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PHOTO ENFORCEMENT PROGRAMS: ARE THEY PERMISSIBLE UNDER THE UNITED STATES CONSTITUTION?

PAUL McNAUGHTON*

I. INTRODUCTION

“BIG BROTHER IS WATCHING YOU” . . . sort of.¹ After all, this is the United States, not Nazi Germany, the Soviet Union, or Oceania, the fictional world created by George Orwell in his renowned novel 1984.² Nevertheless, aspects of Orwell’s technological world are creeping into American society.³ The state’s use of automated cameras to enforce traffic laws is a case-in-point.⁴ And though not equivalent in degree to the intrusive state action of Orwell’s Oceania, it is equivalent in kind.⁵ Unless checked, this type of state action will have lasting repercussions on an individual’s right to interstate travel and personal privacy.

This Comment will consist of three parts: enactment, enforcement, and interpretation of photo enforcement statutes. The first part, enactment, will provide a brief historical background of photo enforcement programs, explain the policy

* Thanks to everyone who helped create this Comment, including my professors, editors, student-peers, and my support-group at home, especially my wife and parents, whose patience was instrumental in bringing this Comment to fruition.

1. GEORGE ORWELL, 1984 2 (Signet Classic 1992) (1949).

2. *Id.* at 3.

3. *See generally* Kevin Werbach, *Sensors and Sensibilities*, 28 CARDOZO L. REV. 2321, 2324 (2007) (discussing different categories of surveillance-based technology, including “cameras, wireless sensor networks, networked devices incorporating location data, and tools for information sharing and aggregation”).

4. *See* Governor’s Highway Safety Association, *Speed and Red Light Camera Laws*, http://www.ghsa.org/html/stateinfo/laws/auto_enforce.html (last visited Mar. 19, 2010) (stating that as of March 2010, twenty-four states and the District of Columbia have some type of automated enforcement program in operation); Kevin P. Shannon, Note, *Speeding Towards Disaster: How Cleveland’s Traffic Cameras Violate the Ohio Constitution*, 55 CLEV. ST. L. REV. 607, 610-13 (2007) (summarizing the different types of photo enforcement—including red-light, speeding, and toll—the technology that each respective system employs, and how the programs work).

5. *See generally* ORWELL, *supra* note 1 (describing the “telescreen” as a device used, similar to photo enforcement cameras, to ensure that citizens were not violating state laws).

arguments for and against them, and extrapolate the most common aspects and distinctions from existing photo enforcement statutes. The second part, enforcement, will focus on executive discretion in the photo enforcement context, analyzing how it differs both from state-to-state and from traditional police enforcement methods. The final part, interpretation, will survey past challenges to photo enforcement statutes, identify the successful and unsuccessful arguments, and propose a new way to constitutionally attack the use of photo enforcement programs.

II. BACKGROUND

A. *Introduction to Automated Camera Laws: Brief Historical Background, Policy, and Analysis of Existing Photo Enforcement Statutes*

Photo enforcement technology has been in use internationally for approximately forty years.⁶ Despite its popularity abroad, the United States has only embraced the idea of photo enforcement within the last ten years.⁷ Most jurisdictions in the United States that have experimented with photo enforcement have done so in the limited context of pilot programs.⁸ Some states that have introduced the photo enforcement pilot program have proceeded to implement full-fledged photo enforcement programs,⁹ while others have gone the opposite direction, substantially curtailing their use¹⁰ or, in some cases, eliminating photo enforcement entirely.¹¹

6. PhotoCop, Violating Traffic Laws is a Snap!, <http://www.photocop.com> (last visited Mar. 10, 2010). More than forty-five countries worldwide have utilized automated cameras to enforce their traffic laws. *Id.*; see also Shannon, *supra* note 4, at 611 (noting that as many as seventy-five countries have attempted photo-enforcement technology to enforce their laws).

7. See PhotoCop, *supra* note 6 (stating that concerns over public reaction to photo enforcement is principally responsible for the hesitancy of many state and local governments to proceed with passing enabling laws). Other concerns include the technology's accuracy, cost, intrusiveness, and legality. *Id.*

8. April Lynch, *AZ Expands Highway Speed Program w/ Redflex*, OFFICER.COM, Aug. 5, 2008, <http://www.officer.com/publication/printer.jsp?id=42623> (announcing that the Arizona Department of Public Safety recently completed a nine-month pilot program along Arizona Highway 101, utilizing photo enforcement technology to catch speeders).

9. Arizona Department of Public Safety, Photo Enforcement Program – Arizona Department of Public Safety, <http://www.azdps.gov/safety/photoenforcement/default.asp> (last visited Mar. 10, 2010); see also Lynch, *supra* note 8 (reporting that on July 18, 2008, Arizona announced that it would expand the pilot program and implement the nation's largest speed enforcement system along a major highway, consisting of 200 cameras).

10. See Dan Harrie, *PhotoCop: Utah Supports New Variation*, SALT LAKE TRIB., Dec. 24, 1997, at A1 (explaining that Utah did not completely ban photo enforcement but restricted it to school zones, effectively ending its use).

11. See Danielle Stanton, *ADP Takes Up Where Photo Radar Leaves Off*, ANCHORAGE DAILY NEWS, Mar. 20, 1997, at 1A (explaining that Alaska

As with any new technology, there are those for and against using photo enforcement programs. Proponents argue that photo enforcement programs reduce speeding violations, red-light violations, accidents, and accident severity.¹² Additionally, supporters claim that photo enforcement technology enforces traffic laws in an objective manner.¹³ Moreover, supporters argue that using this type of program allows police officers to dedicate more time toward enforcing other, potentially more important, laws.¹⁴ Finally, advocates point to the revenue producing benefits of using photo enforcement.¹⁵

Opponents argue that photo enforcement programs are inaccurate, intrusive, unnecessary, and a waste of taxpayers' money.¹⁶ Moreover, critics question the technology's effectiveness as a safety measure, arguing that the data provided by various pilot programs implemented across the United States is inconclusive on the question of accident reduction.¹⁷ Similarly,

suspended its program because of its ineffectiveness in deterring speeding, its failure to generate revenue, and its overall unpopularity among the public). Neither Alaska nor Utah has made any plans to reinstitute photo enforcement in their states.

