the constitution. But it believed the qualitative effect was enormous, because state courts would be relieved of all power to protect any criminal right—including due process, equal protection, and counsel rights—beyond the federal minimum standard. Principles of federalism would clearly be threatened.

## B. State Constitutional Independence and Issues of Federalism

Just as *Raven* guaranteed state independence in providing constitutional protections beyond those federally mandated in the area of criminal rights, state constitutions guard privacy rights beyond federal protection levels. State constitutions traditionally have provided a second line of defense for civil liberties,<sup>193</sup> and with recent erosions in federal protections,<sup>194</sup> will serve as the new front line.<sup>195</sup> Many state protections surpass federal minimal protections of individual rights.<sup>196</sup> For example, *City of Santa Barbara v. Adamson*<sup>197</sup> did not share the U.S. Supreme Court's reluctance in *Village of Belle Terre v. Boraas*<sup>198</sup> to protect unrelated cohabitants against a hostile city zoning ordinance. The California Supreme Court held that a zoning ordinance violated the state privacy rights of a group of unrelated persons who chose to share a household, absent a showing of a compelling state interest against communal living arrangements.<sup>199</sup> The U.S. Supreme Court did protect a grandmother's right to live with her grandson in *Moore v. City of East Cleveland*,<sup>200</sup> by a 5-4 majority, but was unwilling to extend federal privacy protection any further.<sup>201</sup>

In two narrow areas, California has adopted federal constitutional standards as its own. California's exclusionary rule, as applied in a crim-

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193. See Feyler, *supra* note 170, at 974, 985; Brennan, *supra* note 7, at 547-52.

194. See *supra* part II.B.

195. "Now, the diminution of federal scrutiny and protection out of purported deference to the states mandates the assumption of a more responsible state court role. And state courts have taken seriously their obligation as coequal guardians of civil rights and liberties." Brennan, *supra* note 7, at 548. State constitutional expansions of fundamental rights are especially significant during an era of retrenchment by the federal government on civil liberties. *Id.* at 547-52. Justice Brennan calls ultimately for dual, overlapping protection of fundamental due process and equal protection rights by federal and state constitutions, but realizes that current judicial and political trends will leave the states to fill the gap. *Id.*

196. See Decker, *supra* note 1, at 566-67.

197. *City of Santa Barbara v. Adamson*, 610 P.2d 436 (Cal. 1980).

198. 416 U.S. 1 (1974).

199. The state court found that the city zoning ordinance, whose "rule of five" proscribed cohabitation of more than five unrelated persons, violated California's right to privacy in Article I, Section 1. *Santa Barbara v. Adamson*, 610 P.2d at 439-42. The court reviewed various city interests, including prevention of overcrowding, and maintenance of "a suitable environment for family life." Because the ordinance "does not limit the number of related residents, or of servants, [i]t does not appear to have been designed to prevent overcrowding . . ." If the "suitable environment" envisioned was one with less traffic and noise, the "rule of five" was not necessarily an effective way to achieve such an environment; related persons may be noisy or have many cars. Finally, if the "suitable environment" phrase was a code word indicating moral condemnation of communal living, "[t]hat implied goal would not be legitimate." *Id.* at 441.

200. 431 U.S. 494 (1977).

201. *Belle Terre*, 416 U.S. 1.

inal search and seizure context, only extends to the federal minimum.<sup>202</sup> Additionally, California uses the federal constitutional standard for cruel and unusual punishment in capital cases.<sup>203</sup> While some state constitutional privacy guarantees are limited to search and seizure contexts, others like California's stand alone.<sup>204</sup> Because the California Constitution has an "inalienable" privacy right separate from its search and seizure protection,<sup>205</sup> Proposition 8's forced linkage of the state's exclusionary rule to federal standards<sup>206</sup> does not affect the broader privacy right.

In general, California constitutional interpretation is not dependent on federal constitutional guidelines:

"It is a fiction too long accepted that provisions in state constitutions textually identical to the Bill of Rights were intended to mirror their federal counterpart. The lesson of history is otherwise . . . . [S]tate charters . . . [provide] the only line of protection of the individual against the excesses of local officials." Accordingly, . . . state courts, in interpreting constitutional guarantees contained in state constitutions, are "independently responsible for safeguarding the rights of their citizens."<sup>207</sup>

California's constitutional privacy right is broader than the federal right,<sup>208</sup> and courts determine it independently.<sup>209</sup> Indeed, California's right was adopted expressly to fill a perceived gap in federal coverage.<sup>210</sup> Federal guarantees provide a floor below which states may not venture,<sup>211</sup> and California courts owe some degree of deference to federal interpretations, especially of criminal rights.<sup>212</sup> Above that floor, Cali-

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202. *People v. Crowson*, 660 P.2d 389, 392 (Cal. 1983); *See Silverstein, supra* note 32, at 245-46.

203. *People v. Frierson*, 599 P.2d 587, 612-14 (Cal. 1979).

204. Regarding search and seizure only: *see Silverstein, supra* note 32, at 227-28; *Ezzard, supra* note 32, at 413-18. Regarding stand-alone privacy rights: *see Silverstein, supra* note 32, at 227-32; *Feyler, supra* note 170, at 980.

205. CAL. CONST. art. I, § 1 (1974) (stand-alone privacy right); CAL. CONST. art. I, § 13 (1974) (search and seizure protection).

206. *See In re Lance W.*, 694 P.2d 744 (Cal. 1985). For discussion of Proposition 8, *see infra* note 341 and accompanying text.

207. *Committee to Defend Reprod. Rights v. Myers*, 625 P.2d 779, 783 (Cal. 1981) (quoting *People v. Brisendine*, 531 P.2d 1099, 1113 (Cal. 1975)).

208. *American Academy of Pediatrics v. Van de Kamp*, 263 Cal. Rptr. 46, 49 (Ct. App. 1989) (citing *Myers*, 625 P.2d at 785); *City of Santa Barbara v. Adamson*, 610 P.2d 436, 440 n.3 (Cal. 1980)).

209. *American Academy*, 263 Cal. Rptr. at 49 (citing *Allen v. Superior Court*, 557 P.2d 65, 67 (Cal. 1976)).

210. *Id.* at 51 (citing *White v. Davis*, 533 P.2d 222, 233-34 (Cal. 1975)).

211. *Id.* at 49. The Supremacy Clause provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Law of any State to the Contrary notwithstanding." U.S. CONST. art. VI.

212. *Raven v. Deukmejian*, 801 P.2d 1077, 1086-89 (Cal. 1990).

ifornia courts are free either to follow federal levels of protection, or to define their own levels.<sup>213</sup> To preserve a holding on independent state grounds and be immune from Supreme Court invalidation using federal grounds, a state court must clearly and expressly indicate the state-law basis of its decision.<sup>214</sup>

Expansion of state privacy rights above the federal floor preserves local history and culture,<sup>215</sup> and permits local "experimentation" with diverse protections.<sup>216</sup> Local social values about privacy may be radically different from the prevailing national consensus.<sup>217</sup> State constitutions and courts may be more democratic and "more immediately 'subject to majoritarian pressures than federal courts.'" Unlike federal judges, state judges do not have life terms, but must face elections.<sup>218</sup> In addition, California grants strong deference to voters' wishes expressed in initiatives and referenda,<sup>219</sup> which were the source of the privacy amendment.

A Washington State case, *State v. Gunwall*,<sup>220</sup> set out six "non-exclusive neutral criteria" to assist in a state court's choice between state or federal constitutional grounds: "(1) the textual language [of both constitutions]; (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern."<sup>221</sup> Washington and California have explicit constitutional privacy protections with broader applicability than that of the federal Fourth Amendment, as discussed above. These states have con-

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213. *American Academy*, 263 Cal. Rptr. at 49-51. *American Academy* offers *People v. Tersinski*, 640 P.2d 753 (Cal. 1982), as an example of the California Supreme Court's adoption of federal Fourth Amendment protection levels. *American Academy*, 263 Cal. Rptr. at 50. *American Academy* itself is an example of state court independence: This case extended state privacy rights involving abortion decisions equally to minors and adults, contrary to Supreme Court decisions such as *Hodgson v. Minnesota*, 110 S. Ct. 2926 (1990). See also *PruneYard v. Robins*, 447 U.S. 74, 81 (1980); Brennan, *supra* note 7, at 548.

214. *Michigan v. Long*, 463 U.S. 1032 (1983); Brennan, *supra* note 7, at 552 (citing *Long*); Ezzard, *supra* note 32, at 410. See Eric B. Schnurer, *The Inadequate and Dependent "Adequate and Independent State Grounds" Doctrine*, 18 HASTINGS CONST. L.Q. 371 (1991). Schnurer suggests a return to the pre-*Long* presumption that state court decisions rest on independent state grounds even where that reliance is not clearly stated. Schnurer also points out how easily state courts can circumvent the *Long* requirement, thus undercutting its utility.

215. See Silverstein, *supra* note 32, at 285-96, for a detailed discussion of Illinois's development of its state privacy right.

216. See Brennan, *supra* note 7, at 549-50.

217. See, e.g., *Ravin v. State*, 537 P.2d 494 (Alaska 1975) (possession of small amounts of marijuana for personal use is protected by state constitutional right to privacy).

218. Brennan, *supra* note 7, at 551 (quoting Gregory S. Bruch, Note, *Michigan v. Long: Presumptive Federal Appellate Jurisdiction over State Cases Containing Ambiguous Grounds of Decision*, 69 IOWA L. REV. 1081, 1096-97 (1984)).

219. *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 583 P.2d 1281, 1283 (Cal. 1978).

220. 720 P.2d 808 (Wash. 1986).

221. *Id.* at 811.

stitutional and common law histories that emphasize privacy safeguards, as the legislative and ballot records surrounding the passage of their state privacy provisions indicate.<sup>222</sup> The *Gunwall* court also contrasted the limited structure of the federal constitution, which grants only enumerated powers, with the plenary power of state constitutions, whose "explicit affirmation of fundamental rights . . . may be seen as a guarantee of those rights rather than as a restriction on them."<sup>223</sup> In excluding evidence obtained from a telephone pen register, which federal precedent would have allowed,<sup>224</sup> the Washington Supreme Court traced a state history of preserving telephone privacy, based on statutory and case law.<sup>225</sup>

California, like Washington, has found state constitutional protection where the U.S. Supreme Court found no federal constitutional protection. The reasoning in California's *Myers* decision<sup>226</sup> was opposite to the U.S. Supreme Court's analysis of a constitutional right to abortion funding.<sup>227</sup> Consistent with *Gunwall's* analysis of the federal constitution, the U.S. Supreme Court found no *affirmative* right to government funding for an abortion even if that effectively would prohibit a poor woman from obtaining an abortion.<sup>228</sup> In contrast, California found an affirmative, state constitutional right for abortion funding.<sup>229</sup>

In another right-to-funding case, *Robbins v. Superior Court*,<sup>230</sup> the California Supreme Court found that a welfare program mandating shelter residency in lieu of direct welfare payments violated the state privacy right. The dormitory shelters had common bathrooms and no partitions around sleeping areas, residents were under curfew and subject to a 9:00 P.M. bedcheck, their visiting rights and phone access were restricted, and the dorms were not always physically safe. The state court believed that the overall loss of control of residents' lives, loss of dignity, and the "social stigma" violated fundamental privacy rights. In addition, the program did not achieve the state's goals of increased self-reliance and self-respect.<sup>231</sup> Although there is no federal case on point, extrapolation

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222. *Id.* at 812. See also *infra* note 284 and accompanying text.

