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## ARTICLE

# READING FOR TERRORISM: SECTION 215 OF THE USA PATRIOT ACT AND THE CONSTITUTIONAL RIGHT TO INFORMATION PRIVACY

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### I. INTRODUCTION

*The Anarchist's Cookbook. Slaughterhouse Five. Mein Kampf. Advanced Techniques of Clandestine Psychedelic and Amphetamine Manufacture. The Turner Diaries.*

What do these controversial books say about their readers? Is it safe to assume that they are anarchists? Anti-war activists? Nazis? Drug lords? Terrorists? In a culture fiercely protective of free speech, the answers to these questions at first blush seem obvious: of course not. Most of the readers are academics, students, concerned parents, or just curious citizens. Yet in the wake of the devastating terrorist attacks of September 11, entrenched American assumptions about the freedom to read without fear of persecution are under question. In particular, a controversial provision of the USA PATRIOT Act has sparked an intense debate about whether reading materials are an appropriate subject of inquiry for law enforcement officials investigating terrorism.<sup>1</sup>

Section 215 of the USA PATRIOT Act amended and expanded the Foreign Intelligence Surveillance Act's (FISA)<sup>2</sup> provisions governing access to "business records" for international terrorism and foreign intelligence investigations.<sup>3</sup> This provision of FISA allows FBI officials to order the production of documents and records; upon an application, an Article III or magistrate judge then enters an ex parte order compelling the release of the items sought.<sup>4</sup> Section 215 made several significant changes to FISA's business records section. First, it expanded the type of records that FBI officials could request. FISA had allowed requests for the records of transportation

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1. See The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001 § 215, 18 U.S.C. §§ 1861-62 (Supp. I 2001) [hereinafter "USA PATRIOT Act"].

2. The Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783, (codified as amended in scattered sections of 8, 18, 47, and 50 U.S.C.) [hereinafter "FISA"].

3. See USA PATRIOT Act § 215.

4. See *id.* at § 215 (a)(1), (b)(1) & (2), (c)(1).

carriers, hotels, storage locker facilities, and vehicle rental agencies only.<sup>5</sup> After amendment by the USA PATRIOT Act, the provision now allows requests for any relevant “tangible item (including books, records, papers, documents, and other items),”<sup>6</sup> which, as interpreted by Attorney General John Ashcroft, authorizes the FBI to obtain such articles as education records, computer files, and, significantly for the purposes of this Article, book purchase and library borrowing records.<sup>7</sup> Second, section 215 amended FISA to allow the FBI to apply for an order without showing any suspicion that the target of the investigation is involved in terrorism or proof that the requested items show involvement in terrorist activity; the records merely must be “sought for” a foreign intelligence or terrorism investigation.<sup>8</sup> Third, section 215 imposes a gag order prohibiting all individuals, including those to whom the FBI directs its section 215 requests, from disclosing the fact of the requests “to any other person.”<sup>9</sup>

Section 215 has become the object of intense controversy and criticism. Civil liberties organizations,<sup>10</sup> the American Library Association,<sup>11</sup> and the popular press<sup>12</sup> have denounced the USA PATRIOT Act in general, and section 215 in particular. A bill entitled the “Freedom to Read Protection Act,” introduced by Representative Bernard Sanders of Vermont and co-sponsored by 144 members of Congress in 2003, is among several legislative proposals seeking to exempt libraries and bookstores from the reach of section 215; it currently awaits further action in a House subcommittee.<sup>13</sup> The American Civil Liberties Union (ACLU), on behalf of six Arab and Islamic

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5. See 50 U.S.C. § 1862(a) (2000) (prior to 2001 amendment).

6. USA PATRIOT Act § 215(a)(1).

7. See *Hearing on the USA PATRIOT Act Before the House Comm. on the Judiciary*, 108th Cong. 45 (2003) (testimony of John Ashcroft, Attorney General).

8. Compare USA PATRIOT Act § 215(b)(2), with 50 U.S.C. § 1862(b)(2)(B) (2000) (prior to 2001 amendment).

9. USA PATRIOT Act § 215(d). For further analysis of the section 215 changes to FISA, see generally CHARLES DOYLE, CRS REPORT FOR CONGRESS, LIBRARIES AND THE USA PATRIOT ACT (2003), available at <http://www.ala.org/ala/washoff/WOissues/civilliberties/theusapatriotact/CRS215LibrariesAnalysis.pdf> (last visited Oct. 21, 2004).

10. See, e.g., Ann Beeson & Jameel Jaffer, American Civil Liberties Union, *Unpatriotic Acts: The FBI's Power to Rifle Through Your Records and Personal Belongings Without Telling You* (2003), available at <http://www.aclu.org/Files/OpenFile.cfm?id=13245> (last visited Oct. 21, 2004); Lawyers Committee for Human Rights, *Assessing the New Normal: Liberty and Security for the Post-September 11 United States* 15–30 (Fiona Doherty & Deborah Pearlstein eds., 2003), available at <http://www.humanrightsfirst.org/pubs/descriptions/Assessing/AssessingtheNewNormal.pdf> (last visited Oct. 21, 2004).

11. See American Library Ass'n, *Resolution on the USA PATRIOT Act and Related Measures that Infringe on the Rights of Library Users* (Jan. 29, 2003), available at <http://www.ala.org/Template.cfm?Section=ifresolutions&Template=/ContentManagement/ContentDisplay.cfm&ContentID=11891> (last visited Oct. 21, 2004) [hereinafter ALA Resolution].

12. See, e.g., Editorial, *Ashcroft's Dragnet*, BOSTON GLOBE, Sept. 9, 2003, at A14; Editorial, *Don't Let Patriot Act Go Overboard*, ATLANTA J. CONST., Aug. 25, 2003, at 10A; Editorial, *Heightened Alert: Increased Government Intrusion Is Not Patriotic*, HOUSTON CHRON., July 11, 2003, at 34; Editorial, *No Shushing the Librarians*, SEATTLE TIMES, Sept. 24, 2003, at B6; Editorial, *Patriot Act's Gag Order Deserves Legal Scrutiny*, DETROIT NEWS, Dec. 3, 2003, at 12A; Editorial, *The Politics of Security*, N.Y. TIMES, Jan. 27, 2004, at 22; Editorial, *Rights and the New Reality*, L.A. TIMES, Aug. 8, 2003, at 14; Editorial, *Take a Patriot to Court*, OREGONIAN, Aug. 1, 2003, at E4.

13. See Freedom to Read Protection Act of 2003, H.R. 1157, 108th Cong. (2003) (“To amend the Foreign Intelligence Surveillance Act to exempt bookstores and libraries from orders requiring the production of any tangible things for certain foreign intelligence investigations, and for other purposes.”). For other currently pending bills, see discussion *infra* Part III.A.1.

organizations and supported by nineteen amici curiae, has filed suit to challenge section 215 as facially invalid under the First and Fourth Amendments.<sup>14</sup>

In response to the upstart, Attorney General John Ashcroft launched a speaking tour in defense of the USA PATRIOT Act in the fall of 2003 in which he branded critics of section 215 “hysterics” who were indulging in “fantasies” about trench-coated FBI agents trolling libraries for information on citizens reading “the latest Tom Clancy Novel.”<sup>15</sup> Conservative commentators similarly decried the perceived overreaction, arguing that section 215 is actually targeted at hotel and bank records, has never been used, and is set to expire in 2005.<sup>16</sup>

Litigants have advanced arguments against the constitutionality of section 215 under the First and Fourth Amendments. In *Muslim Community Association v. Ashcroft*,<sup>17</sup> the ACLU is currently pressing the claim that section 215 is facially invalid as a violation of the Fourth Amendment because, although it implicates an individual’s reasonable expectation of privacy, it does not require probable cause, and because it lacks procedural safeguards.<sup>18</sup> The ACLU also claims that section 215 violates the First Amendment by implicating speech activity without providing a compelling state interest or a narrowly tailored program.<sup>19</sup> Similarly, commentators have tended to focus their attention on section 215 and government surveillance of readers more generally through the rubric of the First and Fourth Amendments.<sup>20</sup>

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14. See *Muslim Cmty. Ass’n v. Ashcroft*, No. 03-72913 (E.D. Mich. filed July 30, 2003). A similar lawsuit by the ACLU recently became the first-ever successful challenge to a surveillance provision of the USA PATRIOT Act. See *Doe v. Ashcroft*, No. 04 Civ. 2614 (VM), 2004 WL 2185571, at \*41 (E.D.N.Y. Sept. 28, 2004) (striking down portions of 18 U.S.C. § 2709, as amended by the USA PATRIOT Act, which allows the FBI to compel internet service providers and telephone companies to produce customer records in connection with terrorism investigations); Julia Preston, *Judge Strikes Down Section of Patriot Act Allowing Secret Subpoenas of Internet Data*, N.Y. TIMES, Sept. 30, 2004, at A26.

15. See Hon. John Ashcroft, United States Attorney General, Protecting Life and Liberty, Remarks in Memphis, Tennessee (Sept. 18, 2003) [hereinafter Ashcroft Remarks], available at <http://www.usdoj.gov/ag/speeches/2003/091803memphisremarks.htm> (last visited Oct. 21, 2004); Hon. John Ashcroft, United States Attorney General, The Proven Tactics in the Fight Against Crime, Remarks in Washington, D.C. (Sept. 15, 2003), available at <http://www.usdoj.gov/ag/speeches/2003/091503nationalrestaurant.htm> (last visited Oct. 21, 2004). Ashcroft’s critics have denounced his defense of the USA PATRIOT Act as dishonest and deceptive. Legal scholar and civil libertarian David Cole, *On the Road with Ashcroft*, NATION, Sept. 22, 2003, at 22, claims that “Ashcroft’s defense of the few provisions it chooses to address is highly misleading,” for instance in its assurance that library records were available to law enforcement through subpoenas prior to the enactment of section 215. *Id.* Professor Cole observes that those subpoenas are limited to public, criminal investigations, whereas section 215 enables secret terrorism investigations. See *id.* The ACLU has even gone so far as to prepare a report highlighting “half-truths” and “plain[] and demonstrabl[e] falsehoods” in Justice Department defenses of the USA PATRIOT Act. See AMERICAN CIVIL LIBERTIES UNION, SEEKING TRUTH FROM JUSTICE 1 (2003).