12. See Lynn Bryant, *Photo Enforcement of Traffic Laws – Sifting Through the Opinions Surrounding This Current Trend*, VIDEO SURVEILLANCE GUIDE, Feb. 15, 2008, <http://www.video-surveillance-guide.com/photo-enforcement-of-traffic-laws.htm> (citing studies conducted by the Department of Transport in England that have shown that, since the implementation of photo enforcement programs, there has been a fifty-five percent reduction in speed violations and a forty-five percent reduction in severe accidents).

13. Thomas M. Stanek, Comment, *Photo Radar in Arizona: Is It Constitutional?*, 30 ARIZ. ST. L.J. 1209, 1216 (1998) (stating that the camera does not care what color your skin is, what your gender is, or how much money you have; if you are speeding, you will be cited).

14. *Id.* at 1217.

15. See Frank Main, *Say Cheese, Speeders*, CHICAGO SUN-TIMES, Aug. 7, 2008, at 6 (discussing Chicago's argument that the technology's revenue raising capabilities could directly fund the creation of an "elite tactical team" of police officers, further contributing to the enhanced safety of the roads and the community in general).

16. See PhotoCop, *supra* note 6 (citing the growing caseload as an additional factor that both militates against the policy underlying photo enforcement, contributing to the high cost of its implementation); see also National Motorist's Association, Ticket Cameras: Red Light Cameras and Photo Radar, <http://www.motorists.org/photoenforce> (last visited Mar. 10, 2010) (listing the many objections to photo enforcement programs, including: (1) ticket recipients are not adequately notified of their violation of a traffic law; (2) the driver of the vehicle is not positively identified when the alleged violation is deemed to take place; (3) ticket recipients are not notified quickly; (4) there is no certifiable witness to the alleged violation; (5) ticket camera systems do not improve safety and are enacted primarily for their revenue-producing benefits; (6) taking dangerous drivers' pictures does not stop those instances of dangerous driving; and (7) radar technology is still inaccurate).

17. See Del Quentin Wilber & Derek Willis, *D.C. Red-Light Cameras Fail to Reduce Accidents*, WASH. POST, Oct. 4, 2005, at A1 (presenting evidence that

many argue that photo enforcement programs do not do enough to prevent the primary causes of accidents: speeding and red-light violations.¹⁸ Finally, some critics argue that the traffic congestion created by the technology is more burdensome than any safety benefits derived from its use.¹⁹

As of March 2010, twenty-one states and the District of Columbia have passed legislation enabling some kind of photo enforcement.²⁰ Many of these statutes restrict the way in which photo enforcement programs may be implemented.²¹ Of all the states that have red-light camera or speed camera monitoring, California's program is by far the most restrictive, incorporating many procedural safeguards to ensure fairness to both the driver and registered vehicle owner.²²

Not every state, however, affords the same level of protection to drivers. For example, although states like California and Arizona require that a driver receive reasonable notice that he or she is approaching a photo enforcement zone,²³ not every

intersections in Washington, D.C., utilizing red-light cameras have increased incidences of traffic accidents); *see also* Shannon, *supra* note 4, at 608 (commenting on a Washington Post study that revealed that intersections where red-light cameras are in effect have seen an increase in the number of traffic accidents and an eighty-one percent increase in injuries and fatalities as a result of those accidents); Bryant, *supra* note 12 (arguing that a study by Safe Speed indicates not only that red-light cameras increase the rate of traffic accidents, but also that such programs are responsible for the hindrance of good driving habits, mainly, paying more attention to speed than surroundings).

18. PhotoCop, *supra* note 6 (acknowledging that “[t]aking a reckless driver’s picture does not stop that incidence of reckless driving.”).

19. *See id.* (highlighting studies that find an increase in traffic congestion as a result of the implementation of photo enforcement programs because of the aforementioned hindrance to good driving habits and increase in rear-end traffic collisions); *see also* National Motorist’s Association, *supra* note 16 (arguing that red-light cameras discourage the synchronization of traffic lights, which further contributes to traffic congestion); Bryant, *supra* note 12 (citing a study conducted in South Wales that revealed that thirty percent of speed cameras in that region had either no effect or increased the number of traffic accidents).

20. Governor’s Highway Safety Association, *supra* note 4. Other photo enforcement programs operating within the states are expressly authorized by “home-rule” jurisdictions of that state. *Id.*

21. These elements include: (1) signs that indicate that a photo enforcement program is in operation; (2) warning periods during which citations may not be issued, preceded by public announcements that photo enforcement programs are in effect; (3) limitations on nongovernmental bodies in the administration and operation of photo enforcement technology; (4) mandated consistency in the administration and maintenance of the systems in operation; and (5) guidelines for preserving the confidentiality of photographic records. CAL. VEH. CODE § 21455.5 (West 2008).

22. *See supra* note 21 and accompanying text (laying out the limitations on how the government may utilize photo enforcement in California).

23. *See* CAL. VEH. CODE § 21455.5(a)(1) (requiring that the governmental

jurisdiction is so generous.²⁴ Additionally, some jurisdictions, such as Washington, D.C., authorize their government to contract with private companies to not only purchase and install cameras, but also to administer and operate the technology.²⁵ Unlike other jurisdictions, Washington, D.C., does not allow the alleged violator to authenticate his or her “mug shot” prior to paying the fine; instead, the registered owner is presumed to have violated the law.²⁶ Similarly, in Texas, the registered owner of a vehicle cited is fined unless he or she can show that the vehicle had been leased, transferred, or stolen before the violation occurred.²⁷ In Chicago, the registered owner is automatically liable, even if he or she can prove that he or she was not driving the car at the time of the violation.²⁸ This “innocent owner” problem is exacerbated if, as in a number of jurisdictions, criminal penalties attach to the violation, such as the assessment of points against one’s driving record.²⁹

Automated photo enforcement programs also differ among jurisdictions in the permissible subject matter of the photograph.

agency “identif[y] the system by signs that clearly indicate the system’s presence and are visible to traffic approaching from all directions, or posts signs at all major entrances to the city, including, at a minimum, freeways, bridges, and state highway routes”); *see also* ARIZ. REV. STAT. ANN. § 28-654(B) (2008) (“At least two signs [must] . . . be placed in a location before a photo enforcement system. One sign shall be in a location that is approximately three hundred feet before the photo enforcement system. Placement of additional signs shall be more than three hundred feet before a photo enforcement system to provide reasonable notice to a person that a photo enforcement system is present and operational”).