223. *Gunwall*, 720 P.2d at 812-13.

224. *Smith v. Maryland*, 442 U.S. 735 (1979).

225. *Gunwall*, 720 P.2d at 814-17.

226. *Committee to Defend Reprod. Rights v. Myers*, 625 P.2d 779, 780-81 (Cal. 1981).

227. *Rust v. Sullivan*, 111 S. Ct. 1759 (1991); *Harris v. McRae*, 448 U.S. 297 (1980); *Maher v. Roe*, 432 U.S. 464 (1977).

228. Under the federal constitution, a woman has a right to choose an abortion but no right to the abortion's funding. *Rust*, 111 S. Ct. 1759; *Harris v. McRae*, 448 U.S. 297; *Maher*, 432 U.S. 464.

229. *Myers*, 625 P.2d at 781 (statute restricting Medi-Cal funding for abortions held unconstitutional, because "the asserted state interest in protecting fetal life cannot constitutionally claim priority over the woman's fundamental right of procreative choice.").

230. *Robbins v. Superior Court*, 695 P.2d 695 (Cal. 1985).

231. *Id.* at 697-706.

from the abortion funding cases and from the substantive traditionalism in federal privacy cases, suggests that a federal analysis would have followed more closely Justice Lucas's dissent in *Robbins*. Lucas took a utilitarian approach, stressing statistics that welfare recipients stayed in the shelters for an average of one month, whereas recipients getting cash welfare benefits received them for an average of nine months. He argued that saving money by encouraging people to get off welfare was a legitimate state interest that was effectively realized through the shelter program.<sup>232</sup> He disagreed with the majority about residents' loss of control over their lives, and pointed out that the program provided a clean bed, a good balanced diet, free bus passes, and stability that would put recipients back on their feet.<sup>233</sup> Each side started with the same facts, but one approach emphasized personal dignity, and the other emphasized the government's financial interests. Thus their end positions differ dramatically.

### C. California Standards of Review

#### 1. *The Default Test Is Bagley Strict Scrutiny*

California requires a compelling governmental interest to justify infringement of a fundamental right such as the constitutional right to privacy.<sup>234</sup> California courts use the three-pronged analysis from *Bagley v. Washington Township Hospital District*<sup>235</sup> to test for a compelling interest that can override a fundamental right, and for narrow tailoring of the statute or action toward achieving that interest.<sup>236</sup> The initial prong is like a rational relationship test, which requires that the action or imposed conditions reasonably relate to the government's purpose.<sup>237</sup> This initial

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232. *Id.* at 711 (Lucas, J., dissenting).

233. *Id.* at 709-12 (Lucas, J., dissenting).

234. *Long Beach City Employees Ass'n v. City of Long Beach*, 719 P.2d 660, 666, 669 (Cal. 1986); *White v. Davis*, 533 P.2d 222, 224-25, 233-34 (Cal. 1975); *Soroka v. Dayton Hudson Corp.*, 1 Cal. Rptr. 2d 77, 82-86 (Ct. App. 1991); *Hill v. National Collegiate Athletic Ass'n*, 273 Cal. Rptr. 402, 410 (Ct. App. 1988), *review granted*, 801 P.2d 1070 (Cal. 1990); *Cutter v. Brownbridge*, 228 Cal. Rptr. 545, 549 (Ct. App. 1986).

235. 421 P.2d 409 (Cal. 1966).

236. *Long Beach*, 719 P.2d at 674 (Bird, C.J., concurring); *Robbins v. Superior Court*, 695 P.2d 695, 704 (Cal. 1985); *Committee to Defend Reprod. Rights v. Myers*, 625 P.2d 779, 781 (Cal. 1981). For a discussion of the basic scrutiny levels, see *supra* note 50 and accompanying text.

237. Part IV.A addresses non-government actors. The *Bagley* test has been applied to government invasions of privacy. See *Long Beach*, 719 P.2d 660; *Robbins*, 695 P.2d 695; *Myers*, 625 P.2d 779. Courts have also used it with privacy invasions by non-government actors. *Valley Bank of Nevada v. Superior Court*, 542 P.2d 977 (Cal. 1975) (balancing compelling interests of a private bank and an invaded customer, without explicitly using the *Bagley* analysis); *Hill v. National Collegiate Athletic Ass'n*, 273 Cal. Rptr. 402, 408-11 (Ct. App. 1988), *review granted*, 801 P.2d 1070 (Cal. 1990) (using *Bagley* test for alleged invasion by private NCAA).

hurdle is not difficult.<sup>238</sup>

The next two prongs are analogous to a strict scrutiny standard. The second prong requires that the benefit from the invasion must “manifestly outweigh any resulting impairment of constitutional rights.”<sup>239</sup> This state standard is higher than federal Fourth Amendment balancing that weighs the privacy invasion against the legitimate government interest.<sup>240</sup> *Bagley* strict scrutiny does not eliminate all balancing, however.<sup>241</sup> In *Cutter v. Brownbridge*, defendant psychotherapist revealed damaging private information about plaintiff patient at a proceeding concerning plaintiff’s visitation rights with his children, for which revelation plaintiff sued.<sup>242</sup> The psychotherapist claimed statutory immunity,<sup>243</sup> and the court held the need to get at the truth in a judicial proceeding is a compelling enough interest to invade plaintiff’s privacy.<sup>244</sup> Once established, this compelling interest was balanced against plaintiff’s privacy interest. Based on California’s psychotherapist-patient privilege and the rule that a psychotherapist must claim this privilege for the patient,<sup>245</sup> the *Cutter* court judged that the legislature intended a psychiatric patient’s privacy interest to be very potent, and held that privacy won this balance.<sup>246</sup>

The third *Bagley* prong considers less offensive alternatives, and requires that defendant “demonstrate that the . . . intrusion on the cherished right of privacy is drawn with narrow specificity.”<sup>247</sup> In *Valley Bank of Nevada v. Superior Court*, for example, a bank customer’s private records were disclosed in judicial proceedings, because a fraud defense

238. See, e.g., *Long Beach*, 719 P.2d at 674 (Bird, C.J., concurring) (arguing that polygraph reasonably related to better public job performance). But see *Myers*, 625 P.2d at 790-91 (demonstrating that first *Bagley* prong proved fatal for a statute that intended to provide greater abortion access to indigents, but accomplished the opposite).

239. *Robbins*, 695 P.2d at 704; *Myers*, 625 P.2d at 781. See *Long Beach*, 719 P.2d at 674-75 (Bird, C.J., concurring) (stating that constitutional privacy so damaged by polygraph that hard to imagine any outweighing benefit, and polygraph evidence not admissible in court, so fails second *Bagley* prong).

240. *Luck v. Southern Pac. Transp. Co.*, 267 Cal. Rptr. 618, 629-31 (Ct. App. 1990). See *Skinner v. Railway Labor Executives’ Ass’n*, 489 U.S. 602 (1989). The Fourth Amendment provides a minimum beyond which the California Constitution protects. *Luck*, 267 Cal. Rptr. at 632.

241. “Fundamental though this constitutional right may be, it is not absolute . . .” *Cutter v. Brownbridge*, 228 Cal. Rptr. 545, 549 (Ct. App. 1986). The *Bagley* phrase “manifestly outweighs” denotes balancing.

242. *Cutter*, 228 Cal. Rptr. 545.

243. The California Civil Code grants immunity for otherwise actionable statements made during a judicial proceeding. CAL. CIVIL CODE § 47(2) (West 1982 & Supp 1992); *Silberg v. Anderson*, 786 P.2d 365 (Cal. 1990).

244. *Cutter*, 228 Cal. Rptr. at 551-53.

245. CAL. R. EVID. 1014 and 1015.

246. *Cutter*, 228 Cal. Rptr. at 551-53.

247. *Long Beach City Employees Ass’n v. City of Long Beach*, 719 P.2d 660, 670 (Cal. 1986).



depended in part on plaintiffs' names on the records.<sup>248</sup> The court acknowledged that the disclosure itself was necessary and overrode the privacy interests, but it dictated procedural safeguards to limit such a disclosure: give plaintiffs notice prior to disclosure; allow them a chance to oppose it; remove their names from the records if practicable (it was not in *Valley Bank* because of the defense); seal all information until specifically needed; and hold *in camera* hearings where possible.<sup>249</sup>

## 2. Wilkinson's Mid-Level Balancing Test and Employee Drug Testing

*White v. Davis* and its progeny mandate a compelling interest test—*Bagley* strict scrutiny—when the state constitutional privacy right has been invaded.<sup>250</sup> In *Wilkinson v. Times Mirror Corp.*,<sup>251</sup> a state appeals court upheld the constitutionality of drug testing of job applicants under California constitutional privacy provisions. *Wilkinson* acknowledged the requirement of strict scrutiny, but claimed that the factually unusual, legally narrow holdings in *People v. Privitera* and *Schmidt v. Superior Court* abrogated the requirement.<sup>252</sup> The appeals court's conclusion seems far-fetched. California precedent consistently has endorsed strict scrutiny for privacy intrusions.<sup>253</sup>

*Privitera* and *Schmidt* were factually unusual and inappropriate precedent for the *Wilkinson* drug testing challenge. In *Privitera*, the state high court declined to guard the right to use the drug laetrille under constitutional privacy grounds.<sup>254</sup> Laetrille's efficacy was questionable at the time, so essentially the right to a *placebo* was at issue. *Schmidt*<sup>255</sup> is equally distinguishable from mainstream privacy rights cases. Although the *Schmidt* court utilized a balancing approach in its equal protection analysis of an age-discrimination case, the court recognized a statutory exception<sup>256</sup> to the general prohibition against age discrimination for mobilehome parks *only*. Park owners could discriminate, because the close quarters, the retirement-age demographics, and the limited scope of the discrimination—not city-wide or even neighborhood-wide—were not

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248. *Valley Bank of Nevada v. Superior Court*, 542 P.2d 977 (Cal. 1975).

249. *Id.* at 980.

250. *White v. Davis*, 533 P.2d 222, 224-25 (Cal. 1975). See also *Committee to Defend Reprod. Rights v. Myers*, 625 P.2d 779 (Cal. 1981) (employing *Bagley* three-pronged strict scrutiny for invasions of California constitutional privacy right); *Porten v. University of San Francisco*, 134 Cal. Rptr. 839, 843-44 (Ct. App. 1976) (noting that private defendant U.S.F. will need, at trial, "some compelling public interest justifying" its invasion).

251. *Wilkinson v. Times Mirror Corp.*, 264 Cal. Rptr. 194 (Ct. App. 1989), *review denied*, 1989 Cal. App. LEXIS 1168 (1990).

252. *Id.* at 202-03.

253. *Long Beach City Employees Ass'n v. City of Long Beach*, 719 P.2d 660, 666-69 (Cal. 1986); *Myers*, 625 P.2d at 793; *White v. Davis*, 533 P.2d at 224, 233-34.

254. *People v. Privitera*, 591 P.2d 919 (Cal. 1979).

255. *Schmidt v. Superior Court*, 769 P.2d 932, 944 (Cal. 1989).

256. *Id.* at 937-39.

very onerous.<sup>257</sup> *Schmidt* is a sensible, narrow ruling limited to mobilehome parks. It should not eliminate a strict standard of review for violations of privacy by restrictions on household makeup. In fact, *Adamson*<sup>258</sup> and *Atkisson*,<sup>259</sup> which use compelling interest tests, are the more general California decisions about violations of privacy in the household makeup area.

