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IDENTITY, PRIVACY, AND THE NEW INFORMATION SCALPERS: RECALIBRATING THE RULES OF THE ROAD IN THE AGE OF THE INFOBAHN: A RESPONSE TO FRED H. CATE

RONALD J. KROTOSZYNSKI, JR.*

Bernard: Oh Brave New World that has such people in it. Let's start at once.

John: Hadn't you better wait till you actually see the new world?¹

INTRODUCTION

Professor Fred Cate makes a powerful and cogent argument against the adoption of European-style privacy regulations in the United States.² To the extent that Professor Cate rests his argument against the adoption of privacy regulations modeled on the European Union's approach solely on policy-based grounds, he makes some important, indeed powerful, points. There is, as Professor Cate suggests, good cause to think that the European Union's approach overvalues individual privacy interests at the expense of facilitating commerce.³ Even if this is so, however, one might question whether Professor Cate's preferred approach to privacy protection in the United States—reliance on market forces to protect privacy interests—is sufficient to the task at hand. Reasonable minds can and will differ as to whether the market predictably will vindicate the legitimate privacy expectations of the citizenry.

Recent events, such as Amazon.com's "fun" practice of releasing employer-by-employer information about employees' purchases from the company,⁴ or the

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1. ALDOUS HUXLEY, BRAVE NEW WORLD 165-66 (1946); cf. WILLIAM SHAKESPEARE, THE TEMPEST, act 5, sc. 1, at 124 (Frank Kenmode ed., 6th ed., Harvard Univ. Press 1958) (Miranda speaking, "O, wonder!/How many goodly creatures are there here!/How beauteous mankind is! O brave new world/That has such people in it!"). In my view, Huxley's caution is far more prudent than Shakespeare's blind, unreflective enthusiasm.

2. See Fred H. Cate, *The Changing Face of Privacy Protection in the European Union and the United States*, 33 IND. L. REV. 173 (1999).

3. See *id.* at 180-95, 225-30.

4. See David Streitfeld, *Who's Reading What? Using Powerful "Data Mining" Technology, Amazon.com Stirs an Internet Controversy*, WASH. POST, Aug. 27, 1999, at A1. This is hardly innocent. Suppose that employees were aficionados of Scott Adams' *Dilbert* cartoons or were purchasing mass quantities of *How to Spruce Up Your Resume* titles? All things being equal, an employee would probably prefer that her employer not have ready access to her reading, music, or video tastes. For a discussion of the market's failure adequately to protect reasonable privacy expectations, see Jerry Berman & Deirdre Mulligan, *Privacy in the Digital Age: A Work in*

practice of telephone companies selling information about their customers to third parties,⁵ raise serious doubts about the wisdom of trusting privacy protection to the invisible hand's not-so-tender mercies. Moreover, whatever the wisdom of federal or state legislation protecting individual privacy interests, I disagree quite strongly with Professor Cate's assertions about the legal authority of the federal or state governments to enact such laws.⁶ As this Essay will explain more fully below, the Bill of Rights should not be read to preclude the vindication of reasonable privacy interests through appropriate legislation, even if restrictions protecting the confidentiality of personal information incidentally burden commercial speech or information gathering practices associated with commercial speech.⁷

In this era of technological marvels, of virtual reality and e-commerce, it is all too easy to become enamored of the obvious (and highly touted) benefits of technology, without giving careful consideration to the costs associated with the introduction of new technologies on society generally and on each of us individually. Indeed, the German existentialist philosopher Martin Heidegger deeply distrusted technology following the turn of the last century.⁸ Despairing of modernity and its focus on the here and now, he took to wearing the garb of a Bavarian peasant and fled to the hills (quite literally to a secluded cabin in the depths of the Black Forest).⁹

Heidegger warned that technology threatened what he called the "Enframing" of "Being."¹⁰ By this, he meant that as technology increased the pace of everyday life, people would find less and less time for meaningful reflection; individuals would live in the world of mundane tasks (bus to be caught, report to be filed) rather than "authentically," which for Heidegger meant living every moment with some consciousness of one's own mortality.¹¹ To the extent that the wonders of technology lead us to forget the blunt reality of our mortality,

Progress, 23 NOVA L. REV. 552, 563-68 (1999).

5. See Shu Shin Luh, *FCC to Fight Ruling on Customer Data*, WASH. POST, Sept. 4, 1999, at E2.

6. See *infra* Part II.A-B.

7. See *infra* Part II.A-B.

8. See Martin Heidegger, *The Question Concerning Technology*, in *THE QUESTION CONCERNING TECHNOLOGY AND OTHER ESSAYS* 3-35 (William Lovitt trans., Garland 1977) [hereinafter *The Question Concerning Technology*]; Martin Heidegger, *The Turning Point*, in *id.* at 38-49 [hereinafter *The Turning*].

9. See RUDIGER SAFRANSKI, *MARTIN HEIDEGGER: BETWEEN GOOD AND EVIL* 131, 185-86 (Ewald Osers trans., Harv. Univ. 1998).

10. *The Question Concerning Technology*, *supra* note 8, at 25-28; *The Turning*, *supra* note 8, at 37-41, 48-49.

11. Heidegger referred to this as "authentic" Being—that is to say, making choices and living with the consequences of these choices with full and actualized knowledge that one has only a limited period of time in which to exercise the power of choice in light of the certainty of death. See MARTIN HEIDEGGER, *BEING AND TIME* 78-86, Ch. I, Pt. 2, §§ 12, 293-311, Ch. II, Pt. 1, §§ 50-53 (John Macquarrie & Edward Robinson trans., 1962).

technology robs us of our ability to make good choices (that is to say, choices that we would make if we reflected about a particular matter in light of our own mortality).

More recently, Theodore Kaczynski embraced a neo-Heideggerian world view and went about destroying the purveyors of technology with mail bombs. Kaczynski, of course, is a deluded madman, who saw violence as the only means of reasserting human control over a world that seemed (to Kaczynski) to be defined and controlled by technology.¹² Like Heidegger, Kaczynski feared that society would permit technology to define our humanity rather than harness technology to accomplish tasks selected independently of technology's ability to accomplish them.¹³

In Kaczynski's view, "[t]he industrial revolution and its consequences have been a disaster for the human race," and "[t]he continued development of technology will worsen the situation."¹⁴ He goes on to explain that "[t]he technophiles are taking us all on an utterly reckless ride into the unknown."¹⁵ Consistent with Heidegger's philosophy, Kaczynski advocates a return to nature because "[n]ature makes a perfect counter-ideal to technology."¹⁶

I deplore Kaczynski's action plan and believe that, not unlike the Luddites before him, he did a great deal more harm than good for his cause. Similarly, I rather doubt that dressing in Bavarian peasant garb and taking to the hills represents an acceptable plan of action for dealing with the new problems and challenges that technology presents. If those of us who severely mistrust the Microsofts of the world, who inevitably pop up every few months bearing new upgrades, choose to disengage and withdraw from the fray, new technologies simply will grow unchecked like weeds. Moreover, the consequences of those technologies will be considered systematically only *after* they have altered the basic chemistry of our society.¹⁷ As the saying goes, once released, it is difficult to put the genie back into the bottle.