16. See, e.g., Joseph Bottum, *The Library Lie*, THE WKLY. STANDARD, Jan. 26, 2004; Rich Lowry, *Patriot Hysteria*, NAT’L REV., Aug. 28, 2003, available at <http://www.nationalreview.com/lowry/lowry082803.asp> (last visited Nov. 20, 2004).

17. No. 03-72913 (E.D. Mich. filed July 30, 2003).

18. See Pl.’s Resp. to Def.’s Mot. to Dismiss at 25–31, *Muslim Cmty. Ass’n v. Ashcroft*, No. 03-72913 (E.D. Mich. filed July 30, 2003), available at <http://www.aclu.org/Files/OpenFile.cfm?id=14305> (last visited Oct. 21, 2004).

19. See *id.* at 35–37. The ACLU also presses the claim that section 215 deprives individuals of their Fifth Amendment due process rights by compelling production without procedural rights, such as notice and the opportunity to be heard. See *id.* at 31–32.

20. See Robert M. O’Neil, *Libraries, Liberties and the First Amendment*, 42 U. CIN. L. REV. 209 (1973) (First Amendment); Kathryn Martin, Note, *The USA PATRIOT Act’s Application to Library Patron Records*,

This Article investigates the possibility of challenging section 215 of the USA PATRIOT Act in the context of reading records on other grounds: as a violation of the Fifth and Fourteenth Amendment constitutional right to information privacy as defined by the Supreme Court in *Whalen v. Roe*<sup>21</sup> and affirmed in *Nixon v. Administrator of General Services*.<sup>22</sup> Although government surveillance of reading habits to many implicates First Amendment rights, to its most ardent opponents, this behavior is equally pernicious to the privacy rights of library patrons, which enable the exercise of First Amendment freedoms.<sup>23</sup> And while in the criminal investigation context privacy rights are more commonly protected (or not protected) by the Fourth Amendment's warrant, probable cause, and reasonableness requirements, the *Whalen* right to information privacy is also apposite and worthy of consideration. This liberty guarantee offers a colorable basis for challenging section 215 of the USA PATRIOT Act, and at the same time presents a useful opportunity for courts to develop further an important line of constitutional jurisprudence in an era in which civil liberties need all the help they can get.

Part I of this Article discusses the existence of a constitutional right to information privacy under the jurisprudence of the Supreme Court and the lower courts. Part II works section 215 into the doctrinal framework of the information privacy case law, paying particular attention to two challenges that litigants must overcome to succeed in overturning section 215. Part III completes the analysis by examining the government's justification for section 215 on the merits. The Article concludes that, while focusing on the right to information privacy would admittedly be an ambitious means of challenging government surveillance of reading records, it nonetheless deserves the serious attention of civil libertarians.

## II. THE CONSTITUTIONAL RIGHT TO INFORMATION PRIVACY

The constitutional right to information privacy was born inauspiciously in the Supreme Court's 1977 decision in *Whalen*.<sup>24</sup> The case involved a challenge to a New York statute governing prescription drugs that called for the retention of all prescription records for dangerous drugs with legitimate purposes—such as opium, cocaine, and amphetamines—by the state department of health.<sup>25</sup> Justice Stevens, writing for the Court in a 7–2 opinion, upheld the statute's constitutionality but first opined that “[t]he cases sometimes characterized as protecting ‘privacy’ have in fact involved at least two different kinds of interests. *One is the individual interest in avoiding disclosure of*

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29 J. LEGIS. 283, 292–295 (2003) (Fourth Amendment); Ulrika Edman Ault, Note, *The FBI's Library Awareness Program: Is Big Brother Reading Over Your Shoulder?*, 65 N.Y.U. L. REV. 1532, 1565 (1990).

21. 429 U.S. 589 (1977).

22. 433 U.S. 425 (1977).

23. See ALA Resolution, *supra* note 11 (discussing “the dangers to individual privacy and the confidentiality of library records” posed by the USA PATRIOT Act and urging librarians “to defend and support user privacy” as well as “free and open access to knowledge and information”).

24. *Whalen*, 429 U.S. at 605–606. One commentator referred to *Whalen*'s announcement of the right to information privacy as a mere “lukewarm hint,” and argued that “the federal constitutional right to informational privacy is, at best, limited.” Elbert Lin, *Prioritizing Privacy: A Constitutional Response to the Internet*, 17 BERKELEY TECH. L.J. 1085, 1089, 1127 (2002).

25. See 429 U.S. at 592–93 & n.8.

*personal matters*, and another is the interest in independence in making certain kinds of important decisions.”<sup>26</sup> The Court found that the statute “threaten[ed] to impair . . . [plaintiffs’] interest in the nondisclosure of private information,” but ultimately held that it did not, “on its face, pose a sufficiently grievous threat to [that] interest to establish a constitutional violation,” largely because of security provisions in place to prevent disclosure of confidential information.<sup>27</sup> In this way, Justice Stevens split the constitutional jurisprudence on privacy into two spheres: decisional privacy, of the *Roe v. Wade*<sup>28</sup> and *Griswold v. Connecticut*<sup>29</sup> stripe, and informational privacy, which was at issue in *Whalen* itself.<sup>30</sup>

The information privacy strain was also at issue in *Nixon v. Administrator of General Services*,<sup>31</sup> in which the Court allowed a federal statute to authorize seizure of President Nixon’s presidential papers but directed the government in hortatory terms to release his purely private communications.<sup>32</sup> There, the Court found that “the privacy interest asserted by [President Nixon] is weaker than that found wanting in the recent decision of *Whalen v. Roe*.”<sup>33</sup> However, the Court also noted, after restating *Whalen*’s rights-creating statement, that “[w]e may agree with [Nixon] that, at least when Government intervention is at stake, public officials, including the President, are not wholly without constitutionally protected privacy rights in matters of personal life unrelated to any acts done by them in their personal capacity.”<sup>34</sup> This passage is viewed by many courts<sup>35</sup> and scholars<sup>36</sup> as an affirmation of the constitutional right to information privacy enunciated in *Whalen* and constitutes the last direct statement by the Supreme Court on the matter.

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26. *Id.* at 599–60 (emphasis added) (citations omitted).

27. *Id.* at 600.

28. 410 U.S. 113 (1973).

29. 381 U.S. 479 (1965).

30. Justices Brennan and Stewart offered divergent interpretations of the Court’s decision in separate concurring opinions. Compare 429 U.S. at 606–07 (Brennan, J., concurring) (“Broad dissemination by state officials of [information about prescription drug use] . . . would clearly implicate constitutionally protected privacy rights, and would presumably be justified only by compelling state interests.” (citation omitted)), with 429 U.S. at 608 (Stewart, J., concurring) (“The only possible support in [Justice Brennan’s] opinion for this statement is its earlier reference to two footnotes in the Court’s opinion. The footnotes, however, cite to only two Court opinions, and those two cases do not support the proposition advanced by Mr. Justice Brennan.”).

31. 433 U.S. 425 (1977).

32. See *id.* at 457–59.

33. *Id.* at 457.

34. *Id.* Professor Lin observes, however, that *Nixon* “seem[s] almost to weaken the constitutional interest” discussed in *Whalen*. See Lin, *supra* note 24, at 1125.

35. For particularly generous readings of *Nixon*, see *Plante v. Gonzalez*, 575 F.2d 1119, 1134 (5th Cir. 1978) (“The Supreme Court has clearly recognized that the privacy of one’s personal affairs is protected by the Constitution.”) and *Slevin v. City of New York*, 551 F. Supp. 917, 929 (S.D.N.Y. 1982), *aff’d in part and rev’d in part* by *Barry v. City of New York*, 712 F.2d 1554 (2d Cir. 1983) (“Any doubt about the constitutional standing of the interest in avoiding disclosure of personal matters remaining after *Whalen v. Roe* was removed by *Nixon v. Administrator of General Services*.”).

36. See, e.g., DANIEL J. SOLOVE & MARC ROTENBERG, INFORMATION PRIVACY LAW 188 (2003) (“After *Whalen*, the Court affirmed this notion of constitutional protection for information privacy in *Nixon* . . . .”); Patricia I. Carter, *Health Information Privacy: Can Congress Protect Confidential Medical Information in the “Information Age”?*, 25 WM. MITCHELL L. REV. 223, 239 n.86 (1999); Richard C. Turkington, *Legacy of the Warren and Brandeis Article: The Emerging Unencumbered Constitutional Right to Information Privacy*, 10 N. ILL. U. L. REV. 479, 497 (1990).

Although the federal constitutional right to information privacy hangs by a thin reed in terms of Supreme Court jurisprudence, it has been developed more fully in the lower federal and state courts, and especially in the federal courts of appeals.<sup>37</sup> Indeed, one commentator has suggested that *Whalen* and *Nixon* represented an invitation by the Supreme Court for lower courts to develop the constitutional right of information privacy on a case-by-case basis.<sup>38</sup> Cases involving medical information have received strong protection. For instance, in *Carter v. Broadlawns Medical Center*,<sup>39</sup> a federal district court found a violation of the constitutional right to information privacy in a hospital's policy of allowing chaplains access to patient files.<sup>40</sup> Similarly, in *Doe v. Borough of Barrington*,<sup>41</sup> a federal court held that a police officer violated a family's *Whalen* rights by disclosing a close relative's AIDS status to strangers.<sup>42</sup> A number of other cases have afforded strong protection for medical information under the constitutional right to privacy.<sup>43</sup>

In addition, the *Whalen* right to information privacy has arguably protected personal information that implicates liberty interests under the *Griswold* decisional privacy cases. Two recent opinions by the U.S. Court of Appeals for the Third Circuit, a noted leader in constitutional information privacy jurisprudence,<sup>44</sup> demonstrate this

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37. The U.S. Court of Appeals for the Sixth Circuit is a notable exception to the general trend of the circuits to recognize a constitutional right to information privacy. In its 1981 opinion, *J.P. v. DeSanti*, 653 F.2d 1080 (6th Cir. 1981), the court held that the post-adjudication dissemination of juvenile delinquents' case histories to social service agencies did not violate the plaintiffs' constitutional rights. *Id.* at 1090-91. The court stated:

We do not view the discussion of confidentiality in *Whalen v. Roe* as overruling *Paul v. Davis* and creating a constitutional right to have all government action weighed against the resulting breach of confidentiality. . . . Absent a clear indication from the Supreme Court we will not construe isolated statements in *Whalen* and *Nixon* more broadly than their context allows to recognize a general constitutional right to have disclosure of private information measured against the need for disclosure.