24. *See* PhotoCop, *supra* note 6 (discussing New York City’s photo enforcement program, which employs what is known as a “stealth program,” where drivers are given no advance notice that cameras are in operation in a particular area).

25. D.C. CODE § 50-2209.03 (2008) (authorizing the mayor to “enter an agreement with a private entity to obtain relevant records regarding registration information or to perform tasks associated with the use of an automated traffic enforcement system, including, but not limited to, the operation, maintenance, administration or mailing of notices of violations”). *Contra* CAL. VEH. CODE § 21455.5(a)(2)(c) (authorizing “[o]nly a governmental agency, in cooperation with a law enforcement agency, [to operate] an automated enforcement system.”).

26. Shannon, *supra* note 4, at 616.

27. TEX. TRANSP. CODE ANN. § 370.177 (2007) (operating in the limited context of deterring toll violations, as distinguished from a red-light or speed enforcement context).

28. *See* Idris v. City of Chicago, No. 06 C 6085, 2008 U.S. Dist. LEXIS 3933, at *4-5 (N.D. Ill. Jan. 16, 2008) (discussing the Chicago ordinance that establishes liability for the registered owner of the vehicle in all cases, except where the registered owner is a licensed lessor of vehicles, and there is a formal contract with the lessee of the vehicle in question).

29. ARIZ. REV. STAT. ANN. § 28-654 (2008) (establishing that a violation may result in the assessment of points against the responsible party’s driving record).

While some states allow automated camera systems to photograph a vehicle from any point of view, other states only permit the camera to photograph the license plate, presumably to lessen the intrusiveness of the technology.³⁰

Finally, photo enforcement statutes sometimes prescribe and prohibit particular types of photo enforcement.³¹ For example, some jurisdictions allow cameras to be placed on local roadways but not state highways, or vice versa.³² As of March 2010, nine states expressly prohibit some or all photo enforcement programs from operating in their states.³³

B. Introduction to the Enforcement of Automated Camera Laws: Differences from Traditional Police Enforcement

There are several major pre-citation differences between photo enforcement and traditional police enforcement of traffic laws.³⁴ The first difference is the ability and ease with which the driver's identity is established. Unlike traditional police enforcement, where a police officer can verify a driver's identity simply by checking a driver's license, photo enforcement has no means of identifying the driver either at the moment the photo is taken, or when the citation is processed.³⁵ This shortcoming has resulted in states imposing liability on the registered owner of the vehicle, regardless of whether that person was driving the car at the time of the violation.³⁶ Second, the systems differ in the police officer's ability to exercise discretion in a given instance.³⁷ Finally,

30. TEX. TRANSP. CODE ANN. § 228.058 (2007); *see also* WASH. REV. CODE § 46.63.160(7)(a) (2008) (limiting the photo taken by automated cameras to the rear license plate of vehicles).

31. *See* ARIZ. REV. STAT. ANN. § 28-654(B) (2008) (prescribing both speed and red-light monitoring systems in the state). *Contra* TEX. TRANSP. CODE ANN. § 370.177 (2007) (prohibiting speed monitoring systems in the state).

32. *See City of Commerce City v. Colorado*, No. 01SC281, 2002 Colo. LEXIS 140, at *8 (Colo. Feb. 11, 2002) (discussing the primary distinction in the use of photo enforcement in different jurisdictions within Colorado, mainly on the types of roadways—e.g., heavy arterials or light connectors—this technology can be used).

33. Governor's Highway Safety Association, *supra* note 4 (listing Arkansas, Mississippi, Montana, Nevada, New Hampshire, New Jersey, Texas, West Virginia, and Wisconsin as states that prohibit some or all photo enforcement in their state).

34. *See generally* Elizabeth E. Joh, *Discretionless Policing: Technology and the Fourth Amendment*, 95 CALIF. L. REV. 199 (2007) (summarizing the benefits and burdens of a so called "discretionless" method of police enforcement through the use of technology similar in style to photo enforcement).

35. *Id.*

36. *See* National Motorist's Association, *supra* note 16 (identifying the cause and effect of the "innocent owner" problem).

37. *See id.* (pointing out that police officers can readily determine whether there is an exigent circumstance making it necessary to violate a traffic law,

enforcement systems differ because the violator is not stopped in the context of a photo enforcement program.³⁸

The post-citation operation and administration of photo enforcement is different as well. Under a typical photo enforcement program, processing a citation begins with a partnership between the governing jurisdiction and a private contractor that manufactures and installs the cameras.³⁹ Some states, such as California, have statutes that prohibit private companies, like Redflex, from being involved in the actual administration, maintenance, and operation of a photo enforcement program.⁴⁰

Other states have no such restriction and allow private contractors to be intimately involved in every aspect of an enforcement program, from the manufacturing of the camera to sending out the citations.⁴¹ Most jurisdictions that permit this sort of arrangement pay private contractors on a contingency fee basis, awarding them a certain percentage of the fine.⁴² The typical photo enforcement process, from the taking of the picture to the issuance of the citation, is described in detail in the Arizona State Senate Issue Brief.⁴³

while cameras generally cannot, leaving the owner of the registered vehicle in the unfair situation of having to spend the time and money to rebut the presumption that he or she violated the law or assert an affirmative defense for so doing).