It is therefore essential that we ask hard questions of those who would lead us into a brave new world before agreeing to make the journey. Before we

12. See Martin Gottlieb, *Pattern Emerges in Bombing Tract*, N.Y. TIMES, Aug. 2, 1995, at A1; Robert D. McFadden, *Times and the Washington Post Grant Mail Bomber Demand*, N.Y. TIMES, Sept. 19, 1995, at A1; see also THEODORE J. KACZYNSKI, *UNABOMBER MANIFESTO: INDUSTRIAL SOCIETY AND ITS FUTURE* (1996).

13. See KACZYNSKI, *supra* note 12. The *Washington Post* published Kaczynski's *Manifesto* in full on Tuesday, September 19, 1995, as a supplement to its regular edition. See FC, *Industrial Society and Its Future*, WASH. POST, Sept. 19, 1995. For a more concise version of Kaczynski's position on technology, see *Excerpts from Manuscript Linked to Suspect in 17-Year Series of Bombings*, N.Y. TIMES, Aug. 2, 1995, at A16.

14. KACZYNSKI, *supra* note 12, at 1 ¶ 1.

15. *Id.* at 29, ¶ 180; see also *id.* at 20-22.

16. *Id.* at 29, ¶ 184.

17. See ELIZABETH EINSTEIN, *THE PRINTING PRESS AS AN AGENT OF CHANGE* (1979); M. Ethan Katsh, *Rights, Camera, Action: Cyberspatial Settings and the First Amendment*, 104 YALE L.J. 1681, 1685-92, 1703-17 (1995).

blithely embrace the ostensible benefits of gizmos and programs that allow us to do things cheaper, faster, and better (or so we are supposed to believe), we must first demand answers to serious questions about the desirability of such devices and their potential social costs.

Technology for technology's sake is no virtue, and a healthy appreciation for the accomplishments of the past (and the means used to achieve them) is no vice.¹⁸ Perhaps synthesizers and computer-assisted musical composition will lead us into a new and wonderful world in which Mozarts, Beethovens, and Verdis abound. You will have to pardon me if I express some doubts about this; for it seems that one of the necessary consequences of technology is homogenization and standardization. A program that assists a composer in creating a bar of music assists every composer using the same lines of code; it undoubtedly makes composing easier, but there is likely to be a good deal of sameness to the resulting compositions.

Similarly, mass production and technology allow anyone with a few hundred dollars to own a perfectly executed piece of jewelry. One wonders, though, if these technologies will give us the wonders that Faberge wrought for the Tsars? At least arguably, the homogenizing effects of technology make it less likely that someone with the talent of a Faberge will fully realize that talent.

If one looks to many of the great works of art or literature, they are the product of great suffering and a society that presented hardships and challenges. Michelangelo's Sistine Chapel is not the product of Java graphics—nor do I think it ever could be. Richard Wright's *Native Son* could only have been conceived and executed by someone who had lived through the horrors and depredations of Mississippi in the Jim Crow era. Make no mistake, I am not arguing that we should work to create a world in which prejudice, sickness, and death are commonplace because an artist's reaction to such conditions can give rise to works of power and beauty. Rather, I am simply suggesting that the convenience and comfort that technology often bring may entail greater difficulty in creating works that are, for better or worse, in part a product of the social conditions extant at the time of their creation.

I. DRAWING THE BATTLE LINES

It is time to draw some battle lines—to challenge the unquestioned march of technology into our lives. To the extent that technology helps us to do things that we freely seek to accomplish, it is a powerful friend. On the other hand, to the extent that purveyors of technology seek to force us to change the way we go about being in the world in order to accommodate a new technology, to the extent that we are forced to change who we are and how we go about our daily lives

18. See LORI B. ANDREWS, *THE CLONE AGE!: ADVENTURES IN THE NEW WORLD OF REPRODUCTIVE TECHNOLOGY* (1979) (discussing the potential social impact of new medical technologies and procedures with particular attention to cloning); GEORGE ANNAS, *SOME CHOICE: LAW, MEDICINE AND THE MARKET* 3-79, 249-59 (1998) (discussing the ethical questions raised by new medical technologies and procedures).

solely in order to accommodate a new technology, we have a legitimate complaint with the seemingly ceaseless forward march of modernity.

Privacy presents one of these "quo vadis" social questions: Shall we permit our identities to be bundled and sold like sacks of potatoes, or rather shall we demand some protection from the power of technology to collect and sell data about everything from where we bank, to what we earn, to what we watch on cable television? As Professor Cate says, the need to have such a debate "is prompted largely by extraordinary technological innovations that are dramatically expanding both the practical ability to collect and use personal data and the economic incentive to do so."¹⁹ Moreover, he correctly posits that "[t]he ramifications of such a readily accessible storehouse of electronic information are astonishing: others know more about you—even things you may not know about yourself—than ever before."²⁰

Given this state of affairs, it seems crucial that citizens demand protection against the involuntary dissemination of confidential information of this sort.²¹ Neither my physician nor my banker should enjoy the legal right to sell information about my physical or financial health. Traditionally, tort law has prohibited the public disclosure of private facts.²² There is no reason that Congress, state legislatures, and state supreme courts should not apply this traditional common law rule to prevent the unauthorized transfer of highly personal information from those providing particular goods or services.²³

Indeed, in a variety of contexts, Congress and state governments have acted to protect the privacy of personal information. The Buckley Amendment, also known as the Family Educational Rights and Privacy Act ("FERPA"), prohibits an educational institution from publicly releasing either academic or disciplinary records without the consent of the student.²⁴ Violations of the Act are punishable with the offending institution's loss of all federal education funds.²⁵ Similarly,

19. Cate, *supra* note 2, at 175-76.

20. *Id.* at 178.

21. Cf. James Lardner, *I Know What You Did Last Summer—and Fall*, U.S. NEWS & WORLD REP., Apr. 19, 1999, at 55 (reporting that "[c]orporate America is mobilizing against the threat of a broad federal privacy-protection law.").

22. See RESTATEMENT (SECOND) OF TORTS, § 652D (1965); see also Lyrissa Barnett Lidsky, *Prying, Spying, and Lying: Intrusive Newsgathering and What the Law Should Do About It*, 73 TULANE L. REV. 173, 198-203 (1998) (describing the nature and scope of the "private facts tort").