*Id.* at 1088-89. The court affirmed this reasoning as recently as 1999, in *Cutshall v. Sundquist*, 193 F.3d 466 (6th Cir. 1999), in which it refused to acknowledge the creation of a constitutional right in *Whalen* and *Nixon*. *Id.* at 480. The court has, however, found violations of information privacy rights of constitutional dimension. See *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1062 (6th Cir. 1998) (city's release of arresting police officers' personnel files to violent criminal defendants, by threatening the officers' lives, implicates Fourteenth Amendment interests, requiring a compelling state interest and narrowly tailored means to survive scrutiny).

38. See *Turkington*, *supra* note 36, at 498 ("[T]he [*Whalen* and *Nixon*] decisions might properly be interpreted as suggesting that it would be appropriate for federal and state courts to find violations of the constitutional right to privacy in circumstances where the government invasion of privacy was significant and unjustified.").

39. 667 F. Supp. 1269 (S.D. Iowa 1987).

40. See *id.* at 1271.

41. 729 F. Supp. 376 (D.N.J. 1990).

42. See *id.* at 390.

43. See, e.g., *Denius v. Dunlap*, 209 F.3d 944, 956 (7th Cir. 2000) ("In this Circuit, the right [of confidentiality] clearly covers medical records and communications."); *Doe v. Southeastern Pa. Transp. Auth. (SEPTA)*, 72 F.3d 1133, 1143 (3d Cir. 1995) (recognizing a constitutional privacy right in one's prescription information but finding that right outweighed in the particular case); *F.E.R. v. Valdez*, 58 F.3d 1530, 1535 (10th Cir. 1995) (acknowledging a constitutional privacy right in the contents of medical records); *Doe v. City of New York*, 15 F.3d 264, 267 (2d Cir. 1994) (finding constitutional protection in an individual's HIV positive status, which was released in a conciliation agreement); *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 577 (3d Cir. 1980) ("There can be no question that an employee's medical records, which may contain intimate facts of a personal nature, are well within the ambit of materials entitled to privacy protection.").

44. See *SOLOVE & ROTENBERG*, *supra* note 36, at 190.

point. In *Gruenke v. Seip*,<sup>45</sup> the court found that a high school swimming coach's demand that a student take a pregnancy test infringed upon the student's privacy rights.<sup>46</sup> And in the heartbreaking case *Sterling v. Borough of Minersville*,<sup>47</sup> the court held that a police officer's threat to disclose the homosexual orientation of an eighteen-year-old boy—which led the boy to commit suicide—violated the Constitution's protection of information privacy.<sup>48</sup> In recognizing the boy's "clearly established right to privacy as protected by the Constitution," the court observed that "[i]t is difficult to imagine a more private matter than one's sexuality."<sup>49</sup> This nascent trend will be explored at greater length later in this article.<sup>50</sup>

At least eight circuits have also found that the *Whalen* right to information privacy extends to financial information.<sup>51</sup> In *Denius v. Dunlap*,<sup>52</sup> the U.S. Court of Appeals for the Seventh Circuit found that a teacher's employment contract requiring a grant of access to "all records concerning" the applicant, including financial and credit information, infringed on the teacher's right to confidentiality.<sup>53</sup> The Fifth Circuit, in *Plante v. Gonzalez*,<sup>54</sup> also determined that the constitutional right to privacy covers financial information, noting that the "substantial" interest in such privacy is "protected constitutionally."<sup>55</sup> Nevertheless, that court found that the public's right to know about elected officials' financial information under the state's "Sunshine Amendment" outweighed the privacy interest in a heightened scrutiny balancing analysis and upheld the challenged amendment.<sup>56</sup>

The constitutional right to information privacy has thus arguably been defined by the Supreme Court and expounded upon at some length in the lower federal courts to cover a broad range of confidential information categories. One may safely assume, therefore, that barring a significant re-assessment of twenty-five years of federal appellate court jurisprudence by the Supreme Court, a *Whalen* challenge to section 215 of the USA PATRIOT Act would at least receive serious consideration in the federal courts.

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45. 225 F.3d 290 (3d Cir. 2000).

46. *See id.* at 301.

47. 232 F.3d 190 (3d Cir. 2000).

48. *See id.* at 196–97.

49. *Id.* at 193, 196.

50. *See infra* Part III.A.2.a.

51. *See Denius*, 209 F.3d at 957 ("Seven of our sister circuits have found that the constitutional right of privacy in confidential information covers some financial disclosures."). The Seventh Circuit went on in *Denius* to join the majority of federal appellate courts to recognize *Whalen* protection for financial information. *See id.* at 958.

52. 209 F.3d 944 (7th Cir. 2000).

53. *See id.* at 949, 958. The court, however, granted qualified immunity to the defendant, who directed a school program affiliated with a military base, because the law had not been sufficiently developed at the time of the incidents that gave rise to the suit. *See id.* at 958. Nevertheless, the court dismissed the defendant's summary judgment claim, directing the lower court to consider the possibility of equitable relief, which was not barred by qualified immunity. *See id.* On remand, after a jury verdict in favor of the defendant, the district court entered a judgment as a matter of law for the plaintiff. *See Denius*, 303 F.3d at 921.

54. 575 F.2d 1119 (5th Cir. 1978).

55. *See id.* at 1135.

56. *See id.* at 1136 ("Financial privacy is a matter of serious concern, deserving strong protection. The public interests supporting public disclosure for these elected officials are even stronger.").

The next section of this Article analyzes several of the key doctrinal questions that would likely confront a litigant challenging section 215 as a violation of the right to information privacy and suggests how these could be resolved in favor of protecting privacy.

### III. FITTING SECTION 215 INTO THE DOCTRINAL FRAMEWORK OF PRIVACY

Section 215 of the USA PATRIOT Act is not precisely the type of measure that has been challenged successfully under the constitutional right to information privacy. The majority of cases that protect *Whalen* privacy rights, as noted above, involve such information as medical history or financial records; none addresses book purchasing or borrowing records. Further, section 215 authorizes government *collection* of information, whereas *Whalen* itself described the right to privacy as an “interest in avoiding *disclosure* of personal matters.”<sup>57</sup> Several key questions must therefore be answered before government searches of library borrowing records can fall within the doctrinal framework of the cases protecting privacy as a constitutional right, at which point courts would balance the threatened privacy interests with the government interest at stake.<sup>58</sup> Does information about one’s reading habits fit within the type of information protected by the right to confidentiality—in other words, are reading records truly private?<sup>59</sup> Should courts reject a strict demarcation between collection and disclosure of information in their constitutional analysis of privacy claims? This section argues for an affirmative answer to these questions, bringing section 215 squarely within the crosshairs of a *Whalen* challenge.<sup>60</sup>

#### A. Are Library Borrowing Records Private?

The first step in assessing whether a provision violates the constitutional right to information privacy is determining whether the information sought is private.<sup>61</sup> The Supreme Court in *Nixon* discussed the existence of constitutional protection based on the type of information involved and the reasonable expectation that it would remain confidential.<sup>62</sup> Lower courts have phrased the inquiry in various terms: determining

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57. *Whalen*, 529 U.S. at 599 (emphasis added).

58. See, e.g., *Westinghouse Elec. Corp.*, 638 F.2d at 577–78 (finding a privacy interest in the plaintiff’s medical records and proceeding to weigh that interest against the government’s regulatory goal).

59. See *Doe v. New York*, 15 F.3d 264, 267 (2d Cir. 1994) (characterizing the constitutional right to information privacy as “a right to ‘confidentiality’”).

60. Another potential barrier in the case of libraries is the argument that it is implausible to fashion a constitutional violation on collection of information from one government agency (library) by another (law enforcement). While this point perhaps deserves some attention, it is sufficient for these purposes to note the existence of authority finding a violation of privacy rights in inter-governmental sharing of information. See, e.g., *Roberts v. Austin*, 632 F.2d 1202, 1213–14 (4th Cir. 1980) (finding an implication of a legitimate privacy interest in government welfare agency’s sharing of client information with law enforcement officials).

61. See *Sterling*, 232 F.3d at 193 (“We first ask whether [plaintiff] had a protected privacy right concerning [defendant’s] threat to disclose his suspected sexual orientation.”).

62. See *Nixon*, 433 U.S. at 465 (“[A]ppellant has a legitimate expectation of privacy in his personal communications. But the [privacy] must be viewed in the context of . . . his lack of any expectation of privacy in the overwhelming majority of the materials, [and] of the important public interest in preservation of the materials.”). See also *Denius*, 209 F.3d at 958.

whether plaintiffs have a legitimate expectation of privacy;<sup>63</sup> whether the information is within an individual's reasonable expectations of confidentiality;<sup>64</sup> whether the individual's privacy interest is of constitutional dimension;<sup>65</sup> and, portentously for section 215 plaintiffs, whether the information impacts other fundamental rights.<sup>66</sup> Because no single test predominates, this section analyzes broadly applicable conceptions of reader privacy that would be useful in litigating under any given standard.