38. *See id.* (arguing that the absence of a stop means that “dangerous drivers” keep on driving).

39. *See Lynch, supra* note 8 (identifying typical bidders for the job, such as Red Flex, who is the “largest provider of digital red light and speed enforcement services in North America”).

40. CAL. VEH. CODE § 21455.5(c) (authorizing “[o]nly a governmental agency, in cooperation with a law enforcement agency, [to operate] an automated enforcement system”).

41. *See supra* note 25 and accompanying text (identifying Washington, D.C., as a jurisdiction that allows commingling of the government and a private contractor in the photo enforcement process).

42. *See In re Red Light Photo Enforcement Cases*, 78 Cal. Rptr. 3d 413, 419 (Cal. Ct. App. 2008), *review granted*, 84 Cal. Rptr. 3d 37 (2008) (discussing the use of various types of contingency fee agreements entered into by Lockheed Martin and a number of jurisdictions within California).

43. Arizona Senate Research Staff, Issue Brief: Photo Traffic Enforcement, <http://www.azleg.state.az.us/briefs/Senate/PHOTO%20TRAFFIC%20ENFORCEMENT.pdf> (last visited Mar. 10, 2010). Once a violation occurs, the camera takes a picture or a series of pictures from different angles, including the license plate and the driver. *Id.* Those photographs are stored on a hard drive and are eventually uploaded and maintained in an electronic government database. *Id.* Next, the operator sifts through the pictures, identifying the license plates and matching them with the registered owner(s) of the vehicle. *Id.* Afterward, the operator mails (to the police department or directly to the responsible party depending on the statute) the “notice of violation” containing information including, the time and date of the traffic violation, the pictures documenting the same, and the vehicle and registered owner’s information.

C. *Introduction to the Court's Interpretation of Automated Camera Laws: Successful and Unsuccessful Challenges*

As photo enforcement programs have continued to increase in popularity over the past ten years, they have faced numerous legal challenges. The most heavily litigated aspect of photo enforcement statutes has been the presumption that the registered owner of a vehicle is liable for the violation.⁴⁴ Many critics argue that this presumption violates a vehicle owner's Fourteenth Amendment Due Process⁴⁵ and Equal Protection rights.⁴⁶ These challenges under both state and federal laws have been wholly unsuccessful.⁴⁷

Another common challenge to photo enforcement programs is that local jurisdictions lack the authority to enact ordinances permitting photo enforcement or, even if they do, are preempted by state law.⁴⁸ Although this preemption argument has been successful in invalidating local photo enforcement laws in some jurisdictions,⁴⁹ procedural due process claims, on the other hand, are highly individualized, and the majority of courts have found no denial of notice or a hearing.⁵⁰ Drivers have also argued—to no

Id. Commonly, the "notice of violation" will include a space titled "affidavit of non-responsibility," where the registered owner can declare that he or she was not driving the car at the time the violation occurred, or some other circumstance existed that justified the violation. *Id.* For example, citations issued to drivers running red lights to make room for emergency vehicles or to keep in line with funeral processions will be waived. If responsible for the violation, upon return of the "notice of violation," the jurisdiction will file a complaint against the offender in its local court. *Id.* The jurisdiction will then send the offender a summons to appear and a copy of the complaint and traffic ticket. *Id.* In lieu of appearing, the jurisdiction typically offers the defendant a variety of options, including payment of a fine, assessment of points against the defendant's driving record, or attendance at traffic school. *Id.*

44. See *Williams v. Redlex Traffic Systems, Inc.*, No. 3:06-cv-400, 2008 U.S. Dist. LEXIS 22723, at *12-13 (E.D. Tenn. Mar. 20, 2008) (discussing that the statutory presumption that the registered owner is driving the vehicle at the time of the violation may impermissibly shift the burden of proof to the defendant).

45. *Id.* at *13 (arguing that it is fundamentally unfair to shift the burden of proof onto the defendant to rebut the allegation of a criminal violation).

46. *City of Knoxville v. Brown*, 284 S.W.3d 330, 332 (Tenn. Ct. App. 2008) (discussing the argument that the law violates equal protection because it creates an impermissible classificatory basis between drivers and registered vehicle owners by "afford[ing] a greater degree of protection to the guilty driver than the innocent vehicle owner").

47. *Id.* at 332-33. This decision indicates that a state has broad authority to regulate pursuant to its police power, and consequently no complainant has the "right" facts to viably argue that the photo or red-light statutes should be subject to anything other than the highly deferential rational-basis review.

48. *City of Commerce City v. Colorado*, No. 01SC281, 2002 Colo. LEXIS 140, at *8 (Colo. Feb. 11, 2002) (holding that local ordinances were superseded by a conflicting state statute).

49. *Id.*

50. *Idris*, 2008 U.S. Dist. LEXIS 3933, at *26 (focusing on whether the

avail—that the partnership agreement between the governing jurisdiction and the private corporation is void as a matter of public policy.⁵¹ Similarly, taxpayer waste claims have been equally ineffective.⁵²

Whether a photo-enforced citation assesses a civil fine or a criminal penalty is integral to a complete assessment of a driver's rights. Most photo enforcement statutes provide that any fines assessed pursuant to a violation of a traffic law are civil in nature.⁵³ But just because a fine is denominated as "civil" does not necessarily mean it is. For example, in *City of Knoxville v. Brown*, the Supreme Court of Tennessee held that a court must look to the nature of the fine to determine whether a citation is a criminal penalty.⁵⁴ Although state law determines whether a fine is criminal, it is clear that the assessment of points against one's driving record is generally considered a criminal penalty.⁵⁵

The significance of this distinction cannot be overstated. Once a fine is deemed a criminal penalty, the offender is entitled to assert all of his criminal procedure rights—including the right

interest in public safety outweighs any burdens that stem from the technology's use). Specifically, the court held that the statutory scheme enabling photo enforcement did not violate due process because "the benefits of the truncated procedure outweighed its costs." *Id.* In other words, the limited process a party is entitled to in the administration of a photo enforcement citation is justified given the relative insignificance of the property interest at stake. *Id.*