23. It is true that, as to media disclosures, the Supreme Court has severely limited the potential applicability of the private facts tort. See *Florida Star v. B.J.F.*, 491 U.S. 524 (1989); Lidsky, *supra* note 22, at 200-01. Of course, those collecting private information of the sort to which Professor Cate is adverting have absolutely no intention of publishing their lists—doing so would destroy the economic value of the database. Rather, information brokers seem much more analogous to Dun & Bradstreet, a financial reporting service, which did not generally make its analyses available to the general public. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985).

24. See 20 U.S.C. § 1232g (1994).

25. See § 1232g(a).

most states have enacted statutes protecting the identity of persons tested for the AIDS virus.²⁶ One can imagine all sorts of marketing opportunities associated with a such a list—everything from birth control devices to viatical settlement plans might be direct-marketed to persons having taken an AIDS test. For better or worse (in my view for better), those providing such test services cannot profit by selling the names of clients to entities wishing to direct-market to them, even if they maintain a database containing the names of such persons.

Viewed from this perspective, the only real question is whether Congress, state legislatures, and state supreme courts will act to protect us from one of the more profoundly negative consequences of living in the information age. Professor Cate, however, does not think that such legislation could be enacted and enforced constitutionally: "In the United States, however, the government is constitutionally prohibited under the First Amendment from interfering with the flow of information, except in the most compelling circumstances."²⁷ For the reasons set forth below, I think he is unduly pessimistic about the possibility of securing appropriate legislation protecting private facts from public disclosure. That said, I am far from convinced that government will act to protect the citizenry's reasonable expectations of privacy.²⁸

II. REASONABLE FEDERAL OR STATE LEGISLATION PROTECTING AN INDIVIDUAL'S PRIVACY WOULD BE CONSTITUTIONAL

Professor Cate argues that efforts to protect personal information are somehow doomed by the First Amendment right of those collecting such information to disseminate it, or alternatively that such regulation might raise serious issues under the Takings Clause.²⁹ Notwithstanding Professor Cate's objections, with respect to average citizens living average lives, the government could, if it wished, secure a great deal more information against commodification and sale than present law protects.

Moreover, one reasonably could take strong issue with Professor Cate's view that markets will sufficiently protect private information from commodification and sale.³⁰ In most instances, disparities of bargaining power will make it

26. See, e.g., *Doe v. Shady Grove Adventist Hosp.*, 598 A.2d 507, 514 (Md. Ct. Spec. App. 1991) (upholding request for plaintiff's name to remain under seal in lawsuit alleging that hospital breached a duty to hold the results of an AIDS test confidential); CAL. HEALTH & SAFETY CODE §§ 120975-121020 (Supp. 1999); MASS GEN. L. ch. 111, § 70F (1992); TEX. HEALTH & SAFETY CODE ANN. § 81.103 (Vernon 1992).

27. Cate, *supra* note 2, at 179-80.

28. See Lardner, *supra* note 21, at 55 (reporting that "corporate lobbyists have sold Republican and Democratic leaders alike on the view of the Internet economy as a tender, if vital, young thing needing protection from, in the words of George Vradenburg, senior vice president for global and strategic policy of America Online, 'the regulatory mechanisms of the past.'").

29. See Cate, *supra* note 2, at 196-225.

30. See *id.* at 225 ("In those and similar situations, the law provides important but carefully circumscribed, basic privacy rights, the purpose of which is to facilitate—not interfere with—the

difficult, if not impossible, for individual citizens to demand that service providers or merchants refrain from distributing highly personal information. As one commentator has wryly observed, reliance on market mechanisms and self-regulation to protect privacy is tantamount to "putting Count Dracula in charge of the blood bank."³¹

Accordingly, government action is needed to secure basic privacy rights. Just as the National Labor Relations Act was necessary to ensure parity of arms in negotiations between workers and management, so too legislation is needed to secure parity of bargaining power between the general public and the new information brokers. If left to the market, working class Americans would be at a considerable disadvantage in disputes with management over the terms and conditions of their employment,³² if left to the market, basic expectations of privacy will not be routinely honored.³³ Just as laborers are free to waive their collective bargaining rights, individuals might choose to waive privacy protections. The existence of privacy protections should not, however, be left to the tender mercies of the market (just as basic rights to collective bargaining should not be, and are not, left to market forces).³⁴

A. *The First Amendment*

Professor Cate argues that the Free Speech and Press Clauses of the First Amendment would preclude the adoption of reasonable privacy legislation.³⁵ His position overstates the First Amendment value of facilitating open markets in highly confidential information about non-public figures that does not implicate matters of public concern. Simply put, the First Amendment value in distributing highly personal information about average citizens is, at best, very low.³⁶ For example, the First Amendment value in permitting an insurance company to sell an average citizen's medical records is slight. The medical records of a sitting President might present a harder question; the President is the ultimate "public figure," and the condition of his health is, at least arguably, a matter of public

development of private mechanisms and individual choice as the preferred means of valuing and protecting privacy."); cf. Berman & Mulligan, *supra* note 4, at 563-79 (describing the market's failure adequately to protect reasonable privacy expectations and proposing legislative remedies to correct these market failures).

31. Lardner, *supra* note 21, at 56 (quoting Stephen Lau, Hong Kong's "privacy commissioner").

32. For an example of how markets treated workers in one sector of the economy at the turn of the last century, see UPTON SINCLAIR, *THE JUNGLE* (1906).

33. See, e.g., Streitfeld, *supra* note 4, at 1, 11 (reporting on Amazon.com's practice of publishing information about customers' buying habits without the overt and freely-given consent of its customers).

34. See Berman & Mulligan, *supra* note 4, at 571-79.

35. See Cate, *supra* note 2, at 203-05.

36. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759 (1985).

concern.³⁷ In this regard, one should keep in mind that the Supreme Court's efforts to protect the free flow of information generally have been limited to information about public figures or matters of public concern. Purely private matters relating to non-public figures are not the subject of serious First Amendment protection.³⁸ Hence, if John falsely tells his co-workers that Jane has syphilis, John will be liable in tort for defamation for his slanderous statement about Jane. If Jane is a non-public figure and her health status is not a matter of public concern, Jane need only show that the statement was false and was "of and concerning" her. Indeed, in most states, stating that someone has a "loathsome" disease is slanderous per se, and damages are presumed at law.³⁹

Professor Cate is correct, of course, in noting that vast areas of state tort law have been constitutionalized by *New York Times Co.*⁴⁰ and its jurisprudential progeny.⁴¹ He argues that "when information is true and obtained lawfully, the Supreme Court has repeatedly held that the state may not restrict its publication without showing a very closely tailored, compelling government interest."⁴² State tort law has not, however, been entirely displaced by First Amendment values. Indeed, *Dun & Bradstreet's* inaccurate assertion that a construction company had filed for bankruptcy led to a judgment for damages against *Dun and Bradstreet*. Predictably, *Dun & Bradstreet* argued that the mistake should not give rise to liability, except under the "actual malice" standard of *New York Times Co.*⁴³