As a preliminary matter, the constitutional analysis of the *Whalen* right to information privacy is conceptually and doctrinally distinct from Fourth Amendment jurisprudence, several features of which could otherwise prove fatal to a section 215 challenge. A Fourth Amendment defense of section 215 would likely claim that individuals do not have a "legitimate expectation of privacy" in their library borrowing records for Fourth Amendment purposes under the rationale of *Smith v. Maryland*.<sup>67</sup> In that case, the Supreme Court rejected a Fourth Amendment attack on the use of pen registers, which allow investigators to record the telephone numbers dialed from a particular phone line but do not record actual conversations.<sup>68</sup> The Court, in a passage that has profoundly shaped the modern application of the Fourth Amendment, reasoned that individuals have no legitimate expectation of privacy in information they voluntarily convey to a third party—such as the defendant's phone records, which he conveyed to the phone company through his daily telephone use.<sup>69</sup> On these lines, a plaintiff's library borrowing records would probably fail to trigger the Fourth Amendment's protections because, through the act of checking out books, she would effectively give the library her borrowing records.<sup>70</sup>

Because there are no reported cases that address whether an individual's reading habits or library borrowing records are private for *Whalen* purposes, the question, when addressed by a court, will be one of first impression. Although pressing for recognition of reading records as private can perhaps be analogized to courts' consistent protection of financial information,<sup>71</sup> the link between the two is tenuous enough to require independent analysis of the private nature of reading records. A general understanding of individuals' expectations with regard to their reading habits, and an important, if

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63. See *Falvo ex. rel. Pletan v. Owasso Indep. Sch. Dist.*, 233 F.3d 1203, 1208 (10th Cir. 2000), *rev'd on other grounds*, 534 U.S. 426 (2002), *opinion reinstated in relevant part*, 288 F.3d 1236 (10th Cir. 2002). Critically, the "legitimate expectation of privacy" test used by the U.S. Court of Appeals for the Tenth Circuit is not the same as the inquiry of the same name in Fourth Amendment jurisprudence. See *Cal. v. Greenwood*, 486 U.S. 35, 39 (1988).

64. See *Fraternal Order of Police v. City of Phila.* 812 F.2d 105, 112–13 (3d Cir. 1987).

65. See *Kallstrom*, 136 F.3d at 1063.

66. See *Denius*, 209 F.3d at 958.

67. See 42 U.S. 735, 740–46 (1979).

68. See *id.* at 742, 745–46.

69. See *id.* at 743–44. In another key case decided before *Smith*, the Court used the same rationale to conclude that individuals do not have a legitimate expectation of privacy in their financial records held by banks. See *United States v. Miller*, 425 U.S. 435, 453–55 (1976).

70. As one commentator recently noted, however, if a Fourth Amendment challenge were to make it past this threshold test, the government would have difficulty explaining the probable cause and particularity requirement infirmities of section 215. Kathryn Martin, Note, *The USA PATRIOT Act's Application to Library Patron Records*, 29 J. LEGIS. 283, 296–300 (2003).

71. See *supra* notes 51–56 and accompanying text.

nascent, line of case law indicate that courts should bring library borrowing records within *Whalen's* protective shield.

### 1. Reading and Societal Expectations

Any number of indicators demonstrate that society resoundingly recognizes an individual's reading habits as private. While the next section argues from a normative perspective why such information should be considered private, it is important first to acknowledge society's (including courts') broad representations to this effect. Case law, federal and state legislation, and the impassioned entreaties of librarians and booksellers all point to this recognition, which should color a court's decision whether to analyze section 215 under the constitutional right to information privacy.

Although no reported cases analyze whether one's reading habits are private for *Whalen* purposes, two recent and prominent cases provide a strong judicial acknowledgment of privacy in reading records. In *Tattered Cover, Inc. v. City of Thornton*,<sup>72</sup> the Colorado Supreme Court used the state constitution to "protect an individual's fundamental right to purchase books anonymously, free from governmental interference."<sup>73</sup> After DEA agents found "how-to" drug manufacture books and a bookstore shipping envelope at the site of a home methamphetamine lab, they obtained a search warrant for the bookstore.<sup>74</sup> The Colorado Supreme Court strongly sided with the bookstore, which sued to prevent execution of the warrant on First Amendment grounds.<sup>75</sup> The court held that the United States Supreme Court's standard from *Zurcher v. Stanford Daily*,<sup>76</sup> requiring mere compliance with the Fourth Amendment's particularity requirement in searches that implicate First Amendment rights, was insufficient for state constitutional purposes, instead applying strict scrutiny in examining the warrant.<sup>77</sup> The court ultimately struck down the warrant for lack of a compelling governmental interest, remarking on the importance of privacy for the uninhibited exercise of First Amendment rights.<sup>78</sup>

Similarly, the U.S. District Court for the District of Columbia demanded strict scrutiny analysis in the context of a demand for book purchase records in *In re Grand Jury Subpoena to Kramerbooks & Afterwords, Inc.*<sup>79</sup> That case involved Independent Prosecutor Kenneth Starr's subpoena of Monica Lewinsky's book purchase records for the period 1995 to 1998;<sup>80</sup> both Lewinsky and the bookstores involved moved to quash

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72. 44 P.3d 1044 (Colo. 2002).

73. *Id.* at 1047.

74. *Id.* at 1048–49. The books were colorfully entitled *Advanced Techniques of Clandestine Psychedelic and Amphetamine Manufacture*, by Uncle Fester, and *The Construction and Operation of Clandestine Drug Laboratories*, by Jack B. Nimble.

75. *See id.* at 1051.

76. 436 U.S. 547, 564 (1978).

77. *See Tattered Cover*, 44 P.3d at 1055–58.

78. *See id.* at 1052, 1063. The court rejected the government's three proffered interests: helping to prove the mens rea of the crime of operating a methamphetamine lab; proving which criminal defendant occupied the bedroom in which the lab was operated; and connecting a particular suspect to the crime. *See id.* at 1061.

79. *See* 26 MED. L. RPTR. 1599, 1601 (D.D.C. 1998).

80. *See id.* at 1599. Specifically, Starr was interested in whether Lewinsky had purchased a torrid novel by Nicholson Baker entitled "Vox." Associated Press, *Starr to Receive Book List from Lewinsky*, CHI. TRIB.,

the subpoena.<sup>81</sup> Although the court announced that the request would have to overcome strict scrutiny review because of its tendency to chill the exercise of First Amendment freedoms, Lewinsky ultimately agreed to a deal in which she disclosed her purchase records directly to Whitewater prosecutors.<sup>82</sup> These two cases—the only two of their kind, according to the court in *Tattered Cover*<sup>83</sup>—stand for the proposition that courts will strongly protect the privacy of individuals who do not wish their book purchases to be made known to investigators in order to protect the First Amendment rights of the readers and the book providers in question.<sup>84</sup>

Federal and state legislation also points to strong support for privacy protection surrounding an individual's reading choices. Congressman Bernard Sanders's Freedom to Read Protection Act, which has 144 co-sponsors, is only one of several currently pending federal efforts to support reader privacy in the face of section 215.<sup>85</sup> Other prominent offerings include the Security and Freedom Ensured (SAFE) Act,<sup>86</sup> introduced by Senator Larry Craig of Idaho, and the Library, Bookseller, and Personal Records Privacy Act,<sup>87</sup> introduced by Senator Russell Feingold of Wisconsin. On the state level, forty-eight of fifty states have statutory measures protecting library borrowing information as confidential.<sup>88</sup> Although section 215 supersedes these laws in practice, they nevertheless stand as an extraordinary testament to the importance that individuals and their elected representatives attach to the privacy of reading information.<sup>89</sup>

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June 23, 1999, at 8.

81. 26 MED. L. RPTR. at 1599.

82. Associated Press, *supra* note 80.

83. *Tattered Cover*, 44 P.3d at 1056 (noting that aside from the *Tattered Covered* case the court's "independent research discloses, only one previous case [*Kramerbooks*] where a court has considered the constitutionality of law enforcement attempts to gain access to the purchase records of a bookstore customer").

84. See *Kramerbooks*, 26 MED. L. RPTR. at 1600 ("The bookstores and Ms. Lewinsky have persuasively alleged a chilling effect on their First Amendment rights."); *Tattered Cover*, 44 P.3d at 1051 (finding that the right to receive information and ideas is "necessary to the successful and uninhibited exercise of the specifically enumerated right to freedom of speech") (internal quotation marks omitted).

85. Freedom to Read Protection Act of 2003, H.R. 1157, 108th Cong. (Mar. 6, 2003).

86. Security and Freedom Ensured Act of 2003, S. 1709, 108th Cong. § 1 (Oct. 2, 2003) (stating that the purposes of the bill is "[t]o amend the USA PATRIOT Act to place reasonable limitations on the use of surveillance and the issuance of search warrants, and for other purposes").

87. Library, Bookseller, and Personal Records Privacy Act, S. 1507, 108th Cong. (July 31, 2003) ("A bill to protect privacy by limiting the access of the government to library, bookseller, and other personal records for foreign intelligence and counterintelligence purposes."). See also Library and Bookseller Protection Act, S. 1158, 108th Cong. (May 23, 2003) (introduced by Sen. Barbara Boxer of California).

88. American Library Association, State Privacy Laws Regarding Library Records, at <http://www.ala.org/Template.cfm?Section=stateifcinaction&Template=/ContentManagement/ContentDisplay.cfm&ContentID=14773> (last visited Oct. 21, 2004). See, e.g., ALA. CODE § 41-8-10 (2004) ("[T]he registration and circulation records and information concerning the use of the public, public school, college and university libraries of this state shall be confidential."); CAL. GOV'T. CODE § 6267 (2004) ("All registration and circulation records of any library which is in whole or in part supported by public funds shall remain confidential and shall not be disclosed to any person, local agency, or state agency. . . ."); 75 ILL. COMP. STAT. 70/1-1(a) (2004) ("The registration and circulation records of a library are confidential information."); MASS. GEN. LAWS ch. 78, § 7 (2004) ("That part of the records of a public library which reveals the identity and intellectual pursuits of a person using such library shall not be a public record as defined by clause Twenty-sixth of section seven of chapter four.").