51. See *In re Red Light*, 78 Cal. Rptr. 3d at 419 (pointing to the potential for conflicts of interest, as well as corruption as a result of the financial arrangements inherent in these partnerships). *But see* *Leonte v. ACS State & Local Solutions, Inc.*, 19 Cal. Rptr. 3d 879, 883-84 (implying that photo enforcement systems in which the state is not "ultimately the system operator" would be void as a matter of public policy). Whether the state is "ultimately the system operator" depends on whether the state "retains the right to oversee and control the functioning of the system." *Id.*

52. See *In re Red Light*, 78 Cal. Rptr. 3d at 425-26 (stating the general rule that "[a] taxpayer waste cause of action will not lie where the challenged governmental action is legal."). Photo enforcement statutes are reviewed with a strong presumption of validity under the United States Constitution. *Idris*, 2008 U.S. Dist. LEXIS 3933, at *19.

53. See, e.g., *Brown*, 284 S.W.3d at 337 (involving a state statute imposing a civil fine on traffic violations); see also TENN. CODE ANN. § 55-8-110 (Supp. 2007) (stating that a violation under the Tennessee photo enforcement statute is a civil violation and may not be considered a moving violation or recorded against the driving record of the owner).

54. 284 S.W.3d at 337 (quoting the United States Supreme Court statement that "[t]he notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law.") The court held that "civil proceedings may impose sanctions that are 'so punitive in form and effect' as to trigger constitutional protections." *Id.*

55. See *id.* at 338 (concluding that where a sanction is imposed that is "intended to be punitive and a deterrent, [then] constitutional protections are triggered").

to confrontation, right against self-incrimination, right against double jeopardy, etc.—in an attempt to defeat the claim.⁵⁶ Given the breadth of constitutional protections that attach in this context, it is easy to see why many governing jurisdictions forego the assessment of fines that could be construed as a criminal penalty. Undoubtedly, in the criminal context, it will not be as easy for the state to shift the burden of proof to the innocent registered owner or withhold notice and hearing requirements in the face of a procedural due process claim.⁵⁷

III. ANALYSIS

Given the distinctions in the way photo enforcement legislation is promulgated, administered, and litigated, the constitutional attacks will begin with an argument against the validity of a California-like statute, with significant procedural safeguards to violators. At appropriate junctures, this Comment will point out how distinctions from a California-like statute may tilt the analysis in favor of or against the constitutionality of the statute.

A. Photo Enforcement Statutes Violate the Fundamental Right to Travel Protected by the Privileges and Immunities Clause of the Fourteenth Amendment

Photo enforcement statutes are unconstitutional because they violate the Privileges and Immunities Clause of the Fourteenth Amendment by unduly burdening U.S. citizens' right to interstate travel.⁵⁸ Although there is no mention of the right to travel in the text of the Fourteenth Amendment, it has long been recognized by the Supreme Court as a fundamental right.⁵⁹ In *Saenz v. Roe*, the Court used the Privileges or Immunities Clause of the Fourteenth

56. *See id.* (finding that constitutional protections were invoked due to the nature of the fine involved).

57. Although interesting questions are raised here, it is not the purpose of this Comment to address the highly particularized circumstances in which these constitutional rights will be successful in thwarting a photo-enforced traffic violation. Instead, this Comment seeks to address the constitutionality of photo enforcement programs in general and thus will presume, unless noted, that the violation of a particular photo enforcement statute imposes a mere civil penalty, rather than any criminal penalties.

58. The Fourteenth Amendment states, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. CONST. amend. XIV, § 1.

59. *See generally* The Passenger Cases, 48 U.S. (7 How.) 283 (1849) (invalidating a tax on non-residents arriving from foreign ports). *See also* *Crandall v. Nevada*, 73 U.S. (6 Wall.) 25, 43-44 (1867) (holding that taxes on railroads and stage coaches for transporting passengers out-of-state were unconstitutional because they impermissibly interfered with citizens' rights of free access).

Amendment to protect the fundamental right to travel,⁶⁰ despite its virtual non-use since the *Slaughterhouse Cases* essentially read it out of the Constitution.⁶¹

Because the successful invocation of the Fourteenth Amendment's Privileges or Immunities Clause is relegated to right to travel cases—and even then only since 1999 when *Saenz v. Roe* was decided—there has been limited opportunities for courts to consider claims under this clause.⁶² As a result, the test for determining what constitutes an infringement of the right to travel under the Fourteenth Amendment's Privileges or Immunities Clause remains uncertain. There is support, however, for the proposition that right-to-travel cases will be adjudicated by using the “levels of scrutiny” test applied in Fourteenth Amendment Due Process and Equal Protection cases.⁶³ Before reaching that point, however, the Court must make a preliminary finding, based on the plaintiff's showing that a particular case or controversy implicates the fundamental right to travel,⁶⁴ then strict scrutiny will likely apply.⁶⁵

1. *Photo Enforcement Statutes Impose a Tax on Interstate Travelers Found Unconstitutional in Crandall v. Nevada*

The Supreme Court has found the right to travel applicable

60. *Saenz v. Roe*, 526 U.S. 489, 501 (1999). The Court identified three aspects of the right to travel protected by the Privileges and Immunities Clause of the Fourteenth Amendment: (1) the right of a citizen of the United States to enter and leave any state, regardless of residency; (2) the right of that citizen to “be treated as a welcome visitor rather than an unfriendly alien” when temporarily visiting another state, and (3) the right of that citizen to be treated the same as a resident of the state in which he chooses to reside, regardless of how long he resides there. *Id.*

61. *See generally* *The Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1873) (severely limiting the applicability of the Fourteenth Amendment's Privileges and Immunities Clause).