The Supreme Court correctly rejected *Dun & Bradstreet's* First Amendment defense. Writing for the plurality, Justice Powell explained that an inaccurate credit rating neither implicated a public figure nor a matter of public concern.⁴⁴ He also noted that the Supreme Court has "long recognized that not all speech is of equal First Amendment importance."⁴⁵ More specifically, "speech on matters of purely private concern is of less First Amendment concern" than speech related to the project of democratic self-governance.⁴⁶

Moreover, Justice Powell emphatically rejected *Dun & Bradstreet's* argument that the dissemination of credit reports constituted an important enterprise related to matters of public concern: "There is simply no credible

37. See U.S. CONST. amend. XXV.

38. See *Dun & Bradstreet*, 472 U.S. at 762-64.

39. See RESTATEMENT OF TORTS § 570 (1938).

40. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

41. See Cate, *supra* note 2, at 203-05.

42. *Id.* at 204.

43. See *Dun & Bradstreet*, 472 U.S. at 751. This standard requires a plaintiff to show that the defendant not only published a false and damaging statement about the plaintiff, but that it did so either with actual knowledge of its falsity or in reckless disregard of its truth or falsity. See also *Hustler Magazine v. Falwell*, 485 U.S. 46, 52 (1988).

44. See *Dun & Bradstreet*, 472 U.S. at 760, 762.

45. *Id.* at 758.

46. *Id.* at 759; see ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 22-27 (1948).

argument that this type of credit reporting requires special protection to ensure that 'debate on public issues will be uninhibited, robust, and wide open.'"⁴⁷

Justices Rehnquist and O'Connor joined Justice Powell's opinion, and Chief Justice Burger and Justice White concurred in the judgment—including Justice Powell's rejection of any special First Amendment protection for credit reports.⁴⁸

The reasoning of *Dun & Bradstreet* strongly suggests that the states are far from powerless to prevent the unauthorized collection and distribution of personal information when such collection and distribution is potentially harmful to the subjects of the information. Accordingly, the state of Vermont was free to impose liability on any standard requiring a showing of fault.

Although one should be cautious against reading too much into *Dun & Bradstreet*, the case seems to support the proposition that state legislatures and the Federal Congress could enact legislation that protects private information from collection and/or disclosure without the permission of the person about whom the information relates.⁴⁹ The specific information in *Dun & Bradstreet*

47. *Dun & Bradstreet*, 472 U.S. at 762 (quotations and citation omitted); see MEIKLEJOHN, *supra* note 46, at 24-25.

48. See *Dun & Bradstreet*, 472 U.S. at 763-64 (Burger, C.J., concurring); *id.* at 765-74 (White, J., concurring).

49. Professor Cate correctly notes that the Supreme Court "has struck down laws restricting the publication of confidential public reports, and the names of judges under investigation, juvenile suspects, and rape victims." Cate, *supra* note 2, at 204 (citations omitted). These precedents may not support his broader argument, however. For example, *New York Times Co. v. United States*, 403 U.S. 713 (1971), a.k.a. "The Pentagon Papers Case," involved an executive order (not a statute) against publication of "information whose disclosure would endanger the national security," based on "the constitutional power of the President over the conduct of foreign affairs and his authority as Commander-in-Chief" (not the imposition of liability after the fact, pursuant to statutory law). See *id.* at 718 (Black, J., concurring). Several justices were quite careful to emphasize this very point. See *id.* at 727-31 (Stewart, J., concurring); *id.* at 731-40 (White, J., concurring); *id.* at 743-48 (Marshall, J., concurring). Cases involving public officials or matters of public concern are also inapposite. See *Dun & Bradstreet*, 472 U.S. at 756-63. This leaves *Florida Star*, the case involving publication of a rape victim's name in violation of a state statute. See *Florida Star v. B.J.F.*, 491 U.S. 524 (1989).

Although *Florida Star* might raise some questions regarding restrictions on the print media's publication of such materials, in the absence of publication, one reasonably could be skeptical that *Florida Star* would necessarily govern. Indeed, given that *Florida Star* involved criminal charges in the public courts, it would be very easy to limit the reasoning of the case and its precedential value, given the Supreme Court's consistent practice of requiring that the press enjoy reasonable access to public court proceedings and the right to report on such proceedings. See, e.g., *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976). The Supreme Court has been much less receptive to claims involving a right to gather information, when the information gathering techniques violate laws of general applicability. See *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984); *Branzburg v. Hayes*, 408 U.S. 665 (1972). The Supreme Court also has permitted the imposition of liability on the press for breaching a promise of confidentiality on general principles of state tort and/or contract law. See *Cohen v. Cowles*

was, of course, false, and therefore outside Professor Cate's assertion about the nature of contemporary First Amendment law. Nevertheless, the states or Congress could enact privacy-protection laws that limit the legal means of obtaining information about non-public figures involving matters that are not of public concern.⁵⁰

Take, for example, the information associated with the processing of health insurance claims. If Indiana wished to enact a statute prohibiting the transfer of such information without a patient's consent, it is difficult to believe that the First Amendment would prevent the enforcement of such a law.⁵¹ That is to say, the state could enact legislation that precludes an insurance company or HMO from disclosing such information without a patient's or plan participant's prior consent.

In many respects, laws shielding the identity of persons testing positive for AIDS are similar in nature. In order to encourage persons to seek testing and treatment for HIV, many communities have adopted privacy laws that prohibit the disclosure of test results to anyone but the patient.⁵² The First Amendment does not preclude state or local governments from preventing testing agencies from selling lists of persons who tested positive for the virus.

Although a privacy law protecting the confidentiality of medical records more generally would be significantly broader in scope, such legislation would not necessarily fail judicial review. The core concern of the First Amendment is democratic self-governance, not the marketing of medical goods or services.⁵³

It also seems self-evident that protection of commercial speech does not necessarily imply a right to disclose otherwise confidential information. "Drink Coca-Cola" is quite different from buying a list of persons with halitosis and mailing them information on "The Halitosis Connection Dating Service" (the "HCDS"). Although HCDS could undoubtedly advertise its services without government censorship, its ability to collect and use confidential private information incident to such marketing efforts presents a very different question.

