because the scheme was surrounded with extensive security protection against disclosure beyond that necessary to achieve the purposes of the program it was not thought to "pose a sufficiently grievous threat to either interest to establish a constitutional violation."[635] Lower court cases have raised substantial questions as to whether this case established a "fundamental right" to informational privacy, and instead found that some as yet unspecified balancing test or intermediate level of scrutiny was at play.[636]

More than two decades after *Whalen*, the Court remains ambivalent about whether such a privacy right exists, but seems to have settled on a context-specific standard of reasonableness to evaluate such claims. In *Nasa v. Nelson*[637] the Court considered whether government contractors working at NASA's Jet Propulsion Laboratory could be required as part of a background investigation to fill out questionnaires regarding, among other topics, illegal drug use or treatment thereof, and to have personal references queried as to any adverse information going to honesty or trustworthiness. Over a vigorous dissent, the Court presumed without deciding that the government actions implicated a privacy interest of constitutional significance,[638] but then, considering that the employees in question were working in a federal facility and that the background check was the same as was used for federal employees, the Court upheld the questions as "reasonable, employment related" inquiries.[639]

The Court has also briefly considered yet another aspect of privacy—the idea that certain personal activities that were otherwise unprotected could obtain some level of constitutional protection by being performed in particular private locations, such as the home. In *Stanley v. Georgia*,[640] the Court held that the government may not make private possession of obscene materials for private use a crime. Normally, investigation and apprehension of an individual

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[635] 429 U.S. at 598–604. The Court cautioned that it had decided nothing about the privacy implications of the accumulation and disclosure of vast amounts of information in data banks. Safeguarding such information from disclosure "arguably has its roots in the Constitution," at least "in some circumstances," the Court seemed to indicate. Id. at 605. *Compare* id. at 606 (Justice Brennan concurring). What the Court's careful circumscription of the privacy issue through balancing does to the concept is unclear after Nixon v. Administrator of General Services, 433 U.S. 425, 455–65 (1977) (stating that an invasion of privacy claim "cannot be considered in abstract [and] . . . must be weighed against the public interest"). But see id. at 504, 525–36 (Chief Justice Burger dissenting), and 545 n.1 (Justice Rehnquist dissenting).

[636] *See, e.g.,* Plante v. Gonzalez, 575 F.2d 1119, 1134 (5th Cir. 1978) (". . . we believe that the balancing test, more common to due process claims, is appropriate here.").

[637] 562 U.S. ___, No. 09–530, slip op. (2011).

[638] 562 U.S. ___, No. 09–530, slip op. at 11.

[639] 562 U.S. ___, No. 09–530, slip op. at 12–16.

[640] 394 U.S. 557 (1969).