62. *See generally id.* (refusing to apply the Fourteenth Amendment's Privileges or Immunities Clause to invalidate a monopoly over the slaughterhouse business on the basis that it violated the affected parties' right to practice their trade). *But see* *Edwards v. California*, 314 U.S. 160, 178 (1941) (Douglas, J., concurring) (recognizing, along with three other justices, the right to travel under the Fourteenth Amendment's Privilege or Immunities Clause).

63. Before the Court resurrected the Privileges or Immunities Clause in *Saenz*, right-to-travel cases were decided predominately under the Fourteenth Amendment's Due Process and Equal Protection Clauses and their “levels of scrutiny” test. *See* *Jones v. Helms*, 452 U.S. 412, 419 (1981) (discussing that if the state establishes a compelling interest in burdening the right to travel, then the law will generally be upheld).

64. *Id.*

65. *See* *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (noting that the court will defer to the legislature unless there is infringement of a fundamental right).

primarily in the context of durational residency requirements.⁶⁶ However, when the law distinguishes between residents and non-residents under residency requirements, the law is deemed not to infringe the citizens' right to travel.⁶⁷ This difference is encapsulated by Justice Brennan in *Attorney General of New York v. Soto-Lopez*.⁶⁸ Because photo enforcement statutes, upon first glance, are not directly analogous to durational residency requirements, another justification must be found to make the right to travel applicable in evaluating the constitutionality of a photo enforcement statute.

Such a justification is found in the earliest cases recognizing the right to interstate travel. Particularly instructive is *Crandall v. Nevada*, where the Nevada legislature imposed a tax on all transportation businesses taking people across state lines.⁶⁹ The Supreme Court struck down the tax as an unconstitutional violation of a citizen's fundamental right to travel.⁷⁰

Photo enforcement programs enact the type of tax that was declared unconstitutional in *Crandall*.⁷¹ There are three factual differences to which critics of this position will point. First, they will argue that photo enforcement programs do not automatically tax citizens who cross state lines. There must be a violation of local law before the "tax" is imposed. Second, they will argue that photo enforcement programs treat in-state and out-of-state

66. See *Shapiro v. Thompson*, 394 U.S. 618, 637-38 (1969) (finding that waiting-period requirements on welfare benefits to new residents clearly burdened the right to travel because it treated established residents differently). As a result, the Court applied strict scrutiny to the legislative act. *Id.*

67. See *Martinez v. Bynum*, 461 U.S. 321, 328 (1983) (holding that residency requirements do not burden the constitutional right of interstate travel because any person may choose to migrate to a state and establish residency there).

68. 476 U.S. 898, 903 n.3 (1986) (expressing that the Court has "always carefully distinguished between bona fide residence requirements, which seek to differentiate between residents and nonresidents, [and residence requirements] such as durational, fixed date and fixed point residence requirements, which treat established residents differently based on the time they migrated to the state").

69. *Crandall*, 73 U.S. (6 Wall.) at 36. In *Crandall*, the Nevada legislature enacted a law requiring the tax of every person leaving the state by way of railroad, stage coach, or "other vehicle engaged or employed in the business of transporting passengers for hire," payable by the proprietor of the service. *Id.* at 35.

70. *Id.* at 43-44 (holding that a citizen has a free right of access, and "this right is in its nature independent of the will of any State whose soil he must pass in the exercise of it").

71. See *infra* pp. 478-81 and notes 74-75 (refuting the counter-arguments that differences between the tax in *Crandall* and photo enforcement have constitutional significance, and characterizing the state action in each case as indistinguishable under the Constitution).

residents the same, unlike the tax in *Crandall*, which discriminated only against citizens leaving the state. Finally, they will argue that photo enforcement programs do not burden interstate travel differently than what is already permissible, pursuant to a state's police power.

a. Factual Differences Between the Tax in *Crandall* and Photo Enforcement Programs Are Not Constitutionally Distinct

The fact that photo enforcement programs require a violation of law before the "tax" is imposed does not turn the constitutional analysis on its head. As Justice Stevens noted in *Saenz*, the right to travel encapsulates the right not only to travel freely from state-to-state, but also to be treated as a "welcome visitor," rather than an "unfriendly alien" in that state.⁷² The right to travel is clearly invoked when automated cameras seek to capture every vehicular indiscretion throughout an interstate trip, especially when photo enforcement programs are still not used in many areas throughout the United States.⁷³ This is a particularly harsh reality in itself, let alone when dealing with a stealth photo enforcement program, as is employed in New York City.⁷⁴ Regardless of the type of photo enforcement statute, the fact that a photo enforced "tax" is not assessed until the law is violated is irrelevant in light of Justice Stevens' second test in *Saenz* because an all-seeing camera makes travelers feel like "unfriendly aliens."⁷⁵

72. *Saenz*, 526 U.S. at 502 (identifying the second test used in determining whether there has been a violation of the fundamental right to travel).

73. Governor's Highway Safety Association, *supra* note 4 (identifying that almost half of the states in the country have no photo enforcement programs operating anywhere in their state).

74. See PhotoCop, *supra* note 6 (discussing New York City's photo enforcement program, which employs what is known as a "stealth program," where drivers are given no advance notice that cameras are in operation in a particular area). When a non-resident's state has no photo enforcement program in place, and such a non-resident is traveling in another state that provides no notice that photo enforcement is the primary method of enforcing traffic laws, citation by photo enforcement may result in a due process violation for lack of notice and will unduly interfere with the non-resident's right to travel. *Id.* This scenario clearly fails Justice Stevens' second test in *Saenz* in that interstate travelers may not be treated as "unfriendly aliens" in non-resident states because they have not received general notice of the implementation of photo enforcement that inures to residents simply by living and working in the state for a period of time. *Cf. Saenz*, 526 U.S. at 502. Photo enforcement statutes of this kind, under these circumstances, create *de facto* durational residency requirements in violation of the fundamental right to travel.