Let me be clear: I am not suggesting that privacy rights exist independent of particular statutory protections. Thus, if Blue Cross/Blue Shield decided to sell Halitosis Connection a list of persons receiving reimbursements or subsidies for drugs associated with treating halitosis, there would be no impediment to the transaction absent some positive legislation. In this sense, Professor Cate is quite correct to assert that, absent some positive law delimiting the right to obtain or distribute particular information, Blue Cross/Blue Shield would be perfectly

Media Co., 501 U.S. 663 (1991); *see also* Lidsky, *supra* note 22, at 184-93, 200-01.

50. *See* Lidsky, *supra* note 22, at 203-26 (arguing that legal limits on newsgathering techniques are consistent with the First Amendment and suggesting the tort of intrusion as an appropriate device to limit intrusive newsgathering techniques).

51. *See* *Branzburg v. Hayes*, 408 U.S. 665 (1972); *see also* *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991).

52. *See* sources cited *supra* note 25.

53. *See* MEIKLEJOHN, *supra* note 46, at 25-27.

entitled to sell lists of persons with halitosis to would-be marketers.⁵⁴ As against purely private companies, privacy protections exist only by operation of legislation creating privacy interests.⁵⁵ That said, a rational legislature could conclude that certain information is sufficiently personal to warrant the protection of legislation (i.e., statutes protecting the identities of persons testing positive for HIV, tuberculosis, or other communicable and socially stigmatizing diseases).⁵⁶

With regard to lawyer solicitations, the U.S. Supreme Court has upheld complete bans on in-person solicitations and even permitted the imposition of time delays before written solicitations can be mailed to the victims of accidents and disasters.⁵⁷ In upholding restrictions on truthful, non-misleading written solicitations, the Court credited Florida's interest in protecting accident victims from the trauma of vulture-like lawyer behavior; the lawyer's interest in communicating truthful information to potential plaintiffs was insufficient to outweigh a kind of privacy interest on the part of victims.⁵⁸

The Florida Bar expressly defended the prohibition on soliciting disaster victims on privacy grounds: "The Florida Bar asserts that it has a substantial interest in protecting the privacy and tranquility of personal injury victims and their loved ones against intrusive, unsolicited contact by lawyers."⁵⁹ The Supreme Court had "little trouble crediting the Bar's interest as substantial," explaining that "[o]ur precedents leave no room for doubt that 'the protection of potential clients' privacy is a substantial state interest."⁶⁰

One should note that, like Justice Powell in *Dun & Bradstreet*, Justice O'Connor emphasized that the scope of First Amendment protection is intrinsically related to the nature of the speech at issue. Hence, "[t]here are circumstances in which we will accord speech by attorneys on public issues and matters of legal representation the strongest protection our Constitution has to offer."⁶¹ According to the majority, direct mail solicitations to the victims of disasters and their families fell well outside this category of speech activity.⁶² Although one might question whether the trauma of receiving a lawyer's solicitation letter is as great as Justice O'Connor seems to believe, the logic of *Went For It* should squarely apply to legislation aimed at protecting the

54. See Lidsky, *supra* note 22, at 193-98; see also S. Elizabeth Wilborn, *Revisiting the Public/Private Distinction: Employee Monitoring in the Workplace*, 32 GA. L. REV. 825, 832-38, 862-66, 879-86 (1998) (describing the absence of privacy protections against non-governmental employees and proposing federal legislation to extend reasonable privacy protections to employees of non-governmental employers).

55. See Wilborn, *supra* note 54, at 879-87.

56. See *id.* at 876-83.

57. See *Florida Bar v. Went for It, Inc.*, 515 U.S. 618 (1995).

58. See *id.* at 624-26, 634-35.

59. *Id.* at 624.

60. *Id.* at 625 (quoting *Edenfield v. Fane*, 507 U.S. 761, 769 (1993)).

61. *Id.* at 634.

62. See *id.* at 635.

confidentiality of highly personal information.

Indeed, if Professor Cate is correct, educational institutions should be free to sell information regarding their students' academic progress. Undoubtedly, Stanley Kaplan or some other entity offering tutoring services would appreciate a list of students currently on the brink of academic probation. Of course, the Buckley Amendment would prevent Indiana University from selling such information to Stanley Kaplan. Professor Cate, however, seems to be of the view that a law largely identical to the Buckley Amendment would potentially violate the First Amendment.⁶³ I think it very doubtful that a reviewing court would absolve Indiana University of liability under the Buckley Amendment if this school's dean, Norman Lefstein, elected to sell student academic records to would-be marketers. The analysis should not be any different just because an Internet service provider happens to be the information broker.

Professor Cate responds that the Supreme Court has never upheld limits on the dissemination of truthful speech.⁶⁴ As he puts it, "all of the cases [Professor Krotoszynski] puts forward as supporting government restraints on information involve false expression."⁶⁵ This is simply not true: *Went for It* upholds limitations on truthful, non-misleading commercial speech by lawyers in order to vindicate important privacy interests.⁶⁶ Justice O'Connor's opinion in *Went for It* expressly balances the community's interest in privacy against the value of certain commercial solicitations by lawyers and holds that the State of Florida may constitutionally strike a balance in favor of privacy at the expense of commercial speech (at least in some circumstances).⁶⁷ Professor Cate is free to lament this turn in the Supreme Court's free speech jurisprudence, but it does not seem reasonable simply to deny the existence of the precedent *Went For It* establishes in this field.⁶⁸

63. See Cate, *supra* note 2, at 203-05.

64. See *id.* at 173 n.*.

65. *Id.*

66. See *supra* notes 57-62 and accompanying text.

67. See *Went For It.*, 515 U.S. at 634-35.

68. Although one should normally abjure attempting to predict the future, the Supreme Court's decision in *Wilson v. Layne*, 119 S. Ct. 1692 (1999), has potential relevance to the First Amendment questions that Professor Cate's article raises. In *Wilson*, the Supreme Court held that local and federal law enforcement officers could not constitutionally invite media representatives to participate in "ride along" activities that included filming at the homes of persons subject to a lawful arrest warrant. See *id.* at 1697-99. Chief Justice Rehnquist, speaking for a unanimous court (at least on this point), explained that the Fourth Amendment's protection of privacy precludes law enforcement officials from facilitating the filming of the execution of arrest warrants over the objections of the arrestees. "We hold that it is a violation of the Fourth Amendment for police to bring members of the media or third parties into a home during the execution of a warrant when the presence of third parties in the home was not in aid of the execution of the warrant." *Id.* at 1699. Along the way, the Court rejected a First Amendment defense of the practice of media ride-alongs, explaining that "the Fourth Amendment also protects a very important right, and in the present case it is in terms of that right that the media ride-alongs must be judged." *Id.* at 1698. On the facts at

