

## 21<sup>ST</sup> CENTURY EMERGING TECHNOLOGIES: A CONSTITUTIONAL RIGHT TO INFORMATION PRIVACY

PROFESSOR ALBERT SCHERR, UNH FRANKLIN PIERCE SCHOOL OF LAW

ALBERT.SCHERR@LAW.UNH.EDU

The currency of the 21st century is information. This development is driven by the increasing wealth of technology that harvests, analyzes, and utilizes data about people – our daily lives, our preferences, and even our genetic makeup. The brave new world where data is the most sought after commodity is turning the 4<sup>th</sup> Amendment into a relic. The 21<sup>st</sup> century requires a 21<sup>st</sup> century privacy right.

The 4<sup>th</sup> amendment reads like it protects tangible items and physical locations. The U.S. Supreme Court has tried for decades, since *Katz v. United States*, to stretch the 4<sup>th</sup> Amendment to cover the privacy threats of an increasingly technological world, from searches of cell tower pinging, geo-locational data, thermal imaging, and more. The 4<sup>th</sup> Amendment has proven flexible, but is now fraying at the edges.

When the police surveilled an individual's whereabouts for 10 days, gathering all sorts of personal and private information, the Supreme Court found that information surveillance of that kind was worthy of 4<sup>th</sup> Amendment protection. But, it did so in 5 separate opinions resulting in a plurality decision that offered only confusing guidance going forwards. And, in its 4<sup>th</sup> Amendment jurisprudence around personal and private information in the hands of a third party, the Supreme Court continues to struggle.

New Hampshire offers an alternative. In November 2018, the NH legislature passed and more than 81 percent of NH voters enacted a constitutional amendment protecting information privacy. Part I, Article 2b of the New Hampshire Constitution now reads: ***"The right to live free from governmental intrusion on personal or private information is natural, inherent and essential."***

Part I, Article 2b liberates the ongoing effort to define the limits of information privacy from the klunky, property-based constraints of New Hampshire's version of the 4<sup>th</sup> Amendment, Part I, Article 19. It ushers effective privacy protections into the 21<sup>st</sup> century by liberating privacy from reliance on physical objects and locations and applies it specifically to information.

Immediately, Part I, Article 2b begs for answers to challenging questions. It is intentionally broad, vague even, because legislators and voters cannot predict today what privacy threats tomorrow will bring. Left open are questions what constitutes "personal or private?" Or, "information?" or even what constitutes "governmental intrusion." Is the protection absolute? Is a search warrant supported by probable cause required? Or, is that enforcement mechanism even suited to 21<sup>st</sup> century information privacy? More broadly, what is it about "information" that should merit **constitutional** protection?

I wrote Part I, Article 2b. I wrote it to intentionally provoke such questions and lobbied for its passage in an effort to free the conversations about information privacy and its meaning from the tightening constraints of the 4<sup>th</sup> Amendment. This presentation will start to offer answers to some of these foundational, now constitutional questions at the core of regulating emerging technologies, and encourage others to pursue similar 21<sup>st</sup> century privacy protections.