75. *Saenz*, 526 U.S. at 502. Under *Saenz*, the right to travel is unduly burdened where the right of the citizen to "be treated as a welcome visitor rather than an unfriendly alien" while temporarily visiting another state is violated. *Id.* This sentiment is exacerbated in the context of photo

b. Bringing Photo Enforcement Squarely Under *Crandall*:
Photo Enforcement Programs Constitute *de facto*
Durational Residency Requirements Invalidated Under
the *Saenz* Right to Travel Analysis

Supporters may further argue that both residents and non-residents are equally affected by automated cameras when traveling throughout a particular state. Such an assertion ignores reality.⁷⁶ Although the law does not expressly set out to burden travel by non-residents, it has the effect of doing so because of the nature of photo enforcement programs. Essentially, photo enforcement statutes create a *de facto* durational residency requirement⁷⁷ because, in most cases, the programs are set up at fixed locations, and residents learn precisely where the cameras are located within a short period of time. Therefore, residents can avoid the burdens that automated cameras create. This is not the case for non-residents, and the result is an increased incidence of a photo enforced “tax” for non-residents. This result is impermissible under Justice Stevens’ third test in *Saenz*⁷⁸ and brings photo enforcement squarely under *Crandall* in that the tax does not treat residents and non-residents the same.

c. The Use of Photo Enforcement Programs Penalizes
Migration by Denying Citizens the Right to Have Police
Officers Administer Laws

As to the final contention, that photo enforcement does not burden the right to travel more than it is already permissibly burdened through traditional police enforcement, it is important to keep in mind that the respective systems are fundamentally

enforcement because almost half of the citizens have never been subject to its use. Governor’s Highway Safety Association, *supra* note 4 and accompanying text (stating that half the states and their residents have no experience with photo enforcement). Furthermore, it is of no significance under *Saenz* that local law must be violated before the tax is assessed. *Saenz*, 526 U.S. at 507. This argument is particularly persuasive where a state uses photo enforcement to enforce its laws, because, like the invalid tax in *Crandall*, it is the tax-assessing mechanism (the photo enforcement program), and not necessarily the tax itself, that makes non-residents feel like “unfriendly aliens” while traveling across state lines.

76. *Saenz*, 526 U.S. at 502. It also ignores Justice Stevens’ third test implicating the right to travel in *Saenz*: whether the state abridges the right of the citizen to be treated the same as a resident of the state in which he chooses to reside, regardless of how long he resides there. *Id.*

77. See *supra* note 74 and accompanying text (explaining why photo enforcement programs are akin to durational residency requirements and thus violate the right to travel).

78. See *Saenz*, 526 U.S. at 502 (describing the third test of the right to travel as the right of “newly arrived citizens [to enjoy] the same privileges and immunities enjoyed by citizens of that state”).

different.⁷⁹ Whether these distinctions make a constitutional difference in terms of the Fourteenth Amendment's Privileges or Immunities Clause depends upon a qualitative analysis of the burdens that photo enforcement creates for motorists above and beyond traditional police enforcement.⁸⁰ In *Soto-Lopez*, the Supreme Court invalidated a durational residency requirement that provided hiring preferences for veterans based on whether they were a resident of the state when they enlisted in the armed forces.⁸¹ In his holding, Justice Brennan noted that "even temporary deprivations of very important benefits and rights can operate to penalize migration."⁸²

The use of photo enforcement programs operate to deny citizens the right to have police officers administer local laws.⁸³

79. See Photocop, *supra* note 6 (explaining the policy arguments against photo enforcement of traffic laws); see also National Motorist's Association, *supra* note 16 (listing the policy arguments against photo enforcement of traffic laws); *supra* Part II (outlining the differences in the enforcement of traffic laws).

80. It is a generally accepted fact that the states, through their power to enact legislation to promote public health, safety, morals, and welfare, have authority under the Constitution to statutorily enable police officers to enforce traffic laws. See, e.g., *Lochner v. New York*, 198 U.S. 45, 53 (1905) (discussing police power generally and the right to enact legislation to enforce police powers); *Vill. of Euclid v. Ambler Realty Co.* 272 U.S. 365, 386-88 (1926) (establishing the framework by which a statutory enactment is to be scrutinized by the courts). However, photo enforcement differs from police enforcement both in degree and in kind. National Motorist's Association, *supra* note 16 (detailing the differences between photo enforcement and traditional police enforcement of traffic laws). Whether the differences have constitutional significance depends on the extent to which the two types of enforcement differ, and specifically, whether the negative characteristics of photo enforcement alter the analysis under the "levels of scrutiny" test. To that end, it will only be clear to what extent photo enforcement can permissibly interfere with the citizen's right to interstate travel upon assessing the burdens that accompany its use. See *Planned Parenthood v. Casey*, 505 U.S. 833, 874 (1992) (employing a similar "undue burden" test in heres for assessing the extent to which the state can permissibly interfere with the right to an abortion before viability). The situations are comparable because in each case the government is attempting to restrict a fundamental right. See *Roe v. Wade*, 410 U.S. 113, 152-53 (finding that a woman's decision to terminate her pregnancy falls under those personal rights that are deemed "fundamental" or "implicit in the concept of ordered liberty").

81. *Soto-Lopez*, 476 U.S. at 911.

82. *Id.* at 907.