B. The Takings Clause

In the alternative, Professor Cate argues that the Takings Clause would raise serious constitutional problems for legislation designed to vest individual citizens with the right to control access to personal information gathered by doctors, creditors, or educational institutions: "Data protection regulation may legitimately prompt takings claims."⁶⁹ According to Professor Cate, "[a] data processor exercises property rights in his data because of his investment in collecting and aggregating them with other useful data."⁷⁰ He concludes that "[a] legislative, regulatory, or even judicial determination that denies processors the right to use their data could very likely constitute a taking and require compensation."⁷¹ All that said, whether or not particular information belongs to the entity that collects it seems to be something about which reasonable legislative minds might disagree.⁷²

The Takings Clause only protects property interests; property, in turn, exists at the sufferance of state governments. The Supreme Court consistently has refused to recognize property interests arising directly under the Constitution.⁷³ This approach is probably mistaken; if liberty interests arise directly under the

issue in *Wilson*, the citizen's interest in privacy simply outweighed any First Amendment benefits that the practice of media ride-alongs might provide. A similar analysis should govern in a case presenting a challenge to reasonable privacy legislation. See, e.g., *Cable News Network v. Noriega*, 917 F.2d 1543 (11th Cir.) (balancing CNN's right to broadcast the Noriega tapes against General Noriega's Sixth Amendment interest in a fair trial), *cert. denied*, 498 U.S. 976 (1990); *cf. id.* at 976-77 (Marshall, J., dissenting from the denial of a writ of certiorari).

69. *Id.* at 207.

70. *Id.* at 208.

71. *Id.*

72. For example, one might assume that one owns her own body, its parts, and the DNA that controlled the creation of those parts. The California Supreme Court did not so view the matter. See *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479 (Cal. 1990), *cert. denied*, 499 U.S. 936 (1991). That said, one could easily imagine a decision going the other way (which is precisely how the intermediate California appellate court had ruled). See *Moore v. Regents of the Univ. of Cal.*, 249 Cal. Rptr. 494 (Ct. App. 1988), *rev'd*, 793 P.2d 479 (Cal. 1990); see also William Boulier, Note, *Sperm, Spleens, and Other Valuables: The Need to Recognize Property Rights in Human Body Parts*, 23 HOFSTRA L. REV. 693 (1995); Michelle Bourianoff Bray, Note, *Personalizing Personality: Toward a Property Right in Human Bodies*, 69 TEX. L. REV. 209 (1990). The Takings Clause would not require compensation to either losing party; the state is free to establish a property right in either the patient or the hospital, and the creation of that property right does not raise any serious Takings Clause issue. It is possible that the decision might raise substantive due process concerns if the court's (or legislature's) decision seemed utterly irrational or arbitrary. See Ronald J. Krotoszynski, Jr., *Fundamental Property Rights*, 85 GEO. L.J. 555 (1997).

73. See, e.g., *Board of Regents v. Roth*, 408 U.S. 564 (1972) (holding that property interests, unlike liberty interests, arise only by operation of positive law and requiring a would-be plaintiff to establish a "legitimate claim of entitlement" under existing state law to demonstrate a cognizable property interest in a government job or benefit).

Constitution, it stands to reason that the Constitution also should limit the states' ability to extinguish or define away the existence of property rights.⁷⁴ Nevertheless, the Supreme Court, in a variety of contexts, has made clear that property interests arise only by operation of positive law; what the state giveth, the state can taketh away (at least prospectively).⁷⁵

A state legislature could simply pass legislation declaring that no property interest accrues from the collection of personal data. Thus, if a Kroger elects to track its customers' grocery purchases, it would be free to do so.⁷⁶ If it attempted to assert a regulatory takings claim in response to state legislation prohibiting it from selling such a list, the claim would fail because the Takings Clause only applies in instances where a property interest has been implicated.

Indiana is particularly instructive in this regard. For reasons that are non-obvious, the state legislature passed a cap on actual damages resulting from medical malpractice. No matter what the plaintiff's actual damages, a plaintiff cannot recover more than \$1.25 million.⁷⁷ The Supreme Court of Indiana sustained this law on a broad-based constitutional attack, including claims arising under the due process and equal protection clauses.⁷⁸

Indiana has effectively revoked the property (or liberty) interest that one has in physical integrity. The legislature snatched a stick from the citizen's bundle of property rights (evidently when not many citizens were looking, or at least failed to appreciate the gravamen of this law).⁷⁹ If positive law can deny a citizen the ability to recover for damages to her person due to negligence, it seems logically to follow that the state could define away Kroger's property interest in its customer database.

Indeed, a sufficiently privacy-loving legislature could go one step further and enact legislation creating an individual property interest in one's confidential personal information and authorizing actions for damages when such information is released without the consent of the person about whom the information relates. It is easy to imagine such a law.

Consider the parallel fates of Monica Lewinsky, Justice Clarence Thomas, and Judge Robert Bork. Independent Counsel Kenneth Starr attempted to force Kramerbooks and Barnes & Noble, two Washington, D.C. bookstores, to disclose

74. See Krotoszynski, *supra* note 72, at 583-90, 615-25.

75. See, e.g., *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985); *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773 (1980); *Arnett v. Kennedy*, 416 U.S. 134 (1974); *Punikaia v. Clark*, 720 F.2d 564, 566 (9th Cir. 1983), *cert. denied*, 469 U.S. 816 (1984).

76. Many grocery stores can and do collect data on their customers, most commonly through "frequent shopper" programs that involve identification cards that permit the store to track a customer's purchasing patterns. See Lena H. Sun, *Checking Out the Customer*, WASH. POST, July 9, 1989, at H1.

77. See IND. CODE § 34-18-14-3(a)(3) (1998).

78. See *Johnson v. St. Vincent Hosp., Inc.*, 404 N.E.2d 585, 598-601 (Ind. 1980); see also Frank Cornelius, *Crushed by My Own Reform*, N.Y. TIMES, Oct. 1, 1994, at A31; Krotoszynski, *supra* note 72, at 610 n.344.

79. See Cornelius, *supra* note 78.

Ms. Lewinsky's recent purchases.⁸⁰ Opponents of Justice Thomas's appointment to the Supreme Court and Judge Bork's nomination to the Supreme Court sought and obtained information regarding their video rental habits,⁸¹ which, in the case of Justice Thomas, ostensibly included some relatively racy titles.⁸² A state legislature could easily conclude that customers of video rental establishments should be able to assert a privacy claim against the disclosure of their rental records without consent.⁸³ The Supreme Court probably would not strike down such legislation on either First Amendment or Takings Clause grounds. Similarly, an insurance company's claim to a proprietary interest in an insured person's medical history also is something that a rational state legislature could reject, probably without encountering serious constitutional difficulties.