Nevertheless, *Wilkinson* developed a mid-level balancing test contrary to California precedent.<sup>260</sup> The court stated that if the privacy "right is not substantially burdened or affected, justification by a compelling interest is not required. Instead, the operative question is whether the challenged conduct is reasonable."<sup>261</sup> Plaintiff job applicants in *Wilkinson* challenged a drug test required as a condition of employment, for the non-safety-related positions of copy editor and legal writer, at lawbook publisher Matthew Bender.<sup>262</sup> The court found the testing reasonable because plaintiffs had advance notice of the requirement, and if they did not want to be tested, "applicants for jobs at Matthew Bender ha[d] a choice": They could take the test or not take the job.<sup>263</sup> Also, several procedural safeguards minimized the intrusion: No one directly watched applicants while urinating; an independent medical clinic administered the tests; the clinic allegedly told Matthew Bender only the applicant's score, and Matthew Bender did not necessarily attribute a failing score of 5 to a positive drug result; applicants could challenge the result and could reapply in six months; according to the employer, fe-

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257. *Id.* at 944-45.

258. *City of Santa Barbara v. Adamson*, 610 P.2d 436, 439-40 (Cal. 1980). Under the challenged city zoning ordinance, no more than five persons unrelated by blood, marriage, or adoption could live together in residential areas. The court held that the ordinance's "rule of five" violated the state constitutional privacy protection. Because more than five *related* persons could live together, the ordinance was not "designed to prevent overcrowding, which may be a legitimate zoning goal." *Id.* at 441.

259. *Atkisson v. Kern County Housing Auth.*, 130 Cal. Rptr. 375, 380-82 (Ct. App. 1976). A Housing Code provision prohibited a defendant's cohabitation with a person of the opposite gender not related by blood, marriage, or adoption as immoral and irresponsible. The court invalidated this provision on the ground, *inter alia*, that it violated the *federal* constitutional privacy right. *Id.* See *supra* part II.A, on the federal right under U.S. CONST. amend. XIV.

260. See *Long Beach City Employees Ass'n v. City of Long Beach*, 719 P.2d 660, 666-69 (Cal. 1986); *White v. Davis*, 533 P.2d 222, 224, 233-34 (Cal. 1975); *Soroka v. Dayton Hudson Corp.*, 1 Cal. Rptr. 2d 77, 83-86 (Ct. App. 1991) ("The major underpinning of *Wilkinson* is suspect," because the California constitutional privacy provision affords just as much protection to job applicants as it does to current employees, and because the *Wilkinson* court should have used *Bagley* strict scrutiny when considering testing of applicants and employees alike.).

261. *Wilkinson v. Times Mirror Corp.*, 264 Cal. Rptr. 194, 203 (Ct. App. 1989), *review denied*, 1989 Cal. App. LEXIS 1168 (1990).

262. *Id.* at 196.

263. *Id.* at 204.

male applicants were not tested for pregnancy,<sup>264</sup> which presumably would be unconstitutional; and applicants' medical histories remained confidential.<sup>265</sup>

Arguments against the reasonableness of drug testing focus on what is being tested: job performance, or personal lifestyle and attitude. An employer should be allowed to test for job impairment, for drug use that affects an employee's performance. But weekend marijuana use, for example, which probably does not affect performance, may generate a positive test for weeks or even months later. An employee's drug use should impact the employer—have some “nexus to the job”—before the employer disciplines, discharges, or does not hire the employee.<sup>266</sup> The U.S. Supreme Court opined that any evidence of drug use, while not conclusive, could indicate possible on-the-job use.<sup>267</sup> In general, effective management addresses behavior, not attitude.<sup>268</sup> Behavior can be documented and reformed; an employer can discipline or eventually fire an employee for stealing, tardiness, unacceptably low productivity, or destroying department morale, without making any presumptions about his or her personal life. Drug use will usually affect performance; in the rare instance it does not and there is no attendant poor performance, the employer loses nothing. Employers often subscribe to independent employee assistance programs (EAPs),<sup>269</sup> which offer help ranging from financial advice to substance abuse counselling. If management refers an egregious or obvious problem to an EAP, management will not be directly involved in an employee's personal life. Dignity is an ephemeral and elusive concept, but California courts have not been afraid to recog-

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264. *Cf. Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 626 n.7 (1989): The *Skinner* majority dismissed any danger of the employer learning “private medical facts,” because there was no showing that the employer had done anything improper with such facts.

265. *Wilkinson*, 264 Cal. Rptr. at 204.

266. Although the state right of privacy is broader than the federal right, California courts construing article I, section 1 have looked to federal precedents for guidance. Under the lower federal standard, employees may not be compelled to submit to a violation of their right to privacy unless a clear, direct nexus exists between the nature of the employee's duty and the nature of the violation. We are satisfied that this nexus requirement applies with even greater force under article I, section 1.

*Soroka v. Dayton Hudson Corp.*, 1 Cal. Rptr. 2d 77, 85 (Ct. App. 1991) (citations to *Luck v. Southern Pac. Transp. Co.*, 267 Cal. Rptr. 618, 629-31 (1990) omitted). See JAMES R. REDEKER, *EMPLOYEE DISCIPLINE: POLICIES AND PRACTICES* 15, 247-51 (Bureau of Nat'l Affairs, Inc., 1989).

267. See *Skinner*, 489 U.S. at 631-32; *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 674 (1989).

268. See REDEKER, *supra* note 266, at 192-98. Redeker advises management, “The employee's poor attitude should have caused, or have been combined with, other unacceptable conduct.”

269. Matthew Bender, the subsidiary of Times Mirror that used the drug test in its hiring process, subscribed to such a service during the period of the *Wilkinson* litigation.

nize it.<sup>270</sup>

Less policy-oriented arguments against drug testing focus on potential errors with serious consequences and on testing's overbroad scope. False positives may have drastic consequences such as losing a job.<sup>271</sup> Sophisticated athletes and other test takers have developed techniques to generate false negatives, such as flushing out traces with diuretics.<sup>272</sup>

Urine or blood samples can reveal many aspects of an employee's life and health: pregnancy, epilepsy, diabetes, high blood pressure, presence of the HIV antibody, and use of prescription medication such as lithium for depression.<sup>273</sup> Employees or applicants have no concrete guarantees that employers are not surreptitiously authorizing prohibited tests, such as for pregnancy, which could benefit an employer greatly.<sup>274</sup> One resolution of this dilemma would be to put the burden on employers to demonstrate that they are not conducting such tests.<sup>275</sup> All these objections reinforce testing's invasiveness and militate for the strictest scrutiny.

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270. See, e.g., *Robbins v. Superior Court*, 695 P.2d 695, 699-700 (Cal. 1985) (en banc) (citing shelter residents' lack of dignity and control over their own lives, and "social stigma" as factors in upholding their privacy action to avoid forced residency in lieu of welfare payments).

271. False positives are test results that erroneously show drug use when the test subject has not in fact been taking drugs. For a discussion on the unreliability of urine drug tests, see generally *Hill v. National Collegiate Athletic Ass'n*, 273 Cal. Rptr. 402, 414-15, 422 (Ct. App. 1988), *review granted*, 801 P.2d 1070 (1990).

In *Wilkinson v. Times Mirror Corp.*, 264 Cal. Rptr. 194, 205 (Ct. App. 1989), *review denied*, 1989 Cal. App. LEXIS 1168 (1990), the court dismissed plaintiffs' claims of test unreliability, relying on *Skinner*. *Skinner*, 489 U.S. 602, 632 n.10, in turn, does not directly address the unreliability issue, because "[r]espondents have provided us with no reason for doubting the Agency's conclusion that the tests at issue here are accurate in the overwhelming majority of cases." Thus the source of the accuracy assessment is a federal agency litigating its right to test.

272. False negatives are test results that fail to show drug use when the test subject has taken drugs.

See *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 676 (1989) (finding avoidance tricks ineffective and "fraught with uncertainty"). See Cochran, *supra* note 104, at 560, on "masking" drug use. Evidently, athletes can enhance performance with substances naturally occurring in the body, such as the hormone testosterone; because of the resulting high threshold level before testing positive, they can ingest significant doses without triggering a positive.

273. See *Skinner*, 489 U.S. at 647 (Marshall, J., dissenting). *Hill*, 273 Cal. Rptr. at 417, listed four privacy interests potentially invaded by drug testing, of which the second was confidentiality of medical information. Female athletes especially had a protectible privacy interest in not revealing whether they took birth control pills.

274. *Skinner*, 489 U.S. at 626 n.7, dismissed this possibility absent any showing of improper use of samples by the employer.

275. See *infra* note 390 and accompanying text, for proposal to shift this burden of proof to employers.

## IV. The Private Sector

### A. No State Action Is Needed for California Privacy

The California constitutional privacy right from Article I, Section 1, is enforceable against governmental and non-governmental invaders alike.<sup>276</sup> "Privacy is protected not merely against state action; it is considered an inalienable right which may not be violated by anyone."<sup>277</sup> State supreme court dicta in *Schmidt* intimated possible hostility toward enforcing the constitutional privacy right absent state action,<sup>278</sup> but later in the decision the court drew back, indicating that since it had not reached the state action issue, it need not decide it.<sup>279</sup> Two years after *Schmidt*, in *Rojo v. Kliger*, the California Supreme Court found that violation of a fundamental, public, constitutional right by a private employer is actionable as a violation of public policy.<sup>280</sup> *Rojo* alluded favorably, in dicta, to *Luck's* and *Wilkinson's* use of constitutional privacy rights against private employers.<sup>281</sup>

Because the California Constitution does not expressly state whether

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276. *Chico Feminist Women's Health Ctr. v. Butte Glenn Medical Soc'y*, 557 F. Supp. 1190 (E.D. Cal. 1983) (private doctors); *Soroka v. Dayton Hudson Corp.*, 1 Cal. Rptr. 2d 77, 83 (Ct. App. 1991) (private employer); *Luck v. Southern Pac. Transp. Co.*, 267 Cal. Rptr. 618, 628 (Ct. App. 1990) (private employer); *Hill*, 273 Cal. Rptr. at 408 (private athletic association); *Wilkinson v. Times Mirror Corp.*, 264 Cal. Rptr. 194, 198-200 (Ct. App. 1989) (private employer); *Cutter v. Brownbridge*, 228 Cal. Rptr. 545, 549 (Ct. App. 1986) (psychotherapist who revealed confidential information about his patient); *Miller v. NBC*, 232 Cal. Rptr. 668 (Ct. App. 1986) (the NBC network); *Kinsey v. Macur*, 165 Cal. Rptr. 608, 612 (Ct. App. 1980) (plaintiff's former girlfriend); *Porten v. University of San Francisco*, 134 Cal. Rptr. 839, 842 (Ct. App. 1976) (private university); *Cochran*, *supra* note 104, at 546; *see White v. Davis*, 533 P.2d 222, 233-34 (Cal. 1975); *Silverstein*, *supra* note 32, at 241.

277. *Porten*, 134 Cal. Rptr. at 842.

278. *Schmidt v. Superior Court*, 769 P.2d 932, 943-44 (Cal. 1989). The court distinguished prior state and federal cases with similar factual backgrounds, because those cases involved direct state action, whereas the complained-of action in *Schmidt* was by a private mobilehome park under color of state law.