89. For a helpful discussion of relationships "analogous" to that of borrower-librarian that receive legal privacy protection, see Ault, *supra* note 20, at 1552 (including physician-patient, bank-depositor, and clergy-member-suppliant).

The guardians of America's books—librarians and book-sellers—have also shown an extraordinary unity behind the view that reading habits are private. Through op-eds,<sup>90</sup> library resolutions,<sup>91</sup> and most importantly, the work of the organizational mouthpiece of librarian activism, the American Library Association,<sup>92</sup> these individuals share the view that one who does not wish his/her reading records to be collected or disclosed has a right to privacy. Like the courts in *Tattered Cover* and *Kramerbooks*, librarians and booksellers defend reader privacy on the view that a lack of privacy in reading impinges upon the enjoyment of First Amendment rights.<sup>93</sup>

The above indications of a broad social recognition of the privacy rights of readers are not precisely tailored to the particular requirements of each circuit's *Whalen* jurisprudence, although they should contribute to a strong showing in those that require a legitimate expectation of privacy<sup>94</sup> or a reasonable expectation of confidentiality.<sup>95</sup> Regardless of any specific jurisdiction's requirements, these indications are a powerful demonstration that society strongly views reading records as private. As the next section indicates, a budding line of information privacy case law also argues for a finding that reading records are "private" for *Whalen* purposes precisely because of their facilitation of First Amendment freedoms.

## 2. Readers' Privacy and the First Amendment

Beyond the reasonable expectation of confidentiality or legitimate expectation of privacy tests, several courts have articulated a potentially more generous basis for finding that information is private for constitutional purposes: it impacts other constitutional rights.<sup>96</sup> On this analysis, a litigant challenging section 215 of the USA PATRIOT Act could make a strong showing that reading records are private under *Whalen* because government collection of them infringes upon the exercise of First Amendment freedoms.

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90. See Frank Kramer, *Why the Patriot Act Worries Booksellers*, BOSTON GLOBE, Oct. 8, 2003, at A23 (authored by a bookstore owner).

91. See American Library Association, USA PATRIOT Act Resolutions of State Library Associations, at <http://www.ala.org/Template.cfm?Section=stateifcinaction&Template=/ContentManagement/ContentDisplay.cfm&ContentID=29738> (last visited Oct. 21, 2004) (listing resolutions of all 50 states plus the District of Columbia).

92. See ALA Resolution, *supra* note 11 ("[T]he American Library Association encourages all librarians, library administrators, library governing bodies, and library advocates to educate their users, staff, and communities about the process for compliance with the USA PATRIOT Act and other related measures and about the dangers to individual privacy and the confidentiality of library records resulting from those measures."). The ALA has also historically been active in debates over free speech. See, e.g., American Library Association, *The Freedom to Read*, in FREE EXPRESSION IN AMERICA: A DOCUMENTARY HISTORY 137–38 (Sheila Suess Kennedy ed., 1999).

93. See ALA Resolution, *supra* note 11 ("Privacy is essential to the exercise of free speech, free thought, and free association.").

94. See *Falvo*, 233 F.3d at 1208.

95. See *Fraternal Order of Police*, 812 F.2d at 112–13.

96. The *Whalen* plaintiffs arguably laid the groundwork for this line of analysis. In that case, they unsuccessfully argued that the New York prescription law infringed upon their right to decisional privacy as a derivative harm of its infringement of their right to information privacy. After information about their drug use was collected and possibly disseminated (information privacy harm), the patients claimed they would be less likely to request and use certain drugs associated with a stigma (decisional privacy harm). See *Whalen*, 429 U.S. at 600, 602–03.

*a. Case law*

In *Denius*, the U.S. Court of Appeals for the Seventh Circuit strongly articulated this basis for determining which information should be deemed private for *Whalen* purposes.<sup>97</sup> The court justified its holding that financial records qualify for *Whalen* protection on the ground that “confidential financial information may implicate substantial privacy concerns *and impact other fundamental rights.*”<sup>98</sup> The court, however, offered little concrete explanation for the statement and has not expounded upon it since. The Sixth Circuit Court of Appeals—ordinarily viewed as having rejected a constitutional right to information privacy<sup>99</sup>—arguably held on the facts of a case that information that affects other constitutional interests qualifies for *Whalen* protection.<sup>100</sup> In *Kallstrom v. City of Columbus*,<sup>101</sup> the court found that a city’s release of police officers’ personnel files to violent criminal defendants whom the officers had arrested violated the officers’ constitutional rights.<sup>102</sup> After acknowledging that its decisions had read *Whalen* and *Nixon* narrowly, the court announced the applicable standard: “This circuit . . . will only balance an individual’s interest in nondisclosure of informational privacy against the public’s interest in and need for the invasion of privacy where the individual privacy interest is of constitutional dimension.”<sup>103</sup> Because the release of the information threatened the officers’ due process rights to life and personal security, in other words, the disclosure amounted to a possible constitutional violation.<sup>104</sup>

Several decisions in the Third Circuit Court of Appeals also arguably recognize privacy rights in information that implicates other constitutional liberties—although perhaps in deed more than in word. In *Sterling*, the court found that a police officer’s threat to reveal the homosexuality of a teenage boy apprehended on other grounds amounted to a violation of the *Whalen* right to information privacy.<sup>105</sup> Although the court did not expressly rely on the impact of disclosure on the boy’s decisional privacy interests (his sexual behavior), one detects an implicit reliance in its analysis.<sup>106</sup> On this view, the fact that the officer’s decision to “out” the boy would have unquestionably impacted the boy’s sexual behavior (by, for instance, chilling his sexual activity to quell others’ suspicion of his homosexuality) favored giving the information constitutional protection.<sup>107</sup> Further, in *Gruenke*, the Third Circuit found that a high school

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97. *Denius*, 209 F.3d at 955–58.

98. *Id.* at 958 (emphasis added).

99. *See supra* note 37.

100. *See Kallstrom*, 136 F.3d at 1062.

101. 136 F.3d 1055 (6th Cir. 1998).

102. *See id.* at 1055.

103. *Id.* at 1061 (citations omitted).

104. *See id.* at 1062.

105. *See Sterling*, 232 F.3d at 197–98.

106. For instance, in a footnote concluding the court’s announcement of the “intrinsically private” nature of information about sexual orientation, it cited with approval several cases that had found forced disclosure of individuals’ homosexuality unconstitutional on what appear to be decisional privacy grounds. *See id.* at 196 n.4. In light of a recent decision by the Supreme Court protecting the decisional privacy interest of all individuals in private intimate behavior, the *Sterling* court’s reliance, if it existed, could now be stated with greater confidence. *See Lawrence v. Texas*, 539 U.S. 558, 567 (2003).

107. *See Sterling*, 232 F.3d at 198.

swimming coach's demand that an eleventh-grade team member who he suspected was pregnant take a pregnancy test violated the student's right to information privacy.<sup>108</sup> Again, the court did not rely on the impact of disclosure of the information on the student's decision-making privacy rights, but one can clearly trace the reasoning that would apply under the Seventh Circuit's "impact[s] other fundamental rights" analysis: the coach's insistence on learning whether the student was pregnant and his disclosure of that information to others could well influence the student's decisions with how to proceed in her pregnancy—especially in light of the student's fear that pregnancy would force her to quit the team.<sup>109</sup> Since decision-making about pregnancy and abortion is protected under the Due Process Clauses of the Fifth<sup>110</sup> and Fourteenth Amendments,<sup>111</sup> information about pregnancy, the argument goes, deserves protection under the constitutional right to information privacy.<sup>112</sup>

*b. Argument*

This string of cases provides the foothold for a potentially powerful basis for arguing that reading records should be private for *Whalen* purposes: government collection of them chills the exercise of First Amendment rights.<sup>113</sup> Although this line of doctrinal analysis is admittedly not well developed, advocates seeking to overturn section 215 of the USA PATRIOT Act on privacy grounds would do well to explore and exploit it in a litigative challenge. For, as even a cursory exploration of the First Amendment interests implicated by section 215 reveals, government collection of reading records profoundly affects the exercise of First Amendment freedoms.

Government surveillance and collection of reading records chills individuals' exercise of the First Amendment right to receive information.<sup>114</sup> This right encompasses Justice Brennan's oft-quoted view that "[i]t would be a barren marketplace of ideas that had only sellers and no buyers."<sup>115</sup> In other words, the right to free expression is meaningless without the ability to read, listen to, or otherwise receive the expression of others.<sup>116</sup> By chilling individuals' willingness to explore and access reading materials that might be deemed suspicious by law enforcement officers, section 215 clearly implicates this First Amendment freedom, which should contribute to a finding that reading records are private for *Whalen* purposes.

Professor Julie Cohen, in examining the philosophical bridge between speech in its various forms and the receipt of speech, has persuasively articulated the basis for First

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108. See *Gruenke*, 225 F.3d at 303.

109. See *id.* at 296–97.

110. U.S. CONST. amend V.

111. U.S. CONST. amend. IX.

112. See *Planned Parenthood v. Casey*, 505 U.S. 833, 834 (1992); *Roe v. Wade*, 410 U.S. 113, 153 (1973).

113. First Amendment freedoms unquestionably stand on firmer constitutional footing as infringed fundamental rights than the "substantive due process" interests that arguably have served as the basis for information privacy protection in the Third Circuit cases.

114. For strong arguments that section 215 of the USA PATRIOT Act also violates the First Amendment as a prior restraint on librarians' ability to disclose the fact of FBI searches, see generally Pl.'s Resp. to Def.'s Mot. to Dismiss at 37–39, *Muslim Cmty. Ass'n. v. Ashcroft*, No. 03-72913 (E.D. Mich. filed July 30, 2003).