Professor Cate responds that the Congress and state legislatures are powerless to adopt legislation that upsets "reasonable investment-backed expectations," citing *Ruckelshaus v. Monsanto Co.*⁸⁴ in support of this proposition.⁸⁵ He fails to mention the Supreme Court's explicit reliance on the existence of a pre-existing property right under Missouri law as a necessary incident of invoking the Takings Clause. As Justice Blackmun explains in *Monsanto*, "we are mindful of the basic axiom that 'property interests . . . are not created by the Constitution. Rather, they are created and their dimensions defined by existing rules or understandings that stem from an independent source

80. See David Stout, *Lewinsky's Bookstore Purchases Are Now Subject of Subpoena*, N.Y. TIMES, Mar. 26, 1998, at A1 (reporting on Independent Counsel Kenneth Starr's efforts to force two Washington, D.C. bookstores to divulge Monica Lewinsky's book purchases over the previous 28 months and the bookstores' decision to fight Starr's subpoena); David Streitfeld & Bill Miller, *Starr's Quest for Book Titles Faces High Bar*, WASH. POST, Apr. 10, 1998, at B1 (same).

81. See Amitai Etzioni, *Privacy Isn't Dead Yet*, N.Y. TIMES, Apr. 6, 1999, at A5 (describing how Judge Bork's experience led to adoption of the Video Privacy Protection Act, 18 U.S.C. § 2710); Michael deCourcy Hinds, *Personal But Not Confidential: A New Debate over Privacy*, N.Y. TIMES, Feb. 27, 1988, at 56 (providing an account of Judge Bork's experience and the uproar that followed); Jeffery Yorke, *The Call-In People's Court*, WASH. POST, Oct. 29, 1991, at C7 (reporting on rumors that Justice Thomas rented pornographic video tapes from Graffiti's, a Washington, D.C. video rental store).

82. See Yorke, *supra* note 81.

83. Indeed, Congress has already passed such legislation in response to Judge Bork's experience of having his viewing habits put on public display incident to his confirmation hearings. See The Video Privacy Protection Act, 18 U.S.C. § 2710 (providing both criminal and civil penalties for disclosing any "personally identifiable information" about a video rental store patron absent the patron's prior written consent). Although case law under the Video Privacy Protection Act is scant, at least one civil suit has gone forward, without any serious First Amendment challenge to the law. See *Dirkes v. Borough of Runnemede*, 936 F. Supp. 235 (D.N.J. 1996) (permitting a civil action pursuant to the Video Privacy Protection Act to move forward against both a video rental store and third parties who distributed the Dirkes' video rental records).

84. 467 U.S. 986 (1984).

85. See Cate, *supra* note 2, at 173 n.*.

such as state law.”⁸⁶ Thus, Monsanto’s takings claim was entirely contingent on Missouri law affirmatively recognizing a property interest in trade secrets, including the specific data at issue in the case.

After examining the matter in some detail, Justice Blackmun concludes that “[w]e therefore hold that to the extent that Monsanto has an interest in its health, safety, and environmental data cognizable as a trade secret property right under Missouri law, that property right is protected by the Takings Clause of the Fifth Amendment.”⁸⁷ The contingent nature of the takings claim on the substance of Missouri state law could not be more clear, or more expressly stated. If Missouri modified its substantive law to abolish the property interest in trade secrets, it would preclude a takings claim identical to the claim raised by Monsanto for data assembled after the new law’s effective date. The *Monsanto* Court’s subsequent discussion of “reasonable investment-backed expectations” takes place against this backdrop of state positive law, and is entirely contingent on Missouri’s decision to recognize a property interest in the data at issue.⁸⁸

To put the matter in some context, consider Congress’s recent decision to extend the life of copyrights from the life of the author plus fifty years to the life of the author plus seventy years.⁸⁹ Simply put, in 1998 Congress enacted legislation extending by twenty years the life of copyrights. If Congress were so inclined, it could have reduced the term of copyrights to two years, or set the term at any point it deemed prudent.⁹⁰ Even if such legislative action upset “reasonable investment-backed expectations,” such a law would not trigger the Takings Clause, at least insofar as the law purported to have merely prospective effect. Since 1937, the Supreme Court has not attempted to establish substantive limits on the powers of the state and federal governments to tinker prospectively with the content or scope of property rights. Accordingly, adoption of state laws prospectively limiting the ability of information scalpers to collect and sell personal information would not exceed the meager limits imposed on such policies by the substantive aspect of the Due Process clause.⁹¹

86. *Monsanto*, 467 U.S. at 1001 (quoting *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 166 (1980)). *Webb’s Fabulous Pharmacies, Inc.*, in turn, quoted language from *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

87. *Monsanto*, 467 U.S. at 1003-04.

88. *See id.* at 1004-16.

89. Compare the 1976 version of 17 U.S.C. § 302(a) (“Copyright in a work created on or after January 1, 1978 subsists from its creation and, except as provided by the following subsections, endures for a term consisting of the life of the author and fifty years after the author’s death.”), with 17 U.S.C. § 302(a) (Supp. IV 1998) (“Copyright in a work created on or after January 1, 1978 subsists from its creation and, except as provided by the following subsections, endures for a term consisting of the life of the author and 70 years after the author’s death.”)

90. *See* U.S. Const. art. I, § 8, cl. 8 (“The Congress shall have the power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”).

91. *Cf. Lochner v. New York*, 198 U.S. 45 (1905) (holding that economic liberty guaranteed by the Due Process clause precluded New York from adopting health and safety

To be sure, it is certainly possible that market mechanisms *might* incent video rental stores or bookstores to promise confidentiality in order to attract privacy-minded customers.⁹² Nevertheless, the citizenry should not be forced to rely solely on the market to protect its privacy interests. After all, neither the First Amendment nor the Takings Clause is a mutual suicide pact. Properly understood, neither provision presents a serious impediment to the adoption of reasonable privacy legislation.⁹³

C. Conditional Spending and Privacy Rights

Let us suppose, for the moment, that one would be wrong to think that the First Amendment and/or the Takings Clause, properly construed, would permit a state to adopt legislation protecting the privacy interests of its citizens. Even if one supposes that the First Amendment and/or the Takings Clause preclude direct privacy protections, a sufficiently privacy-loving state government (or the federal government) could nevertheless prevent a good deal of private information from being commodified and sold like bags of potatoes.⁹⁴

When the government elects to subsidize the delivery of particular goods or services, it may condition its willingness to do business with potential providers of goods or services on those providers agreeing to particular terms or conditions. For example, the receipt of federal family planning funds might be conditioned on the recipient clinic refusing to provide *any* meaningful information about abortion services.⁹⁵ Similarly, the decision to fund particular kinds of art does

regulations governing maximum weekly hours of employment in a bakery); *Truax v. Corrigan*, 257 U.S. 312 (1921) (invoking the Due Process clause to impose substantive limits on Arizona's ability to define the scope of property rights associated with ownership of a restaurant).