279. "[W]e have no occasion in this case to consider under what circumstances, if any, purely private action by a property owner or landlord would constitute a violation of the state constitutional privacy provision." *Schmidt*, 769 P.2d at 944 n.14. *Luck*, 267 Cal. Rptr. at 628, analyzed the *Schmidt* dicta and found that it did not override the precedents against a state action requirement, because: the privacy interest in *Schmidt* was less personal (the right to live in a mobilehome park, as opposed to the right to be free from bodily intrusion, for example); the court expressly declined to decide the issue; the ruling found no constitutional protection, so even if the court had decided the state action issue, it would have been dicta; and finally, as in *White's* analysis, the ballot argument repeatedly characterized the constitutional protection as being against government and private business. *See White v. Davis*, 533 P.2d 222, 233-34 (Cal. 1975).

280. *Rojo v. Kliger*, 801 P.2d 373, 389 (Cal. 1990) (citing *Foley v. Interactive Data Corp.*, 765 P.2d 373 (Cal. 1988)). *Rojo* found sex discrimination by a private employer actionable in tort if the employer "contravenes the dictates of fundamental public policy."

281. *Rojo*, 801 P.2d at 388.

state action is needed, the issue must be resolved by inference.<sup>282</sup> The supreme court's *White v. Davis* decision and subsequent appeals court cases dissected the ballot arguments submitted to voters.<sup>283</sup> The ballot arguments discussed in these cases testify to the intentions of the framers of the privacy amendment, which was added by initiative in 1972. First, *White* affirmed the process of inferring a provision's intended content from its ballot arguments.<sup>284</sup> Then the court identified many references to "government and business" in the ballot argument for the privacy amendment. The amendment would fulfill the need for "effective restraints on the information activities of government and business." It would "preven[t] government and business interests from collecting and stockpiling unnecessary information about us," and would retard "[t]he proliferation of government and business records over which we have no control. . . . Even more dangerous is the loss of control over the accuracy of government and business records of individuals."<sup>285</sup> *Wilkinson* analyzed the same ballot argument language, noted assorted references to private business activities such as credit card and insurance applications, and concluded, "The [ballot] argument's repeated references to information-gathering activities by both government and business lead inexorably to the conclusion that the amendment was intended to reach both governmental and nongovernmental conduct."<sup>286</sup> *Wilkinson* additionally asserted that an amendment that realistically meant to ensure informational privacy "would indeed be illusory if only the government's collection and retention of data were restricted."<sup>287</sup>

The California constitutional privacy right, then, does not have the state action requirement that the federal due process privacy right carries. The framers of the state constitutional amendment expressed their clear intent, inferable from their ballot arguments, that the privacy protection extend to invasions by private actors. In addition, the explicit state provision does not have the Fourteenth Amendment's language limiting its applicability to state action.<sup>288</sup>

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282. *Luck*, 267 Cal. Rptr. at 627.

283. *White v. Davis*, 533 P.2d at 233-34; *Luck*, 267 Cal. Rptr. at 627-28; *Wilkinson v. Times Mirror Corp.*, 264 Cal. Rptr. 194, 198 (Ct. App. 1989), *review denied*, 1989 Cal. App. LEXIS 1168 (1990).

284. *White v. Davis*, 533 P.2d at 234 n.11; *In re Lance W.*, 694 P.2d 744, 753 n.8 (Cal. 1985).

285. *White v. Davis*, 533 P.2d at 233-34 (quoting from the ballot argument in favor of the privacy amendment). *Wilkinson*, 264 Cal. Rptr. at 198, adds another quotation from the ballot argument, that "few government agencies or *private businesses* permit individuals to review their files and correct errors."

286. *Wilkinson*, 264 Cal. Rptr. at 198; *see also In re Lance W.*, 694 P.2d at 754 ("the intent of the enacting body is the paramount consideration").

287. *Wilkinson*, 264 Cal. Rptr. at 200.

288. "[N]or shall any *State* deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1 (emphasis added). CAL. CONST. art. I, § 1

## B. Public Interests and Private Employer Interests

Over centuries of industrialization and concentration of capital, with the concomitant decline in the artisan class, the employer-employee relationship has become the foundation of our economy.<sup>289</sup> This relationship is for many the center of social existence as well, as suburbanization and secularization seem to have displaced traditional social matrices such as the town square or the local church or temple. Self-worth and community reputation depend significantly on one's job. Both on a personal and a macro-economic level, the employment relationship underlies health and stability, and is fundamental.

Productivity and efficiency are usually an employer's primary concern about its employees. A worker's private pursuits such as drug use can affect productivity.<sup>290</sup> Federal Fourth Amendment analyses such as that in *Von Raab* have viewed an employer's interest in good employee performance as compelling, asserting that the employment context alone should reduce employee expectations of privacy; however, *Von Raab* addressed Customs workers in potentially dangerous jobs, so this point may be limited.<sup>291</sup> The state action requirement also restricts the Fourth Amendment's applicability to private employers, through the Fourteenth Amendment.<sup>292</sup>

The *Luck* decision held that efficiency and worker competency are not compelling interests that overcome an employee's privacy right under the state constitution.<sup>293</sup> The *Luck* court also maintained that public safety interests would be compelling, and that determining whether a job affects public safety is a question of law.<sup>294</sup> Plaintiff Luck had a desk job at defendant railroad that was unrelated to public safety.<sup>295</sup> The court believed it was following the underlying reasoning of

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states in part: "All people are by nature free and independent and have inalienable rights. Among these are . . . pursuing and obtaining safety, happiness, and privacy."

289. See Decker, *supra* note 1, at 554.

290. See Lehr & Middlebrooks, *supra* note 104, at 407; Dean S. Landis, Note, *Drug Testing of Private Employees*, 16 U. BALT. L. REV. 552, 552 n.3 (1987); SHEPARD, *supra* note 1, at 41-42 (citing several surveys). Shepard confirms that employee drug use can affect absenteeism, productivity, accidents, and employer liability.

291. National Treasury Employees Union v. Von Raab, 489 U.S. 656, 670-72 (1989). See *supra* notes 86-88 and accompanying text.

292. See *supra* part II.C.

293. Luck v. Southern Pac. Transp. Co., 267 Cal. Rptr. 618, 629-32 (Ct. App. 1990).

294. *Id.*

295. *Id.* *Luck's* examples of safety-related jobs include: a transportation worker involved with moving vehicles; a frontline (customs) official who might be corruptible (e.g., with bribes); an employee carrying a weapon; and a worker involved with volatile (nuclear) material. On the other hand, an office employee is not a "safety risk when the chain of causation between misconduct and injury is greatly attenuated." *Id.* at 631. *Luck* borrows a federal standard from *Skinner* and *Von Raab*: The employee must be directly involved, on the front line, where the danger posed is immediate.

the Supreme Court's Fourth Amendment, no-reasonable-expectations approach in *Skinner* and *Von Raab*.<sup>296</sup> *Luck* declined to use the California search and seizure provision, however, and relied on the separate state constitutional privacy right.<sup>297</sup> Another California appeals court, in *Wilkinson*, used the state search and seizure protection of privacy to uphold a drug test for non-safety-related positions.<sup>298</sup> Generally, in both federal and state cases, public safety is a compelling interest, but employer efficiency, without more, is not.

Substance abuse and other health problems cost an employer directly and indirectly. Poor attendance, careless errors, and erratic performance<sup>299</sup> have a direct impact on productivity. Impaired employees cause more workplace accidents and injuries, and an employer's health and/or liability insurance costs may be adversely affected.<sup>300</sup>

Many employers use drug testing or personality testing to reduce worker theft of employer property from minor office supplies to major trade secrets. Psychological profile tests are aimed at identifying applicants with greater tendencies toward dishonesty, often through revelation of intimate non-work-related information. Employees rarely have challenged psychological tests as invasions of privacy.<sup>301</sup> An employer's interest in preventing theft and its interest in promoting efficiency can conflict when restricting employee access to supplies or information could cause delays or inconvenience in interdepartmental interactions. For example, the efficiency of allowing each worker access to his or her own office supplies, despite isolated pilferage, might outweigh the added bureaucratic layer of a supply department and its attendant paperwork. On the other hand, the employer might need the regular tracking of supplies for ordering, expense analysis for taxes, or other purposes.

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296. *Id.* at 629-32.

297. *Id.* See CAL. CONST. art. I, § 13, for the search and seizure provision; CAL. CONST. art. I, § 1, for the free-standing privacy provision.

298. *Wilkinson v. Times Mirror Corp.*, 264 Cal. Rptr. 194, 200-06 (Ct. App. 1989), *review denied*, 1989 Cal. App. LEXIS 1168 (1990). This decision replaced the compelling interest test with a mid-level balancing approach, discussed in detail, *supra*, in part III.C.2: *Wilkinson* appears to be a maverick case in its selection of a mid-level test for an invasion of privacy as extreme as a bodily intrusion. *Wilkinson*, 264 Cal. Rptr. at 206-07, also rejected a non-constitutional claim that the drug testing violated state statutory prohibitions of medical testing that is not meant "to determine fitness for a particular job or where necessary for health and safety reasons." The court found that drug test results could indeed be "reasonably related" to job performance.

299. *Lehr & Middlebrooks*, *supra* note 104, at 418 (discussing "considerable peaks and valleys" in performance).

300. *Id.* at 407, 418. Employers have also been held liable for negligence in screening their employees. *Id.* at 407-08 (citing *D.R.R. v. English Enter.*, LATV, 356 N.W.2d 580 (Iowa Ct. App. 1984)).

301. "Few states prohibit or restrict use of honesty or psychological profile tests." *Id.* at 414. See *infra* note 317 (personality tests) and accompanying text; note 318 and accompanying text (recent *Soroka* decision).



Employers are generally permitted to search their own property, "such as desks and lockers."<sup>302</sup> Such searches would come under search and seizure scrutiny rather than under stand-alone privacy rights such as California's, and thus would be analyzed in terms of employees' reasonable expectations.<sup>303</sup> Employees generally do have an expectation of privacy in their offices,<sup>304</sup> so the Fourth Amendment applies and its first prong met. Beyond this point in the analysis, an employer can easily claim a special need other than law enforcement.<sup>305</sup> For example, a supervisor may need work-related files in an employee's desk after the employee goes home or when the employee is out sick.

More controversial are searches of vehicles on employer property or of employee packages leaving the worksite. Courts have upheld these too, although an employer who physically detains a worker against the worker's will may incur tort liability for false imprisonment.<sup>306</sup>

Employers are interested for many reasons, legitimate and not, in private information about their workers. For various business reasons, employers must maintain records to administer benefits, evaluate employees, decide promotions, determine salary adjustments, and track financial and tax data. Federal statutes may mandate such record keeping. For instance, OSHA requires documentation on workplace accidents, and Title VII demands records pertaining to possible age, gender, and race discrimination in hiring and firing.<sup>307</sup> "[H]ere . . . employee privacy rights must be delicately balanced with the employer's need to make legitimate, informed business decisions."<sup>308</sup> Administrative needs for employees' private information also reflect important pub-

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302. Lehr & Middlebrooks, *supra* note 104, at 412.

303. See SHEPARD, *supra* note 1, at 206-15. See *supra* part II.B, discussing federal search and seizure analyses. California courts use federal standards for state court application of the exclusionary rule that enforces California's search and seizure provision. See *supra* note 202 and accompanying text. For a discussion of the two privacy protections in the California constitution, see *supra* note 205 and accompanying text.