115. *Lamont v. Postmaster Gen.*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring).

116. See *Ault*, *supra* note 20 at 1540.

Amendment protection of the right to receive information:

Functionally, the activities of the recipient and the proponent of speech—reading/hearing and speaking/writing, respectively—are properly viewed as two halves of the same whole. . . . Thoughts and opinions, which are the predicates to speech, cannot arise in a vacuum. Whatever their content, they are responses formed to things heard or read. It is this iterative process of “speech-formation”—which determines, ultimately, both the content of one’s speech and the particular viewpoint one espouses—that the First Amendment should shield from scrutiny.<sup>117</sup>

While the Supreme Court has not overtly recognized Cohen’s proffered “right to read anonymously,” it has protected on First Amendment grounds the right to receive information on several occasions.<sup>118</sup>

Section 215 chills<sup>119</sup> the exercise of this right to receive information by casting a cloud of subversiveness over the exploration of certain books, materials, and information—namely, materials that trigger the FBI’s suspicions. Without the confidence that private inquiry affords, bookstore or library patrons may refrain from searching databases, communicating with staff members, or exploring certain controversial materials if they fear that their movements could be tracked by law enforcement officials and used to mark them as terrorist suspects.<sup>120</sup> This self-censorship of intellectual curiosity and free inquiry is not mitigated by the fact that section 215 operates to prevent patrons from ever knowing that their activities have been monitored by prohibiting librarians or booksellers from divulging the existence of their investigation.<sup>121</sup> The mere rumor that a single patron of a bookstore or library had been surveilled would be enough to stifle the exploration of controversial materials for many, if not all, of that facility’s patrons. Further, although an individual might not know that his or her reading records had been investigated because of the USA PATRIOT Act’s secrecy provisions, a society in which such law enforcement practices are legally contemplated, employed, and tolerated would soon find itself enveloped by a culture of self-censorship.

Thus the strongest basis on which to argue that reading records qualify as “private” for purposes of the constitutional right to information privacy is the Seventh Circuit Court of Appeals’ test that the collection of the information implicates fundamental rights. Government surveillance of reading records unquestionably chills the First Amendment freedom to receive information, making it an important category of information for constitutional protection. As the next section demonstrates, the fact that FBI agents merely collect reading records under section 215, as opposed to

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117. See Julie E. Cohen, *A Right to Read Anonymously: A Closer Look at “Copyright Management” in Cyberspace*, 28 CONN. L. REV. 981, 1006–07 (1996) (footnotes omitted).

118. See *Stanley v. Georgia*, 394 U.S. 557, 557 (1969); *Lamont*, 381 U.S. at 301; Cohen, *supra* note 117, at 1008–11. For a discussion of the framers’ arguable support of the use of the First Amendment to protect both speech and its receipt, see O’Neil, *supra* note 20, at 220–22.

119. For a slightly dated survey of First Amendment “chilling” cases, including those based on government surveillance, see Ault, *supra* note 20, at 1544–48.

120. See Ault, *supra* note 20, at 1549.

121. See USA PATRIOT Act § 215(d) (“No person shall disclose to any other person . . . that the Federal Bureau of Investigation has sought or obtained tangible things under this section.”).

disseminating that information to others, also should not stand in the way of a successful *Whalen* challenge.

### B. Collection Versus Disclosure: A Hazy Distinction

Critics might argue that section 215 does not implicate the constitutional right to information privacy because that right prevents public disclosure of information, whereas section 215 merely authorizes government collection of information—FBI collection of reading records.<sup>122</sup> The very nature of the *Whalen* right, this argument would contend, prevents state actors from making confidential information known to the world; mere governmental collection of that information, with appropriate safeguards, is less threatening.<sup>123</sup> This line of reasoning—perhaps the greatest obstacle to a successful challenge of section 215 under *Whalen*—has found favor in several circuit courts, and at least one state supreme court.<sup>124</sup> As the U.S. Court of Appeals for the District of Columbia Circuit put it in its skeptical opinion in *AFL-CIO v. Department of Housing and Urban Development*<sup>125</sup> and *AFL-CIO v. Perry*,<sup>126</sup> “the individual interest in protecting the privacy of the information sought by the government is significantly less important where the information is collected by the government but not disseminated publicly.”<sup>127</sup>

Three important points rebut critics’ reliance on a sharp distinction between collection and disclosure of private information for purposes of constitutional analysis. First, contrary to the D.C. Circuit’s contention,<sup>128</sup> the information privacy cases that embrace a constitutional right do not monolithically involve government disclosure rather than collection of information. As the Fifth Circuit Court of Appeals pointed out

122. *See id.* at § 215(a)(1).

123. *See Whalen*, 429 U.S. at 605–06 (emphasizing the importance of security provisions and other safeguards to protect against unwarranted public disclosure of information collected by government officials).

124. *See Statharos v. New York City Taxi & Limousine Comm’n*, 198 F.3d 317, 325–26 (2d Cir. 1999) (“[T]he plaintiffs’ confidentiality interest in protecting their financial information from being revealed to the world at large is significantly greater than their interest in protecting that information from being revealed to [members of] the [New York City Taxi and Limousine] Commission.”); *Barry v. City of New York*, 712 F.2d 1554, 1561 (2d Cir. 1983) (“The adverse effect of public disclosure on privacy interests is considerably greater than the effect of disclosure to the City.”); *Stone v. City of Stow*, 593 N.E.2d 294, 301 (Ohio 1992) (“Whatever privacy interest the patients and physicians possess in these prescription records is limited to the right not to have the information disclosed to the general public. Disclosures to police officers, or to officials of the State Pharmacy Board, do not violate that right.”).

Even Justice Brennan observed a difference between the routine and generally permissible collection of information by government officials with a legitimate interest in the information, and the counterfactual and impermissible “[b]road dissemination by state officials of such information” that “would clearly implicate constitutionally protected privacy rights, and would presumably be justified only by compelling state interests.” *Whalen*, 429 U.S. at 606 (Brennan, J., concurring). Nevertheless, this point arguably leaves open the challenge that even collection, when done without a proper government purpose, is problematic.

125. 118 F.3d 786 (D.C. Cir. 1997).

126. *Id.*

127. *Id.* at 793. The case involved a challenge by Department of Housing and Urban Development (HUD) employees to a department policy requiring employees to provide information about their finances and drug use. *Id.* at 788–92. The court, after raising doubts about the existence of a constitutional right to information privacy, held that even if such a right existed, the fact that the measure in question involved collection only and not disclosure, coupled with security measures in place to prevent disclosure, required a finding that the plaintiffs’ rights had not been violated. *Id.* at 791–93.

128. *Id.* at 793 (“In fact, the [plaintiffs] could cite no case in which a court has found a violation of the constitutional right to privacy where the government has collected, but not disseminated, the information.”).

in *Plante*, the Supreme Court case *Nixon*, viewed by many as validation for the right announced in *Whalen* and one of only two Supreme Court cases directly on point, “involved not public disclosure” of the President’s personal information “but viewing and screening of public and private documents by archivists”—collection, in other words.<sup>129</sup> In this context, the Court recognized that President Nixon had “a legitimate expectation of privacy in his personal communications,”<sup>130</sup> and “was not wholly without constitutionally protected privacy rights.”<sup>131</sup> Thus, according to the Supreme Court’s own analysis, mere collection of information can infringe upon the constitutional right to information privacy.

Similarly, *Whalen* involved not a broadcast of individuals’ private prescription records but a collection of those records by government officials.<sup>132</sup> Although the Court did not invalidate the statute authorizing this collection, the fact that it required strong security measures to prevent disclosure demonstrates the Court’s recognition of the potential for unconstitutional invasions of privacy even when the challenged measure allows collection rather than actual disclosure of information.<sup>133</sup> In other words, the Court did not find that because the act in question merely authorized collection rather than disclosure it survived constitutional attack. Rather, the Court upheld the act because it authorized collection but maintained adequate safeguards to prevent against disclosure.

This leads to a second point that brings section 215 under *Whalen*: it is a short distance to travel between governmental collection of information and dissemination of the same. As the Court in *Whalen* implicitly recognized, collection is merely the first step to widespread disclosure. This point is graphically illustrated by the facts of *Borough of Barrington*, a district court case.<sup>134</sup> There, during the arrest of the plaintiff’s husband, the husband advised the arresting officers of the Barrington police department to take care in searching him because he was HIV positive.<sup>135</sup> Later in the day in an unrelated traffic incident involving the plaintiff, word of the husband’s condition spread from the Barrington officers to the Runnemede police officers who responded to the traffic incident, and from there to the other individuals involved in the incident, who told parents whose children went to school with the plaintiff, and the local media.<sup>136</sup> Thus the husband’s initial warning to government officials quickly turned into widespread public dissemination.

The U.S. Court of Appeals for the Seventh Circuit also recognized the ephemeral border between collection and disclosure in connection with the ongoing dispute over the Justice Department’s demands that hospitals release records of patients who have obtained so-called “partial-birth abortions” for the department’s use in defending the

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129. *Id.* at 1133.

130. *Nixon*, 433 U.S. at 465.

131. *Id.* at 457.

132. *See Whalen*, 429 U.S. at 593–94.

133. *See id.* at 605–06. *But see id.* at 601 (stating that “[t]here is no support in the record . . . for an assumption that the security provisions of the statute will be administered improperly”).

134. *See Borough*, 729 F. Supp. at 378–79.

135. *See id.* at 378.

136. *See id.* at 378–79.

challenged Partial-Birth Abortion Ban Act of 2003.<sup>137</sup> In rejecting the Justice Department's subpoena of the records under Rule 45 of the Federal Rules of Civil Procedure rather than the *Whalen* right to information privacy, Judge Posner observed that the fact that the government had merely collected patients' medical records did not dampen the privacy harm they suffered.<sup>138</sup> Suggesting one possible way that their information might be more broadly disseminated, he noted the accessibility of the redacted information once it became a part of the trial record and its vulnerability to "skillful Googlers" who might "put two and two together" and reveal the patients' identities to the public.<sup>139</sup> Viewed in light of the nightmare scenario of *Borough of Barrington*, this demonstrates not only the short distance between government collection and disclosure of information, but also a prominent judicial recognition of the same.