92. Scott McNealy, chairman and CEO of Sun Microsystems, has stated publicly that "[y]ou already have zero privacy—get over it." Etzioni, *supra* note 81, at 27. If Mr. McNealy's approach is representative of the Internet industry's attitudes toward privacy issues, I seriously question whether reliance on market mechanisms will prove sufficient to protect reasonable privacy expectations. See, e.g., Streitfeld, *supra* note 4.

93. Indeed, the Clinton administration has recently issued proposed regulations governing access to individual medical records. See Standards for Privacy of Individually Identifiable Health Information, 64 Fed. Reg. 59,918 (proposed Nov. 3, 1999); see also Robert Pear, *Clinton to Unveil Rules to Protect Medical Privacy*, N.Y. TIMES, Oct. 27, 1999, at A1 ("The Proposed regulations would be the first comprehensive Federal standards specifically intended to protect the confidentiality of medical records."). The President proposed the new rules because Congress failed to meet a self-imposed statutory deadline for enacting legislation in this area. See Pear, *supra*. The proposed rules have proven controversial, and their ultimate fate remains uncertain. See Robert Pear, *Rules on Privacy of Patient Data Stir Hot Debate*, N.Y. TIMES, Oct. 30, 1999, at A1.

94. See generally Berman & Mulligan, *supra* note 4, at 571-79.

95. See *Rust v. Sullivan*, 500 U.S. 173 (1991); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1412 (1989); cf. William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

not imply that the government must fund all kinds of art.⁹⁶

The federal and state governments are among the largest purchasers of medical services. Literally billions of dollars pass through the Medicare and Medicaid programs. Either the federal or a state government could condition participation in the Medicare and Medicaid programs on respecting the privacy interests of plan participants, perhaps by not disclosing patient information to third parties without prior patient consent. A health care provider who wished to create and sell patient lists would remain free to do so, provided, of course, that it did not take Medicare or Medicaid funds.

A similar sort of arrangement protects student grade and disciplinary records from public disclosure. If I were to locate and publish Dan and Marilyn Quayle's transcripts from this law school, the law school's continued participation in *all* federal educational programs would be jeopardized (notably including student loan programs).

All of this is a rather round about way of saying that, if government has the will to protect confidential personal information, multiple avenues of potential relief exist. The failure of the federal and state governments to protect such information adequately to date has a great deal more to do with the lobbying power of those who profit by trading in such information than with the weakness of the legal tools at the government's disposal.

III. THE NEED TO RETHINK THE PUBLIC/PRIVATE DICHOTOMY IN THE CONTEXT OF PRIVACY RIGHTS

At a more theoretical level, Professor Cate's article raises, rather squarely, the age old question of precisely where to draw the line between the government and the private sector. Historically, the private sector has been free to disregard the constitutional limitations applicable to the government. Thus, the City of Indianapolis could not fire an employee for subscribing to the political goals of the National Organization for the Reform of Marijuana Laws ("NORML"), whereas IBM could do so. The theory behind this result is that the state presents a far greater threat to liberty than does the private sector.

If the Framers had foreseen the advent of Microsoft, one might question whether they would have created a system that assumes that only the government is the enemy of liberty.⁹⁷ As Professor Owen Fiss has argued in various contexts, in contemporary times, the state can be as much the friend of individual liberty as its enemy.⁹⁸ This is doubly so when one contrasts government efforts to enhance personal liberty through progressive legislation with the liberty-squelching behavior of large corporate interests.⁹⁹

At least arguably, the creation of new and vast capabilities to create and

96. See *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998).

97. See Wilborn, *supra* note 54, at 828-31, 864-76.

98. See Owen M. Fiss, *Silence on the Street Corner*, 26 SUFFOLK U. L. REV. 1 (1992).

99. See Scott Edwin Sundby, *Is Abandoning State Action Asking Too Much of the Constitution?*, 17 HASTINGS CONST. L.Q. 139, 144 n.11 (1989).

disseminate data make the private sphere even more potentially threatening to individual liberty.¹⁰⁰ If this is so, legal academics, judges, and legislators should rethink the wisdom of limiting basic privacy protections to the government. Of course, the extension of privacy protections to non-state actors, like Anthem or Blue Cross/Blue Shield, would require positive legislation. If the community concludes that the principal contemporary threat to individual liberty is the collection and dissemination of intensely personal information by private information brokers, then it would be entirely appropriate to rethink the wisdom of maintaining the public/private distinction in this particular area.

CONCLUSION

I am not a great fan of the new information age—I am not yet convinced that “faster, cheaper, better” will mean that we live qualitatively better, more fulfilling lives.¹⁰¹ Professor Cate’s article presents a rather nightmarish scenario in which our very souls can be digitized, commodified, and sold to the highest bidder. If this is truly the import of the information age, one should question whether we are not losing a great deal more than we are gaining in the bargain.

Nevertheless, there is no stopping the information revolution. China has tried and failed.¹⁰² The ubiquity of technology means that, like it or not, we will all have to readjust our lives to accommodate new technological realities. One must hope, however, that the federal courts resist the temptation to “*Lochner*-ize” the info-bahn.

Some of the arguments contained in Professor Cate’s article could be deployed in an attempt to use the First Amendment and Takings Clause to create a kind of constitutional “liberty of contract” for information service brokers. Just as industrial production and the benefits of economies of scale led capitalists at the turn of the last century to reject social welfare legislation as an untenable interference with freedom of contract, it appears likely that similar arguments will be mustered on behalf of the information brokers. Just as the federal courts eventually came to realize that laws protecting men, women, and children from dangerous or unfair terms and conditions of employment were not unconstitutional, let us hope that federal and state courts do not interpose the Bill of Rights to thwart legislation and common law precedents designed to check the worst abuses of the new information brokers.

Markets failed to protect labor at the turn of the last century. There is every reason to believe that markets will fail to protect privacy at the turn of this

100. See Berman & Mulligan, *supra* note 4, at 563-68.

101. See ANDREWS, *supra* note 18, at 248-60 (arguing that new biological technologies, including cloning, are not inherently beneficial or harmful, but require careful debate about ethics and culture before they are embraced).

102. See Scott E. Feir, Comment, *Regulations Restricting Internet Access: Attempted Repair of Rupture in China’s Great Wall Restraining the Free Exchange of Ideas*, 6 PAC. RIM L. & POL’Y J. 361 (1997).

century. History teaches that if there is money to be made by collecting highly personal information and selling it to the highest bidder, someone will undertake to provide this service—absent some legal impediment to doing so. Let us hope that the federal and state courts will take a lesson from the past and embrace, rather than reject, progressive legislation aimed at securing a modicum of personal privacy in the new information age.