304. See, e.g., *O'Connor v. Ortega*, 480 U.S. 709 (1987); *Mancusi v. DeForte*, 392 U.S. 364 (1968).

SHEPARD, *supra* note 1, at 212, suggests that employers can counter this reasonable expectation. First employers should state in advance—in their employment contract, for instance—that employees should not expect offices, desks, lockers, and other employer property to be private. Second, employers should conduct periodic searches so that employees cannot later claim that this policy became obsolete by disuse.

305. For a discussion of "special needs" exceptions and the balancing approach to the second prong of the Fourth Amendment analysis, see *supra* note 71 and accompanying text.

SHEPARD, *supra* note 1, at 210-15, discusses the use of privacy torts as alternatives to actions based on search and seizure.

306. Lehr and Middlebrooks, *supra* note 104, at 412.

307. *Id.* at 565-66 and nn.86-90, and statutory requirements cited therein. See generally Rebecca A. Thacker & Stuart A. Youngblood, "Trends in Title VII Discrimination Legal Theories: The Future of Disparate Treatment and Disparate Impact," in *MANAGING EMPLOYEE RIGHTS AND RESPONSIBILITIES* 83-95 (Chimezie A. B. Osigweh, Yg., ed. 1989).

308. Decker, *supra* note 1, at 566.

lic interests in worker health and safety, egalitarian employment, and union representation.<sup>309</sup>

Employers often want private information about an employee that is neither required nor directly job-related. The higher a position is in a company's hierarchy, the more personal commitment the company may require. If a company is contemplating a promotion to a front-line management position, or a promotion from an hourly job to a salaried job, it may have a special interest in an employee's capacity for commitment.<sup>310</sup> The intangible personality traits contributing to employee commitment or "attitude" are not easily assessed in an applicant interview, a controlled setting that often proves the applicant's ability to master interviewing techniques more than his or her aptitude for the position.<sup>311</sup>

Employers may find all information about an applicant or employee "relevant and necessary in determining suitability for employment. Thus, the employer feels it is important to know if the employee smokes marijuana at home, is a homosexual, or socializes with the 'wrong' kind of people."<sup>312</sup> *Long Beach*, which banned polygraph exams as inherently intrusive, listed some sample questions from an employee polygraph exam:

One polygraph technician's manual contained the following questions for use in preemployment polygraph tests . . . : "Have you ever suffered a nervous breakdown? . . . Have you ever filed for, or collected workmen's compensation insurance from an on-the-job injury? . . . Are you now or have you ever been a communist sympathizer?" . . . A prospective firefighter who submitted to a polygraph examination was reportedly asked: "Have you had sex with men? Have you had sex with animals? Have you touched a child with sexual intent? How often do you masturbate? Do you cheat on your wife?"<sup>313</sup>

These are personal areas about which employers often have genuine—if illegitimate—interests, and which implicate constitutional privacy rights.

Employers may have goals for workforce composition; they may want ethnic homogeneity, for instance, because of personal prejudice, because they feel it will enhance teamwork, or because they perceive that their clients demand it. Employers increasingly view employees as repre-

309. *See id.* at 552, 566.

310. *See Luck v. Southern Pac. Transp. Co.*, 267 Cal. Rptr. 618, 632 (Ct. App. 1990).

311. *But see* SHEPARD, *supra* note 1, at 134: "Good interviews offer many advantages. . . . [E]ach person communicates at several levels, . . . [including] gestures, posture, and eye contact. . . . An observant, trained interviewer also can detect evasive responses or uneasiness regarding certain areas of inquiry, and these should be investigated further."

312. Decker, *supra* note 1, at 561.

313. *Long Beach City Employees Ass'n v. City of Long Beach*, 719 P.2d 660, 665 n.11 (Cal. 1986). As discussed below, such polygraph exams are unconstitutional invasions of the California privacy right.

sentatives for their company even when not at work.<sup>314</sup> Public image and goodwill have long been recognized as valuable business assets,<sup>315</sup> especially for employers engaged in fundraising. These pressures combine to create a strong employer interest, legitimate or not, in employees' non-workplace activities, such as bankruptcy, union involvement, general lifestyle, sexual orientation, marital status, and political or religious affiliations.<sup>316</sup>

Personality tests offer employers a method other than interviewing to obtain sensitive information from job applicants. Two prototypes for personality tests exist: the inventory-measure test, which catalogs the test-taker's affinity toward certain activities, lifestyles, and attitudes; and the projection test, which provides suggestive but open shapes or narratives onto which the test-taker can project his or her own personality traits.<sup>317</sup> The Minnesota Multiphasic Personality Inventory (MMPI) is the most popular inventory-measure test. The Rorschach ink blot test is a simple projective test; a more complex one might offer the test-taker a short, unfinished story and ask him or her to complete it. Although job applicants have rarely challenged personality screening tests on constitutional privacy grounds, a unanimous state appeals panel recently limited an employer's use of such a test to uncover either the sexual orientation or religious beliefs of job applicants.<sup>318</sup> The decision, which will be appealed, was expressly based on the California constitutional privacy right.<sup>319</sup>

Employers have various reasons for curiosity about their employees' lifestyles. Lifestyle may appear irrelevant to work performance, but in some jobs requiring teamwork, it may affect compatibility and hence team effectiveness. An employer may also feel better able to attract business and clients by presenting a certain employee profile to the public.

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314. Lehr & Middlebrooks, *supra* note 104, at 408.

315. See Cochran, *supra* note 104, at 563-64; Brunn, *supra* note 59, at 414-16.

316. Decker, *supra* note 1, at 564. Decker proposes that only non-workplace conduct that will affect an employer's business affairs should be regulated by that employer. *Id.* at 579.

Privacy and confidentiality are distinct: A worker or individual has a privacy interest in keeping certain information from the government or an employer in the first place; whereas the government or other employer has an interest in keeping certain employment information from unauthorized persons or from other employers. *Id.* at 562.

317. Decker, *supra* note 1, at 574 n.147.

318. *Soroka v. Dayton Hudson Corp.*, 1 Cal. Rptr. 2d 77 (Ct. App. 1991); Reynolds Holding, *Court Ruling Expands Rights in Workplace*, S.F. CHRON., Oct. 29, 1991, at A1; Philip Carrizosa, *Employers' Psychological Test Rights Are Limited*, DAILY J., Oct. 29, 1991, at 1, 9. Target Stores, owned by Dayton Hudson, used a personality test on applicants that included such true-false questions as "I believe in the second coming of Christ" and "I am very strongly attracted to members of my own sex." The state appeals panel found that "[w]hile Target unquestionably has an interest in employing emotionally stable persons to be SSOs [store security officers], testing applicants about their religious beliefs and sexual orientation does not further this interest." See *supra* note 266 on the nexus test.

319. *Soroka*, 1 Cal. Rptr. 2d at 82, 86.

The U.S. Supreme Court in *Von Raab*<sup>320</sup> accorded more weight to public confidence in the company's product or service than did a California court in *Luck*.<sup>321</sup> Company image partially accounts for a "philosophical [trend toward] the concept that employees represent their employers twenty-four hours a day," so employers have a legitimate interest in their workers non-work activities.<sup>322</sup> For example, an employee's termination for "open adultery" did not violate that employee's federal constitutional privacy right in *Hollenbaugh v. Carnegie Free Library*.<sup>323</sup> If specific non-work considerations are integral to employment decisions, the employer should notify its employees in advance to insulate itself from due process attacks,<sup>324</sup> unless of course those considerations are illegal ones such as gender or race.

### C. Individual Interests and Employee Interests

#### 1. Due Process, Notice, and Stated Policies

An employee needs to know what performance the employer expects and what behavior may lead to discipline.<sup>325</sup> Random punishment or testing can raise issues of procedural due process if an employer acts without notifying employees in advance.<sup>326</sup> An accused employee deserves some complaint process in which he or she may offer a mitigating explanation or legitimate denial.<sup>327</sup> Many companies immediately fire an

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320. See *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 659-61, 668-71 (1989) (The Customs Director implemented testing, despite evidence of virtually no drug use in his department, because Customs agents' public image of integrity is important in the "drug crisis.").

321. *Luck v. Southern Pac. Transp. Co.*, 267 Cal. Rptr. 618, 632 (Ct. App. 1990) ("creating a drug-free environment . . . and ensuring public confidence in the integrity of the railroad industry" are not compelling interests that justify invasion of the California right to privacy).

322. *Lehr & Middlebrooks*, *supra* note 104, at 408.

323. 436 F. Supp. 1328, 1333-34 (W.D. Pa. 1977).

324. See *Lehr & Middlebrooks*, *supra* note 104, at 415-17. Both *Wilkinson v. Times Mirror Corp.*, 264 Cal. Rptr. 194, 204 (Ct. App. 1989), *review denied*, 1989 Cal. App. LEXIS 1168 (1990), and *Von Raab*, 489 U.S. at 672 n.2, illustrate the importance courts place on providing advance notice of an employment practice.

325. REDEKER, *supra* note 266, at 25-27, 36-37, 54-58. Using "due process" not in a strictly legal sense, Redeker generalizes that "some kind of notice of employer expectations must exist prior to discipline, if the employees are to receive due process and if the system is to have widespread employee acceptance." *Id.* at 27.

Giving such notice can help an employer at subsequent labor arbitrations. *Id.* at 25, 36-37, 51; William R. Hutchison & Chimezie A. B. Osigweh, Yg., "Positive Discipline: A Nonpunitive Approach to Managing Human Resources," in *MANAGING EMPLOYEE RIGHTS AND RESPONSIBILITIES* 106-07 (Chimezie A.B. Osigweh, Yg., ed. 1989).

326. See *Rulon-Miller v. International Business Machines Corp.*, 208 Cal. Rptr. 524 (Ct. App. 1984) (IBM policy did not ban the type of relationship for which plaintiff employee was fired, and her supervisor gave her no advance warning); *Wilkinson*, 264 Cal. Rptr. at 204 (drug testing upheld partially because job applicants knew of testing in advance).

327. [T]he rights of the employee . . . include . . . the right to prompt and specific notice of the need for change; an opportunity to improve; fair and consistent treat-

employee who tests positive for drug use, despite possible test inaccuracies caused by sample contamination, mislabelling, or false positives.<sup>328</sup> Employee discharge without demonstrable grounds can be actionable, so employers must be careful about jumping to conclusions, even if only to cover themselves.<sup>329</sup>

An employer can give notice of possible privacy intrusions by adopting formal policies and publishing them, for instance, in its employee manual. A clear policy can tip the balance in favor of an employer's invasion of privacy, such as Matthew Bender's drug testing of job applicants in *Wilkinson*, because the advance notice can defeat employees' reasonable expectations of privacy.<sup>330</sup> Such a policy must not, however, be openly discriminatory,<sup>331</sup> or so intrusive as to tip the balance in the opposite direction.<sup>332</sup>

Failure to observe its own company policy can rebound against an employer, as it did in the California decision *Rulon-Miller v. International Business Machines Corp.*<sup>333</sup> In this case, defendant IBM fired plaintiff employee, ostensibly for a romantic liaison with a competitor's employee, although no harm to IBM was shown or, the court felt, was

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ment; maintenance of one's dignity and self-esteem; clear and reasonable rules and requirements; the opportunity to mount a defense and to appeal to a neutral party.