A third response to the claim that section 215 does not violate the constitutional right to information privacy because it authorizes mere government collection of information, rather than disclosure, is that, in a way, government collection of certain information in an age of terrorism actually amounts to disclosure of that information. The USA PATRIOT Act has dramatically reduced the barriers to intelligence sharing among various law enforcement agencies, and further efforts to facilitate cooperation between law enforcement and federal agencies are currently debated vigorously in policy circles.<sup>140</sup> Given that most individuals oppose section 215 not for fear that federal agents would disclose their reading habits to the public at large, but because the information might be used to identify them as suspect or dangerous for other law enforcement purposes, a section 215 order demanding borrowing records is arguably tantamount to disclosure to other government agencies for the purposes of constitutional analysis. For example, imagine a library patron who is under FBI suspicion for reading about the teachings underpinning the Iranian revolution of 1979. If the FBI were to obtain an order demanding his library borrowing records, he would fear widespread use of that information among law enforcement officials—made possible by the intra-governmental dissemination that other provisions of the USA PATRIOT Act facilitate.

Thus, from a positive perspective, the collection-versus-dissemination debate does not necessarily weigh against a challenge to section 215 as a violation of the *Whalen* right to information privacy, although it is a difficult obstacle to surmount. Further,

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137. See Partial-Birth Abortion Ban Act of 2003, 18 U.S.C.A. § 1531 (West Supp. 2004); see also Eric Lichtblau, *Defending '03 Law, Justice Department Seeks Abortion Records*, N.Y. TIMES, Feb. 11, 2004, at A1.

138. See *Northwestern Mem'l Hosp. v. Ashcroft*, 362 F.3d 923, 929 (7th Cir. 2004).

139. *Id.* (quotation marks omitted).

140. E.g., USA PATRIOT Act § 203(b) (authorizing the sharing of foreign intelligence information between federal law enforcement, immigration, national defense, or national security officers under certain circumstances). See generally CHARLES DOYLE, CRS REPORT FOR CONGRESS, THE USA PATRIOT ACT: A LEGAL ANALYSIS, 19–23 (2002), available at <http://www.fas.org/irp/crs/RL31377.pdf> (last visited Oct. 21, 2004) (discussing the intelligence sharing provisions of the USA PATRIOT Act). The September 11 commission and President Bush's effort to enlist support for renewing provisions of the USA PATRIOT Act that are set to expire in 2005 have kept the debate over intelligence sharing alive. See Neil A. Lewis, *Rule Created Legal "Wall" to Sharing Information*, N.Y. TIMES, Apr. 13, 2004, at 19 (discussing an interpretation of the Foreign Intelligence Surveillance Act eliminated by the USA PATRIOT Act that had prevented the sharing of information between law enforcement and intelligence officers before September 11, 2001); Richard W. Stevenson & Eric Lichtblau, *Bush Pushes for Renewal of Antiterrorism Legislation*, N.Y. TIMES, Apr. 18, 2004, at 16.

from a normative standpoint, courts should not draw a sharp distinction between collection and dissemination—indeed, they should use a section 215 challenge as an opportunity to announce the insignificance of that distinction. As Part III demonstrates, this brings the analysis to the balancing of the privacy interest with the government’s need for invading privacy—an analysis that section 215 plaintiffs are likely to win.

#### IV. BALANCING

Once the threshold determination has been made that reading records are private for *Whalen* purposes, and assuming that the distinction between collection and dissemination of information is not dispositive in the constitutional analysis, challengers to section 215 of the USA PATRIOT Act are in the clear. After finding a legitimate privacy interest, courts balance it against the government purpose served by the invasion: “The right to informational privacy... is not absolute; rather, it is a conditional right which may be infringed upon a showing of proper governmental interest.”<sup>141</sup> Because of the extremely weak governmental interest in the reading records of individuals, plaintiffs would most likely prevail in this inquiry.

Courts have not settled on the appropriate level of scrutiny for analyzing a governmental infringement of a legitimate privacy interest under the *Whalen* right to information privacy. The Supreme Court in *Nixon* appeared to apply heightened or intermediate scrutiny, stating that any intrusion on the complainant’s privacy “must be weighed against the public interest” in the challenged measure.<sup>142</sup> Most courts and circuits have followed this approach, labeling it intermediate scrutiny or a balancing standard.<sup>143</sup> Some articulate a multi-factored inquiry; the Third Circuit Court of Appeals employs the most commonly used test.<sup>144</sup> Several courts have used a more rigorous analysis, applying strict scrutiny to measures that infringe on privacy by requiring that they serve a compelling government interest and be no more restrictive than necessary to achieve that end.<sup>145</sup> Each framework provides at least some

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141. See *In re Crawford*, 194 F.3d 954, 959 (9th Cir. 1999) (citations and quotation marks omitted).

142. See *Nixon*, 433 U.S. at 458.

143. See, e.g., *Statharos v. New York City Taxi & Limousine Comm’n*, 198 F.3d 317, 324 (2d Cir. 1999) (“We conclude that intermediate scrutiny is appropriate.”); *In re Crawford*, 194 F.3d at 959 (“[T]he government has the burden of showing that its use of the information would advance a legitimate state interest and that its actions are narrowly tailored to meet the legitimate interest.”) (citations and quotation marks omitted); *Plante*, 575 F.2d at 1134 (“Although in the autonomy strand of the right to privacy, something approaching equal protection ‘strict scrutiny’ analysis has appeared, we believe that the balancing test, more common to due process claims, is appropriate here. The constitutionality of the amendment will be determined by comparing the interests it serves with those it hinders.”); *State v. Russo*, 790 A.2d 1132, 1149 (Conn. 2002) (“Courts generally have applied a balancing test to determine whether the disclosure of personal or confidential information is constitutionally permissible under the particular facts and circumstances presented.”).

144. See *Westinghouse Elec. Corp.*, 638 F.2d at 578. The factors are:

[1] the type of record requested, [2] the information it does or might contain, [3] the potential for harm in any subsequent nonconsensual disclosure, [4] the inquiry from disclosure to the relationship in which the record was generated, [5] the adequacy of safeguards to prevent unauthorized disclosure, [6] the degree of need for access, and [7] whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access.

*Id.*

145. See, e.g., *Falvo*, 233 F.3d at 1208 (“In assessing whether a specific category of information is

additional scrutiny beyond rational basis review, which is more than enough for section 215 challengers to exploit.

The government interest served by section 215—namely, fighting terrorism—is unquestionably compelling. In an age of terrorist attacks, security alerts, and the unending tension of the unexpected, no American would deny security services the effective and reasonable tools to protect the homeland. Yet, as the Colorado Supreme Court noted in *Tattered Cover, Inc.*, “the law enforcement officials’ need to investigate crime will almost invariably be a compelling one.”<sup>146</sup> The salient question, therefore, is “whether law enforcement officials have a compelling need for the precise and specific information sought.”<sup>147</sup> Other courts invariably acknowledge this important distinction in the privacy context, usually by insisting that the challenged measure be narrowly tailored to serve a “legitimate” or “appropriate” state interest.<sup>148</sup> Thus, the significant inquiry in evaluating the importance of the governmental interest advanced by section 215 is examining the usefulness of obtaining suspects’ reading records in fighting terrorism, not merely the importance of the fight itself.

The policy goal underlining section 215, in the words of one of the provision’s supporters, is “aggressive, preemptive law enforcement” in an age of global terror.<sup>149</sup> In light of recent attacks and current threats against the United States, section 215—and the USA PATRIOT Act more broadly—allows law enforcement officers the flexibility and access to information they need to discover and intercept terrorist threats before they happen.<sup>150</sup> Specifically, in reference to reading records, section 215 could give law enforcement officers who had identified a suspect the opportunity to obtain further information about him that could shed light on terrorist activities, or it could give officers the ability to monitor those accessing certain, highly suspicious materials.

These justifications for investigating individuals’ reading records in terrorism investigations are misguided. As a tool in fighting terrorism, section 215 orders are breathtakingly overinclusive. For instance, a recent FBI bulletin warned law enforcement officials that almanacs may represent a particularly useful tool for terrorist operatives to use in selecting targets.<sup>151</sup> Were this bulletin to be translated to a secret section 215 order for bookstores’ and libraries’ almanac selling and borrowing records—and because of section 215’s gag provision,<sup>152</sup> no one knows whether it has

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constitutionally protected, this court must consider, (1) if the party asserting the right has a legitimate expectation of privacy [in that information], (2) if disclosure serves a compelling state interest, and (3) if disclosure can be made in the least intrusive manner.”); *F.E.R. v. Valdez*, 58 F.3d 1530, 1535 (10th Cir. 1995) (discussing balancing test). The influential Third Circuit ordinarily applies intermediate review, but uses a “compelling interest analysis” if the privacy intrusion is particularly severe. See *Doe v. SEPTA*, 72 F.3d 1133, 1139–40 (3d Cir. 1995) (applying intermediate review); see also *Paul P. v. Verniero*, 170 F.3d 396, 402 (3d Cir. 1999) (requiring a compelling interest).

146. *Tattered Cover*, 44 P.3d at 1058.

147. *Id.* (emphasis added).

148. See *In re Crawford*, 194 F.3d at 959; *Borough of Barrington*, 729 F. Supp. at 385 (“While prevention of this deadly disease is clearly an appropriate state objective, this objective was not served by Smith’s statement that the DiAngelos should wash with disinfectant.”).