Hutchison & Osigweh, *supra* note 325, at 109. See also Michael J. Kavanagh, "How'm I Doin'? I Have a Need and a Right to Know," in *MANAGING EMPLOYEE RIGHTS AND RESPONSIBILITIES* 182 (Chimezie A. B. Osigweh, Yg., ed. 1989).

328. Landis, *supra* note 290, at 553-58.

329. Lehr & Middlebrooks, *supra* note 104, at 411-13, 417-18, give the example that an employee should be fired or disciplined because the employee showed deception on a polygraph test when asked about pilferage, not because he or she is a thief. Their article, which is written for management, uncharacteristically recommends that employers not threaten termination "unless [the employee] confesses to personal involvement." *Id.* at 417. See also REDEKER, *supra* note 266, at 97-104, on the erosion of the common law rule of at-will employment; see also *infra* part IV.C.4, for a discussion of the implied covenant of good faith and fair dealing.

330. *Wilkinson*, 264 Cal. Rptr. at 204. See also *supra* note 263 and accompanying text; Chimezie A. B. Osigweh, Yg. & Marcia P. Miceli, "The Challenge of Employee Rights and Responsibilities in Organizations," in *MANAGING EMPLOYEE RIGHTS AND RESPONSIBILITIES* 4-7 (Chimezie A. B. Osigweh, Yg., ed. 1989); Brunn, *supra* note 59, at 397, 402.

331. A federal court distinguished between a situation where an employer's stated policy discriminated against unmarried mothers, *Andrews v. Drew Mun. Separate Sch. Dist.*, 507 F.2d 611 (5th Cir. 1975), and a situation when an employer fires one particular couple for conduct disapproved of by the community. *Hollenbaugh v. Carnegie Free Library*, 436 F. Supp. 1328, 1332 (W.D. Pa. 1977).

332. *E.g.*, *O'Brien v. Papa Gino's of America, Inc.*, 780 F.2d 1067 (1st Cir. 1986) (although the employment contract and personnel manual forbade drug use, the company was not therefore allowed to make a "highly offensive" investigation—by polygraph—to enforce its policy).

333. 208 Cal. Rptr. 524 (Ct. App. 1984). See also *Bratt v. International Business Machines Corp.*, 785 F.2d 352 (1st Cir. 1986) (IBM's stated policy against disclosure of employees' private medical information affected plaintiff employee's reasonable expectation of privacy, in an intrusion-into-seclusion tort action); Howard A. Nunes, Comment, *Bratt v. International Business Machines*, 7 W. NEW ENG. L. REV. 337 (1984).

probable.<sup>334</sup> The termination contravened two company policies: “strict regard for [an employee’s] right to personal privacy,” as described unequivocally in a lengthy policy announcement from CEO Tom Watson, Jr.<sup>335</sup>; and an aggressive promotion policy, for which plaintiff’s glowing record qualified her.<sup>336</sup> No company conflict-of-interest policy extended to non-business romance.<sup>337</sup> The appeals court analogized to contract law, found an implied covenant of good faith and fair dealing, and opined that “the fair dealing portion of the covenant of good faith and fair dealing is at least the right of an employee to the benefit of rules and regulations adopted for his or her protection.”<sup>338</sup>

## 2. *Employees’ Reasonable Expectations of Privacy*

As observed above, federal constitutional standards for reasonable expectations of privacy, under a Fourth Amendment analysis, have been significantly reduced between *Katz* in 1967 and *Skinner* and *Von Raab* in 1989.<sup>339</sup> If a searcher can show any special need at all, the Court will balance the searcher’s need for the information against the searchee’s privacy rights. Individualized suspicion, let alone probable cause, is no longer necessary, as long as the searcher can demonstrate a good reason to dispense with individualized suspicion. Finally, an employee’s expectations of privacy are reduced in the employment setting, in civil cases, and if the job entails any particular danger or susceptibility to corruption.<sup>340</sup>

California’s Proposition 8, passed in 1982, mandated that in a criminal search and seizure context, federal minimum standards rather than California constitutional standards must govern the admission or exclusion of evidence.<sup>341</sup> *In re Lance W.* upheld Prop. 8’s amendment to the California exclusionary rule,<sup>342</sup> and subsequent cases have adopted federal guidelines for determining what constitutes a search.<sup>343</sup> This re-

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334. *Rulon-Miller*, 208 Cal. Rptr. at 531-32.

335. *Id.* at 530.

336. *Id.* at 527-28.

337. *Id.* at 530-31.

338. *Id.* at 529-30.

339. *See supra* part II.B.

340. *INS v. Delgado*, 466 U.S. 210, 218, 224 (1984) (stating that employee has reduced expectation of privacy when on job). *See Reamey, supra* note 57, at 317-22 (pervasive “special needs” exception).

341. *In re Lance W.*, 694 P.2d 744, 752 (Cal. 1985).

342. *Id.*

343. *People v. Crowson*, 660 P.2d 389, 392 (Cal. 1983) (“In the search and seizure context, the Article I, Section 1 ‘privacy’ clause has never been held to establish a broader protection than that provided by the Fourth Amendment of the U.S. Constitution or Article I, Section 13 of the California Constitution.”).

Presumably, results such as that in *People v. Blair*, 602 P.2d 738, 747 (Cal. 1979), would no longer be possible: *Blair* found phone records admissible under the federal Fourth Amend-

quirement does not extend to civil cases and only applies in search and seizure contexts where California Constitution Article I, Section 13,<sup>344</sup> would govern. Thus, the California free-standing privacy right in Article I, Section 1, remains untouched. The resulting difference is striking. *Luck* found drug testing unconstitutional under the free-standing privacy right,<sup>345</sup> whereas *Wilkinson* went even further than *Skinner* and *Von Raab* to uphold drug testing of applicants for non-safety-related jobs under a search and seizure analysis.<sup>346</sup>

What are an employee's reasonable expectations of privacy in the workplace? California case law supports the following general parameters: if unrelated to payment of salary or benefits, information about an employee's finances and personal credit, or about health, especially his or her mental health, should remain private; an employee's bodily integrity should not be violated unless the employer meets a strict scrutiny test such as the *Bagley* test; and an employee's lifestyle away from the job should remain beyond the scrutiny of the employer.<sup>347</sup> Conversely, an employee should not reasonably expect privacy in communications on the employer's property, such as a company phone or computer message system, and an employer should be allowed to search employee packages leaving the workplace if the employer can show individualized suspicion of wrongdoing.<sup>348</sup>

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ment (following *Smith v. Maryland*, 442 U.S. 735 (1979)), but inadmissible under CAL. CONST. art. I, § 13.

344. CAL. CONST. art. I, § 13 provides in part: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated . . . ."

345. *Luck v. Southern Pac. Transp. Co.*, 267 Cal. Rptr. 618, 627 (Ct. App. 1990). See also *Long Beach City Employees Ass'n v. City of Long Beach*, 719 P.2d 660, 663-66 (Cal. 1986).

346. *Wilkinson v. Times Mirror Corp.*, 264 Cal. Rptr. 194 (1989), review denied, 1989 Cal. App. LEXIS 1168 (1990). *Soroka v. Dayton Hudson Corp.*, 1 Cal. Rptr. 2d 77, 82-86 (Ct. App. 1991), criticizes *Wilkinson's* disregard of clear California precedent in *Wilkinson's* use of search-and-seizure reasonableness balancing, rather than *Bagley* strict scrutiny. See *supra* part III.C.

347. *Hill v. National Collegiate Athletic Ass'n*, 273 Cal. Rptr. 402, 410-11 (Ct. App. 1988), review granted, 801 P.2d 1070 (1990), adopted *Bagley's* strict scrutiny. *Bagley v. Washington Township Hosp. Dist.*, 421 P.2d 409 (Cal. 1966), required that the tester (in *Hill*, the NCAA) show a compelling reason to test, which reason "manifestly outweighs" the testees' privacy interests; the testing must also be as narrowly tailored as it can be and still achieve the tester's interest. The NCAA did not show significant drug use among student testees, *Hill*, 273 Cal. Rptr. at 414-15, 422; or that drug testing would protect students' health and safety, *id.* at 417-18; or even that the banned drugs enhanced performance (the causal nexus), *id.* at 418-20. The student athletes, in contrast, had strong privacy interests in the confidentiality of, and control over, their own medical treatment, and in their own off-site conduct, *id.* at 416-17. In addition, the drug testing program was too broad, and ignored narrower alternate approaches such as drug education, or testing only with reasonable suspicion. *Id.* at 421-22; *Cochran, supra* note 104, at 546-52.

348. But see *Brunn, supra* note 59, at 397, 402 ("employees often have an expectation of privacy with respect to phone calls, cars, lockers, and legal activities in their homes").

California decisions have emphasized the individual privacy interest in financial records, which provide “‘a virtual current biography’” of a person, because they “may reveal his habits, his opinions, his tastes, and political views, as well as his movements and financial affairs.”<sup>349</sup> A checking account or credit card ledger is indeed a road map to its holder’s lifestyle outside the workplace. If an employee’s habits—messiness and disorganization, for example—or beliefs affect his or her performance, they should be addressed by an employer only in the performance context.<sup>350</sup>

Privacy of medical, especially mental and psychological, information has been perhaps the most protected area of privacy in California.<sup>351</sup> The state supreme court disallowed polygraphs of employees in *Long Beach*, contending that “[i]f there is a quintessential zone of human privacy it is the mind,” and that polygraphs can access “repressed beliefs, guilt feelings and fantasized events.”<sup>352</sup> The seminal case on the free-standing privacy right, *White v. Davis*, quoted language from ballot arguments for the privacy amendment that described the amendment’s protection of the privacy of “our thoughts, our emotions, our expressions, our personalities.”<sup>353</sup>

### 3. *The White v. Davis Four Mischiefs*

In *White v. Davis*, the supreme court identified the four primary “mischiefs” that the privacy amendment intended to remedy:<sup>354</sup> (1) “government snooping” and secret collection of data; (2) “overbroad collection and retention of unnecessary personal information by government and business interests”<sup>355</sup>; (3) “improper use of information,” that is, using it for a purpose other than the purpose for which the information was

349. *People v. Blair*, 602 P.2d 738, 745 (Cal. 1979) (quoting *Burrows v. Superior Court*, 529 P.2d 590, 596 (Cal. 1974)).

350. As discussed above, good management addresses behavior and performance instead of underlying attitude. See *supra* note 268 and accompanying text.

351. See *Hill*, 273 Cal. Rptr. at 417; *Cutter v. Brownbridge*, 228 Cal. Rptr. 545, 548 (Ct. App. 1986).

352. *Long Beach City Employees Ass’n v. City of Long Beach*, 719 P.2d 660, 663-65 (Cal. 1986). The court also noted that the coercive circumstances tend to compel a tested employee to answer, and if the employee remains silent, the instruments record a psychological response—in effect, no answer is interpreted as a self-incriminatory answer.

Because of intrusiveness and inaccuracy, many jurisdictions regulate or prohibit employment use of polygraphs. Brunn, *supra* note 59, at 407. Polygraph accuracy rates range from 70% to 90%. Using an average rate of 75%, if 100 employees out of 1000 were dishonest, the results would be the following: “225 honest people and 75 dishonest people test as liars, for a ratio of three to one; 25 dishonest people slip through undetected.” *Id.* at 407 n.168.

353. *White v. Davis*, 533 P.2d 222, 233 (Cal. 1975); *Long Beach*, 719 P.2d 660, 663 (Cal. 1986).

354. *White v. Davis*, 533 P.2d 222, 234 (Cal. 1975).

355. See Brunn, *supra* note 59, at 390 (exponential spread of available information on employees).



obtained<sup>356</sup>; and (4) "lack of a reasonable check on the accuracy of existing records."

Simple workplace procedures can alleviate the effects of these four mischiefs. Commentators have suggested that employers collect only necessary information, ensure that "only those parties who need to know . . . have access to the information," and afford employees access to their own files, so they can correct or explain errors.<sup>357</sup> An employer can also purge its files regularly, and former employees' records are therefore not retained after the employer needs them, because the ability to leave one's past behind is an important privacy interest.<sup>358</sup>

Finally, employers can erect informational barriers between departments, to minimize the spread of private information about employees to only those who *need* to know.<sup>359</sup> *Porten* found an actionable invasion of constitutional privacy in the "improper use of information, . . . for example, . . . the [unauthorized] disclosure of it to some third party."<sup>360</sup> Revelation of private information may limit unfairly an employee's opportunities for promotion or other growth.<sup>361</sup>

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356. *Cutter v. Brownbridge*, 228 Cal. Rptr. 545, 549 (Ct. App. 1986) (California constitutional privacy "protects one from the improper use of information which has been properly obtained") (citing *White v. Davis*, 533 P.2d at 234).

357. *Brunn*, *supra* note 59, at 391; *Decker*, *supra* note 1, at 575-77.

358. *See* *Briscoe v. Reader's Digest Ass'n, Inc.*, 483 P.2d 34, 41 (Cal. 1971) (Regarding publication of a crime committed by plaintiff 11 years earlier, the court stated, "It would be a crass legal fiction to assert that a matter once public never becomes private again."); *Kinsey v. Macur*, 165 Cal. Rptr. 608, 613 (Ct. App. 1980) (stating right to leave behind traumatic murder trial, in which plaintiff was acquitted).

359. *Decker*, *supra* note 1, at 575-77.

360. *Porten v. University of S.F.*, 134 Cal. Rptr. 839, 843 (Ct. App. 1976) (quoting *White v. Davis*, 533 P.2d 222, 234 (Cal. 1975)).

Defamation or privacy tort relief may also be available for disclosures to third parties, though this is beyond this Note's scope. *See* *Decker*, *supra* note 1, at 570-72; *Lehr & Middlebrooks*, *supra* note 104, at 409-11; *Landis*, *supra* note 290, at 562-67.

361. *Decker*, *supra* note 1, at 554-55: "[s]ensitive . . . information [that] may reveal the employee's innermost beliefs, ethical attitudes, and outside interests and activities . . . may cause co-workers to form incorrect and unfavorable opinions of the employee which may affect his standing and reputation inside and outside the workplace."

Ironically, employers are increasingly reluctant to provide any information—even positive recommendations—about former employees. Predictably, employees have brought defamation and invasion of privacy actions against former employers, for negative recommendations from those employers. But employers are now also concerned about liability arising from *favorable* recommendations of former employees. In case a future employer relies on such recommendations and the employee fails to live up to them, the future employer could conceivably sue the former employer for misrepresentation or for negligent failure to investigate the employee's background. *SHEPARD*, *supra* note 1, at 135-39, discusses this trend and various strategies for employers to avoid such liability. The simplest way around the problem is for an employee to release the former and/or prospective employer, in writing, from all liability stemming from the disclosure of confidential information.

#### 4. *The Implied Covenant of Good Faith and Fair Dealing*

California has recognized an additional reasonable expectation for employees, inherent in the employment relationship: an implied covenant of good faith and fair dealing.<sup>362</sup> This covenant can abrogate the common law assumption of at-will employment, so an employer must show a good reason for terminating an employee.<sup>363</sup> In *Luck*, for example, defendant railroad breached its implied covenant to its employees by firing plaintiff employee for refusing a random, suspicionless drug test. Plaintiff's continued good evaluations and promotions contributed to her reasonable expectation that she would not be fired but for good cause.<sup>364</sup> Absent statutory provisions to the contrary, employment at-will is the default position.<sup>365</sup> *Luck* found a presumption of at-will employment in California,<sup>366</sup> but identified several factors that might interact to overcome this presumption and indicate an implied contract to terminate only for good cause: "consideration, any express contract terms, the employer's personnel policies and practices, the employee's longevity of service, the employer's actions or communications reflecting assurances of continued employment, and industry practices."<sup>367</sup>

*Rulon-Miller* contended that California courts had altered the presumption of employment at-will and that the implied covenant of good faith and fair dealing was now the default position.<sup>368</sup> The *Rulon-Miller* court considered an abusive termination of plaintiff IBM employee, ostensibly for dating a competitor's employee.<sup>369</sup> It determined that the discharge was not for legitimate business reasons, because plaintiff employee had a glowing record of evaluations and promotions; she had no access to confidential IBM information, so her dating did not jeopardize IBM nor create any conflict of interest; and IBM's disregard of its stated policy of respect for employees' personal privacy constituted unfair deal-

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362. *Luck v. Southern Pac. Transp. Co.*, 267 Cal. Rptr. 618 (Ct. App. 1990); *Rulon-Miller v. International Business Machines Corp.*, 208 Cal. Rptr. 524 (Ct. App. 1984); *Decker*, *supra* note 1, at 557.

363. *See REDEKER*, *supra* note 266, at 97-104 (discussing erosion of the common law default of at-will employment).

364. *Luck*, 267 Cal. Rptr. at 624-25.

365. *Hollenbaugh v. Carnegie Free Library*, 436 F. Supp. 1328, 1332 (W.D. Pa. 1977) (holding that courts should not "intervene" where at-will employment); *Decker*, *supra* note 1, at 555-57 (including list of various federal statutory exceptions to employment at will); *see also* Richard W. Humphreys et al., *Positive Discipline from the Worker's Perspective*, in *MANAGING EMPLOYEE RIGHTS AND RESPONSIBILITIES* 117-19 (Chimezie A. B. Osigweh, Yg., ed. 1989).

366. *Luck*, 267 Cal. Rptr. at 624-25.

367. *Id.* at 625 (citing *Foley v. Interactive Data Corp.*, 765 P.2d 373, 387 (Cal. 1988)).

368. *Rulon-Miller v. International Business Machines Corp.*, 208 Cal. Rptr. 524, 529 (Ct. App. 1984) (citing *Seaman's Direct Buying Service v. Standard Oil Co.*, 686 P.2d 1158 (Cal. 1984); *Tameny v. Atlantic Richfield Co.*, 610 P.2d 1330 (Cal. 1980)).

369. *Rulon-Miller*, 208 Cal. Rptr. at 528.

ing.<sup>370</sup> Plaintiff's supervisor evidently had known of the dating relationship for some time and had reassured plaintiff that it was not a problem. Then without warning, the supervisor used the dating as "a pretext" for a callous termination.<sup>371</sup>

The general principles from *Luck* and *Rulon-Miller* are that in California, an employee who is doing a good job, according to his or her employer's evaluations, raises, and promotions, has a reasonable expectation not to be fired without a good reason. And if the grounds for such a firing involve substantial privacy interests, the reason must be compelling.<sup>372</sup>

## V. Conclusions and Suggestions for Change

Many ways to protect workplace privacy follow from the foregoing discussion. In search and seizure analysis, which federal courts use to address workplace privacy, Fourth Amendment protection could be returned to its level in *Katz*,<sup>373</sup> which genuinely required probable cause for most searches. California could redevelop its own stricter, independent search and seizure standards.

Locating the analysis in search and seizure, rather than in a free-standing privacy right, defines the level of scrutiny. The scrutiny applied can decide the case, as demonstrated by the contrast between *Luck*'s invalidation of employer drug testing absent a compelling employer interest,<sup>374</sup> and *Wilkinson*'s balancing analysis that upheld drug testing for non-safety-related positions in a civil context.<sup>375</sup>

The federal, substantive due process, privacy right could be expanded to encompass non-traditional rights that are fundamental. Finally, a federal privacy right amendment, while politically unlikely, would establish national uniformity in protecting a right that deserves a constitutional guarantee. Such a federal amendment could be designed

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370. *Id.* at 527-33.

371. *Id.* at 528-29. In fact, the court upheld the plaintiff's verdict for intentional infliction of emotional distress, which requires behavior "so extreme and outrageous as to go beyond all bounds of decency." *Id.* at 533-35.

372. *Long Beach City Employees Ass'n v. City of Long Beach*, 719 P.2d 660, 666, 669-70 (Cal. 1986) (requiring compelling interest, and other elements of *Bagley* test, such as narrow tailoring and lack of better alternatives); *Luck v. Southern Pac. Transp. Co.*, 267 Cal. Rptr. 618, 629-30 (Ct. App. 1990). *But see* *Wilkinson v. Times Mirror Corp.*, 264 Cal. Rptr. 194, 202-03 (Ct. App. 1989), *review denied*, 1989 Cal. App. LEXIS 1168 (1990) (following *Schmidt* dicta to discard need for compelling interest). See *supra* part III.C, for a discussion of *Wilkinson*'s balancing.

373. *Katz v. United States*, 389 U.S. 347 (1967).

374. *Luck*, 267 Cal. Rptr. at 629-32.

375. *Wilkinson*, 264 Cal. Rptr. at 202-03.

like the Thirteenth Amendment<sup>376</sup> to directly limit private and individual action.

**A. Choose the Free-Standing Privacy Analysis Over the Search-and-Seizure Privacy Analysis**

Courts have addressed both federal and state constitutional privacy rights under either a free-standing privacy right or the privacy rights inherent in constitutional protections against unreasonable search and seizure. Because courts have extended the federal privacy right implied from the Due Process Clause of the Fourteenth Amendment only to a very limited number of substantive rights, the Supreme Court has used a Fourth Amendment analysis for workplace privacy.<sup>377</sup> The jurisprudential balance struck in *Katz*<sup>378</sup> between the legitimate needs of the searcher and those of the searchee, was distorted by *Skinner* and *Von Raab*'s special-need exception not only to the basic probable cause requirement, but to any requirement for individualized suspicion.<sup>379</sup> A blood or urine test is one of the most intrusive personal searches imaginable, and even a lenient balancing approach, with understandable exceptions for exigent circumstances<sup>380</sup> or good faith,<sup>381</sup> should require at least individualized suspicion. Justice Marshall's *Skinner* dissent shows cogently how to accommodate both the employer's interest in obtaining samples before any drug metabolites have passed through the employee's body, and the employee's interest in not being invaded without probable cause and a warrant: Allow the initial search of collecting the sample on a special-need exception if exigent circumstances can be shown by the employer, then preserve the sample untested until the employer secures a warrant to perform the second search of actual laboratory analysis.<sup>382</sup>

Current drug tests do not test for on-the-job impairment<sup>383</sup> but for recent use, whether on or off the job. The intrusiveness of such an invasion into employees' private lives and bodies<sup>384</sup> should require a strong showing by the testing employer that off-the-job conduct affects employ-

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376. "Neither slavery nor involuntary servitude . . . shall exist within the United States . . ." U.S. CONST. amend. XIII. Because there is no mention of state action, this amendment is construed to apply directly to private action.

California's explicit privacy right also needs no state action. *See supra* note 276 and accompanying text.

377. *E.g.*, *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989).

378. *Katz v. United States*, 389 U.S. 347 (1967).

379. *Skinner*, 489 U.S. at 631; *Von Raab*, 489 U.S. at 668-75.

380. *See Katz*, 389 U.S. at 357-58.