149. See Lowry, *supra* note 16.

150. See Martin, *supra* note 20, at 285–86.

151. See Dan Eggen, *Almanacs May Be Tools for Terrorists, FBI Says*, WASH. POST, Dec. 30, 2003, at A2.

152. See USA PATRIOT Act § 215(d) (preventing any person, including the subject of a section 215 order, from disclosing the fact of an order to others). The president of the Boston Public Library, Bernard

been—the records would implicate hundreds or thousands of individuals, the overwhelming majority of whom accessed the material for benign purposes.<sup>153</sup> Law enforcement agents might then cross-check their search results against other incriminating activity, such as arrest records, to find individuals worthy of further pursuit. The process just described might at very best yield a lead or two out of many names canvassed, and as a by-product would stigmatize and chill the legitimate use of almanacs by a great number of readers.

Section 215 is also an overinclusive terror-fighting tool on the individual level. Rather than identifying a suspicious book and then investigating those who have bought or purchased it, the FBI could pursue the reading habits of an already identified terror suspect. Yet a search of the reading habits of such an individual—who is necessarily tied inconclusively to terrorism, given the resort to a search of his reading records—will again cover much, much more innocent than incriminating material. Many suspects are ultimately found innocent, in which case their reading habits are irrelevant, and even among the category of legitimate suspects, and the sub-category of those legitimate suspects who actually make perfidious use of reading materials, most will only do so with a fraction of their books. Further, any controversial or provocative materials that the suspect reads will subject him to further suspicion, even if those materials were not used in any connection with terrorist activity.

Section 215 is also underinclusive. An initial difficulty with investigating reading habits as a means of intercepting terrorist activity in this regard is that it is necessarily reactive and *ex post*; it must rely to a significant degree on reading materials previously identified as suspicious. For instance, the FBI issued its advisory bulletin on almanacs because an almanac had in fact been found in an apartment used by an al Qaeda sleeper agent.<sup>154</sup> Thus, the method presumably under-detects a wide array of previously undiscovered, so-called dangerous reading materials. Further, flagging certain suspect materials is, in effect, an attempt to fight terrorism by anticipating the sources of dangerous or subversive information.<sup>155</sup> Yet surely this is quite an impossible task. If books as innocuous as almanacs are suspect, the list of other questionable material must be tremendous: scientific treatises for technical expertise, political manifestos for radical ideology, sociology texts for understanding the enemy, business journals for

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Margolis, has publicly stated that if his library were presented with a section 215 order, he “would give very serious consideration to informing my trustees about that request and . . . going public with it.” David Mehegan, *Reading Over Your Shoulder: The Push is On to Shelve Part of the Patriot Act*, BOSTON GLOBE, Mar. 9, 2004, at E5.

153. Indeed, it is staggering to consider the miniscule number of individuals who have bought or borrowed almanacs for purposes related to terrorism. See Eggen, *supra* note 151 (quoting the editor of the *Farmers’ Almanac*, which collects weather predictions and cleaning tips, among other things: “Our almanac is about as far away as you can get from terrorism and about as close as you can get to what you would think of as Americana”) (internal quotation marks omitted).

154. See *id.* The al Qaeda agent was Ali Saleh Kahlal al-Marri, in whose apartment investigators discovered an almanac with bookmarked pages on important American dams, rivers, reservoirs, and railroads. See *id.*

155. For a discussion of a similar issue, preventing terrorism by *intercepting* the voluntary receipt of certain types of information through limitations on its availability, see *Bernstein v. U.S. Dep’t. of Justice*, 176 F.3d 1132, 1135 (9th Cir. 1999), *opinion withdrawn, reh’g en banc granted*, 192 F.3d 1308 (9th Cir. 1999). The court struck down as a violation of the First Amendment regulations that prevented the distribution of certain highly sophisticated encryption software, the dissemination of which the government feared would threaten national security. See *id.* at 1135.

organizational efficiency, law books for guidance on legal consequences, newspapers for staying abreast of political and military developments, and historical tomes for insight on past terrorist failures and successes, to name a very few.

The over- and under-inclusivity of section 215 thus makes it an exceptionally imprecise tool for fighting terrorism—one that occupies law enforcement energies and resources that could be better spent elsewhere. The Supreme Court, in a widely cited passage, implied the uselessness of this method of investigation in the famous Fourth Amendment case *Stanford v. Texas*.<sup>156</sup> The Court struck down as overbroad a search warrant pursuant to the Texas Suppression Act that authorized a search of the defendant's apartment for books, pamphlets, or other evidence of Communist activity.<sup>157</sup> With a restrained sense of irony, the Court noted several of the items seized, including “works by such diverse writers as Karl Marx, Jean Paul Sartre, Theodore Draper, Fidel Castro, Earl Browder, Pope John XXIII, and Mr. Justice Hugo L. Black.”<sup>158</sup> In authorizing a general search of the intellectual pursuits of the defendant, the Court concluded, the state of Texas had committed an act directly analogous to the British policies that America's founders sought to escape.<sup>159</sup>

Another significant infirmity with using reading records to identify suspicious or subversive behavior is the tendency to abuse this investigative method. History is replete with such instances. For example, the FBI's “Library Awareness Program” of the Cold War era was designed to prevent Soviet diplomats and intelligence personnel from culling unclassified but critical information from America's scientific and technical libraries.<sup>160</sup> Nevertheless, librarians in general-use facilities including the New York City Public Library reported interactions with FBI agents, in which the agents appeared interested mainly in learning about the library activities of foreign patrons who looked suspicious.<sup>161</sup> Similarly, in 1970 the Internal Revenue Service sent agents to public libraries requesting the names of individuals who had borrowed certain books discussing explosive devices.<sup>162</sup> After scrutiny by the American Library Association and Senator Sam Ervin, the Secretary of the Treasury publicly stated that he had not authorized such activities, which soon ceased.<sup>163</sup> These cursory examples of abuse in a history of government investigation of reading habits should inform a court's decision to reject section 215 of the USA PATRIOT Act as a narrowly tailored means to a legitimate government purpose.

Finally, proponents of section 215 have defended the measure as a largely harmless terrorism-fighting tool on the grounds that it has never actually been used, and would be reserved for the most pressing of circumstances.<sup>164</sup> As an initial matter, Attorney General Ashcroft's prominent announcement that no section 215 orders have issued to

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156. 379 U.S. 476, 479–80 (1965).

157. *See id.* at 478–80.

158. *Id.* at 479–80 (emphasis omitted).

159. *See id.* at 480–83.

160. *See Ault, supra* note 20, at 1533–34; *see generally* HERBERT N. FOERSTEL, SURVEILLANCE IN THE STACKS: THE FBI'S LIBRARY AWARENESS PROGRAM (1991).

161. *See Ault, supra* note 20, at 1536.

162. *See O'Neil, supra* note 20, at 214.

163. *See id.*

164. *See Bottum, supra* note 16; Lowry, *supra* note 16; Stuart Taylor, Jr., *Let's Focus on Real Threats to Liberty, Not False Alarms* 35 NAT'L J. 3399, 3399–3400 (2003).

date has been disputed by librarians across the country and is unverifiable because of the provision's gag order and the classified nature of the information.<sup>165</sup> Nevertheless, the argument that a law concededly inimical to constitutional freedoms that is used in secret and produces classified results is unproblematic merely because the government claims it has not yet been used seems naive to the point of being absurd. It also belies an American ethos of healthy skepticism of governmental interference in citizens' liberty—one that Mr. Ashcroft's Justice Department has provided ample grounds for maintaining.<sup>166</sup>

In sum, "[t]here is no evidence that government searches of library [or bookstore] records have any value," and considerable evidence showing that such searches are ineffective and prone to abuse.<sup>167</sup> Against this weak governmental interest, courts must balance the considerable privacy interests of individuals in their reading records.<sup>168</sup> When faced with an overbroad and unworkable tool in the war on terror that infringes significant First Amendment freedoms through the loss of reader privacy, courts should strike that tool down under either heightened or strict scrutiny. Such a policy clearly does not outweigh the harms that it creates, and is not narrowly tailored to a legitimate government interest, to quote the tests of two courts that apply intermediate scrutiny in *Whalen* privacy cases.<sup>169</sup>

## V. CONCLUSION

Section 215 of the USA PATRIOT Act, which amends the Foreign Intelligence Surveillance Act to allow FBI searches of, among other things, reading records, is constitutionally infirm. While the natural inclination of scholars and advocates is to demonstrate this assertion with reference to the First and Fourth Amendments, an additional, and potentially useful, mode of attack exists. The constitutional right to information privacy, which has been acknowledged by the Supreme Court and most federal circuit courts of appeals, provides a plausible basis for litigants to challenge this harmful provision. Fitting section 215 into the doctrinal framework of the constitutional right to information privacy is not without its difficulties, but should advocates succeed in doing so, they will likely prevail in demonstrating that the harms the section creates outweigh the governmental interests it serves. This constitutional malady also counsels toward serious consideration of legislative attempts to amend section 215.

Significantly, a court's determination that section 215 violates the right to information privacy does not necessarily mean that the government can never advance a

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165. See Ashcroft Remarks, *supra* note 15. In addition, a recent *Boston Globe* article reported the following:

In a survey last fall of 465 public and 120 private libraries in Illinois by the Library Research Center, seven public libraries reported that they had received requests for information about patrons or circulation records from the FBI, and 17 said other requests came from police or other agencies. Eight said the reason given for the requests was a national security investigation.

Mehegan, *supra* note 152.

166. See generally *A Question of Freedom*, THE ECONOMIST, Mar. 8, 2003, at 29.

167. See Martin, *supra* note 20, at 292.

168. See discussion *supra* Part III.A.2.

169. See *In re Crawford*, 194 F.3d at 959; *Plante*, 575 F.2d at 1134.

pressing enough interest in a suspect's reading records to warrant investigating them. If a challenge succeeded in overturning section 215 as applied, rather than on its face, then the government would merely have to show a legitimate or compelling (as the case may be) interest in the particular search in question in order to overcome the significant harms created by investigating reading habits. Those harms, however, are severe indeed, so a court should, when presented with the opportunity, strike down section 215 as a violation of the constitutional right to information privacy.