381. *See United States v. Leon*, 468 U.S. 897 (1984).

382. *Skinner*, 489 U.S. at 641-43 (Marshall, J., dissenting).

383. *Id.* at 652 (Marshall, J., dissenting).

384. *Id.* at 617; *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989).

ees' work performances.<sup>385</sup> Procedures to mitigate the invasiveness<sup>386</sup> seem trivial when balancing drug testing policy under the Fourth Amendment. Recommending that the urination be unobserved, or having samples analyzed by an independent lab, does not remove the offense of a suspicionless invasion. Personal medical<sup>387</sup> and psychological information,<sup>388</sup> financial data, sexual orientation, and off-the-job conduct that does not affect employees' productivity or attendance,<sup>389</sup> should be protected zones of privacy.

The testing employer should bear the burden of demonstrating that it is not testing to determine lifestyle characteristics of its employees or potential employees. Unequal access to evidence militates for a shift in the burden of proof here. Because tested employees have no way of knowing what tests their employer actually had run on their samples, the burden should be on the employer to prove that no tests infringed on protected areas of privacy.<sup>390</sup>

California courts interpreted that state's constitutional search and seizure provision more broadly than its federal counterpart, until Proposition 8 passed in 1982.<sup>391</sup> Proposition 8's unequivocal mandate was that California's judge-made exclusionary rule conform with federal standards for the admission and exclusion of evidence.<sup>392</sup> It did not, however, require that California conform all its search and seizure analysis under state constitution Article I, Section 13, to federal minimum standards.<sup>393</sup> Thus California is left with dual paths of independent state grounds: State courts can use California's explicit privacy guarantee in Article I, Section 1, instead of its search and seizure clause<sup>394</sup>; or they

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385. See *Decker supra* note 1, at 579; *Hill v. National Collegiate Athletic Ass'n*, 273 Cal. Rptr. 402, 416-18 (Ct. App. 1988), *review granted*, 801 P.2d 1070 (Cal. 1990).

386. *E.g.*, *Skinner*, 489 U.S. at 672; *Von Raab*, 489 U.S. at 672-73 n.2; *Wilkinson v. Times Mirror Corp.*, 264 Cal. Rptr. 194, 204 (Ct. App. 1989), *review denied*, 1989 Cal. App. LEXIS 1168 (1990).

387. The *Skinner* majority acknowledges that an employer might "learn certain private medical facts that an employee might prefer not to disclose" through a blood or urine sample. *Skinner*, 489 U.S. at 627 n.7.

388. See *Long Beach City Employees Ass'n v. City of Long Beach*, 719 P.2d 660, 673 (Cal. 1986).

389. See *Decker supra* note 1, at 562-64; *Lehr & Middlebrooks supra* note 104, at 418; *Brunn supra* note 59, at 401-02.

390. *American Academy of Pediatrics v. Van de Kamp*, 263 Cal. Rptr. 46, 54 (Ct. App. 1989), put the burden on the people (that is, on the privacy invader) to prove that it had a compelling interest, and that its invasion was as narrow as possible.

391. Compare, *e.g.*, *People v. Blair*, 602 P.2d 738, 747-48 (Cal. 1979) with *In re Lance W.*, 694 P.2d 744, 752 (Cal. 1985).

392. *In re Lance W.*, 694 P.2d 744, 752 (Cal. 1985).

393. *Id.* at 752-53; *People v. Crowson*, 660 P.2d 389, 398-99 (Cal. 1983) (Bird, C.J., dissenting).

394. *E.g.*, *Luck v. Southern Pac. Transp. Co.*, 267 Cal. Rptr. 618, 629 (Ct. App. 1990). CAL. CONST. art. I, § 13 (search and seizure provision).

can analyze searches and their reasonableness more broadly than the Supreme Court's current lax balancing.

The level of scrutiny depends on the analytical framework chosen: Both the federal implied privacy right and California's explicit free-standing right consistently receive strict scrutiny,<sup>395</sup> because the rights implicated are fundamental or inalienable.<sup>396</sup> Thus, when the *Luck* appeals court found drug testing of a non-safety employee unconstitutional, although its balancing of employer and employee interests was reminiscent of *Skinner*, the California court followed the overwhelming state precedent in applying strict scrutiny.<sup>397</sup> The maverick appeals court that decided *Wilkinson* declined to follow this precedent, selecting instead an intermediate-level test and thus dipping below even the federal minimum to uphold drug testing for non-safety-related positions.<sup>398</sup> Common sense, and federal and state precedent indicate that privacy is among our most fundamental liberty interests, and its violation must be justified by a truly compelling interest.<sup>399</sup>

## B. Expand the Scope of Fundamental Rights

Two simple, though politically unlikely, avenues exist for expansion of federal constitutional privacy rights. The first would be to include more rights under the protective wing of the implied due process guarantee. The current list of substantive rights is narrowly limited to heterosexual marital, procreative, and child rearing choices.<sup>400</sup> The sanctity of personal privacy against bodily invasions such as drug tests, is not novel.<sup>401</sup> A worker's medical condition, political beliefs, sexual orientation, and lifestyle choices should be included as areas of fundamental privacy to which an employer should gain access only under the most compelling, demonstrably work-related circumstances.<sup>402</sup> California and

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395. *E.g.*, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 40 (1973); *Long Beach City Employees Ass'n v. City of Long Beach*, 719 P.2d 660, 666, 668-70 (Cal. 1986).

396. *Roe v. Wade*, 410 U.S. 113, 152-53 (1973); CAL. CONST. art. I, § 1 (privacy provision).

397. *Luck*, 267 Cal. Rptr. at 629-32. *See Long Beach*, 719 P.2d at 668-70; *White v. Davis*, 533 P.2d 222, 233-34 (Cal. 1975); *Cutter v. Brownbridge*, 228 Cal. Rptr. 545, 549-50 (Ct. App. 1986).

398. *Wilkinson v. Times Mirror Corp.*, 264 Cal. Rptr. 194, 202-03 (Ct. App. 1989), *review denied*, 1989 Cal. App. LEXIS 1168 (1990). *See supra* part III.C, for a more detailed discussion of the level of test used in *Wilkinson*.

399. *See Soroka v. Dayton Hudson Corp.*, 1 Cal. Rptr. 2d 77, 82-86 (Ct. App. 1991).

400. *See Roberts v. United States Jaycees*, 468 U.S. 609 (1984); *Roe v. Wade*, 410 U.S. at 152-53. *See also supra* part II.A.3.

401. *See, e.g., Olmstead v. United States*, 277 U.S. 438 (1928) (Brandeis, J., dissenting); *Boyd v. United States*, 116 U.S. 616 (1886); *Warren & Brandeis, supra* note 179. *See also supra* note 179 and accompanying text.

402. *See supra* note 266 and accompanying text, about the "nexus" test, under which testing is allowed only if the reason behind the testing is directly job-related.

other states have repeatedly found constitutional protection for privacy rights left unguarded by the federal constitution.<sup>403</sup> This is partially because California courts have been more expansive at a policy level and partially because California's free-standing constitutional guarantee is explicit.

### C. Amend the Federal Constitution to Protect Privacy Explicitly

The second avenue would be to amend the federal constitution, adding an explicit, inalienable privacy right analogous to California's. Such an amendment would encounter strenuous political opposition, especially from anti-abortion factions.<sup>404</sup> But modern proliferation of personal information and concomitant government bureaucracy might nevertheless spark popular support for protection of these crucial rights at a constitutional level.

A privacy amendment should be designed, like the Thirteenth Amendment, to guard directly against private, individual action, to obviate the state action requirement of the Fourteenth Amendment.<sup>405</sup> California's free-standing privacy right is self-executing,<sup>406</sup> because it is explicit and because state constitutions delineate their governments' plenary power, whereas the federal constitution enumerates its government's limited power.<sup>407</sup> In the alternative, if a federal privacy amendment were still to require state action, the Supreme Court should assess realistically the degree of government involvement in such activities as federally designed and funded Medicaid facilities.<sup>408</sup> The Court must also revive its government-function and symbiosis theories,<sup>409</sup> especially where a nominally private entity like the utility in *Jackson* clearly

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403. *E.g., compare* Committee to Defend Reprod. Rights v. Myers, 625 P.2d 779 (Cal. 1981) (government funding for abortions constitutionally protected) *with* Harris v. McRae, 448 U.S. 297 (1980) (government funding for abortions not constitutionally protected); *compare* Luck v. Southern Pac. Transp. Co., 267 Cal. Rptr. 618 (Ct. App. 1990) (using strict scrutiny privacy analysis to find employee drug testing unconstitutional) *with* National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) (using lenient Fourth Amendment balancing to uphold constitutionality of employee drug testing); *compare* City of Santa Barbara v. Adamson, 610 P.2d 436 (Cal. 1980) (overturning government restrictions on cohabitation of unrelated persons, as violative of constitutional right to privacy) *with* Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (finding no constitutional privacy right to live with unrelated persons).

404. The politics of ratifying a federal privacy amendment are beyond the scope of this Note.

405. National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 191 (1988); Shelley v. Kraemer, 334 U.S. 1, 13 (1948).

406. White v. Davis, 533 P.2d 222, 234 (Cal. 1975); Cutter v. Brownbridge, 228 Cal. Rptr. 545, 548-50 (Ct. App. 1986); Porten v. University of S.F., 134 Cal. Rptr. 839, 842 (Ct. App. 1976).

407. State v. Gunwall, 720 P.2d 808, 815 (Wash. 1986).

408. See Blum v. Yaretsky, 457 U.S. 991, 1020-25 (1982) (Brennan, J., dissenting).

409. See Strickland *supra* note 110, at 617-26; and *supra* part II.C.

provides a public entitlement owed to citizens by modern government, and is hence acting in a governmental capacity.<sup>410</sup>

An explicit federal privacy right would offend many proponents of states' rights. Our federal system allows states to construct locally and regionally responsive legal protections on top of a federal floor.<sup>411</sup> California's privacy right is a relatively successful example of this process at work.<sup>412</sup> Regionalism's benefit can also be its drawback, however, as local prejudices can create inequitable differences between states and make unpopular individuals or groups legally vulnerable. Privacy is a fundamental enough right to deserve vigorous, uniform,<sup>413</sup> national protection. The California Constitution and state courts have for the most part demonstrated that greater workplace privacy can be accomplished with respect for the interests of employer and employee alike,<sup>414</sup> and federal jurisprudence needs to catch up.

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410. Providing electricity is quintessentially and "traditionally identified with the State through universal public regulation or ownership." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 371 (1974) (Marshall, J., dissenting).

411. See Brennan, *supra* note 7, at 548-51.

412. Compare, e.g., *Committee to Defend Reprod. Rights v. Myers*, 625 P.2d 779 (Cal. 1981) (government funding for abortions constitutionally protected) with *Harris v. McRae*, 448 U.S. 297 (1980) (government funding for abortions not constitutionally protected). See *Raven v. Deukmejian*, 801 P.2d 1077 (Cal. 1990) (deciding that although state supreme court generally defers to federal standards, state highest court must be final arbiter of state constitutional guarantees, as long as no conflict with federal constitution).

413. For a discussion of the benefits of national uniformity, see Brennan, *supra* note 7, at 548-50; *State v. Gunwall*, 720 P.2d 808, 812, 815 (Wash. 1986).

414. E.g., *Luck v. Southern Pac. Transp. Co.*, 267 Cal. Rptr. 618 (Ct. App. 1990).