83. Although it is a general proposition that allocation of police resources is a state, as opposed to a federal concern, several states have fostered a belief that motorists should have the benefit of a police officer to explain away the violation, to utilize his discretion in issuing a warning, and to resolve any confusion that may arise from a potentially complex situation. See Photocop, *supra* note 6 (discussing issues that the use of photo enforcement programs create). As previously mentioned, almost a third of the states in the union have no form of photo enforcement operating anywhere in their state. Governor's Highway Safety Association, *supra* note 4. There are only twenty-

Within that framework, citizens are deprived of all of the benefits that traditional police enforcement methods have over photo enforcement, including the possibility of communicating with the law enforcement agent in attempt to mitigate guilt and avoid liability for the fine.⁸⁴ Also, within that framework, citizens are saddled with all of the burdens of photo enforcement (that are avoided by traditional police enforcement), including the administrative problems that arise from the inability to identify the driver, contest the citation before its issuance, and the vehicle's registered owner's presumption of guilt.⁸⁵ Chicago-like photo enforcement statutes, which presume the guilt of the registered owner of the vehicle even where "affidavits of non-responsibility" are signed, are particularly susceptible to more exacting scrutiny by the courts because they supplant traditional police enforcement procedures with their own. By doing so, these statutes deprive citizens of important rights, which unduly burdens interstate travel.⁸⁶ A qualitative analysis of the burdens of photo enforcement makes it clear that, at the very least, photo enforcement programs create a distinct and new obstacle for travelers, particularly non-residents, and, consistent with *Soto-Lopez*,⁸⁷ should implicate the right to travel for purposes of the Privileges or Immunities Clause of the Fourteenth Amendment.

one states and the District of Columbia that expressly authorize photo enforcement in their state. *Id.* The other photo enforcement programs that exist are spread sporadically across the nation, many merely taking the technology out for a test-run. *Id.* Nine states have rejected all or specific types of photo enforcement technology. *Id.* As such, photo enforcement technology has not been widely embraced across the nation, and non-residents are in for a truly rude awakening when traveling interstate and subjected to technology with which residents have already had a chance to become accustomed, without any comparable benefit to non-residents, nor any notice that the benefit of traditional police enforcement is suspended.

84. See Photocop, *supra* note 6 (explaining the policy arguments against photo enforcement of traffic laws); see also National Motorist's Association, *supra* note 16 (listing the policy arguments against photo enforcement of traffic laws).

85. See Photocop, *supra* note 6 (identifying additional problems caused by automated cameras).

86. See *Idris*, No. 06 C 6085, 2008 U.S. Dist. LEXIS 3933, at *4-5 (discussing a Chicago ordinance that automatically assumes that the registered vehicle owner violated the traffic law).

87. Photo enforcement programs implicate the fundamental right to travel because, like the durational residency requirement in *Soto-Lopez*, photo enforcement establishes a *de facto* durational residency requirement on non-residents by denying "the very important benefit" of having police officers administer local laws, through the use of technology with which many non-residents are unfamiliar. *Soto-Lopez*, 476 U.S. at 907.

2. *Photo Enforcement Statutes Are Not Necessary to Accomplish a Compelling Government Purpose*

Infringements on fundamental rights trigger strict scrutiny.⁸⁸ Therefore, a state must establish that photo enforcement programs are necessary to accomplish a compelling government purpose.⁸⁹ Conceding that public safety in general, and specifically the safety of our roadways, presents a compelling purpose, photo enforcement statutes must nonetheless fail under strict scrutiny because they are not necessary to effectuate that purpose. Under the least restrictive alternative test,⁹⁰ the safety of our roadways can be preserved through other equally effective means, including increasing the number of patrolling squad cars, utilizing speed trailers, and increasing education for defensive driving. The burdens that photo enforcement programs impose on interstate travel do not justify its use, especially where other equally effective programs accomplish the same goal without negatively affecting a citizens' right to travel.

B. *Photo Enforcement Statutes Violate the Right of Individuals to Control Information About Themselves, Protected by the Due Process Clause of the Fourteenth Amendment*

Photo enforcement statutes are unconstitutional because they impermissibly infringe upon citizens' privacy rights, specifically the right to control information about oneself, as protected by the Fourteenth Amendment's Due Process Clause.⁹¹ The modern revival of so-called substantive due process has been responsible for the constitutional protection of many rights that, up until this

88. See *id.* (discussing the strict scrutiny standard used when fundamental rights are involved).

89. See *Carolene Products Co.*, 304 U.S. at 152 n.4 (noting, *inter alia*, that the court will defer to the legislature unless there is infringement of a fundamental right). Footnote four in *Carolene Products Co.* implies but does not reach the conclusion that in certain circumstances, such as where there is "prejudice against discrete and insular minorities," or restrictions of fundamental rights, government conduct will be subject to "a correspondingly more searching judicial inquiry." *Id.*

90. The least restrictive alternative test is used where strict scrutiny applies to the government's conduct in a Fourteenth Amendment Privileges and Immunities Clause case. See *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 285 (1978) (holding that the means by which the government sought to accomplish its objective were not necessary). Thus, if a court identifies a way in which the state could have carried out its purpose with less onerous effect on individual rights, then the government's conduct at issue fails the least restrictive alternative test. *Id.*

91. The Fourteenth Amendment states, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

point, were not recognized by the Constitution.⁹² Contrary to the economic rights protected by substantive due process in the *Lochner*-era, however, so called privacy or autonomy rights are the ones that receive the most protection under modern day substantive due process.⁹³

1. *The Fourth Amendment Does Not Protect Victims of Photo Enforcement from Privacy Invasions Because No Search or Seizure Occurs*

The Fourth Amendment, like modern day substantive due process, has long protected the privacy rights of citizens of the United States, and, at first glance, it may look to provide a significant amount of protection in the photo enforcement context.⁹⁴ However, Fourth Amendment jurisprudence with respect to the protection of an individual's privacy rights in his automobile has afforded scant protection. In *Carroll v. United States*, the Supreme Court first recognized a constitutionally protected privacy interest in an automobile.⁹⁵ The case, however, also recognized an "automobile exception" to the general rule that searches should be conducted pursuant to a warrant.⁹⁶ Later, in *California v. Carney*, the Supreme Court noted that the "automobile exception" did not rely solely on the "mobility" factor identified in *Carroll*, but also upon the reduced expectation of privacy with respect to one's automobile.⁹⁷ So long as searches and

92. See generally *Griswold v. Connecticut*, 381 U.S. 479 (1965) (the right to purchase and use contraceptives); *Roe v. Wade*, 410 U.S. 113 (1973) (the right to abortion); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (the right to keep the family together); *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261 (1990) (the right to refuse treatment); *Lawrence v. Texas*, 539 U.S. 558 (2003) (the right to sexual autonomy).

93. In fact, other than impingements on long-recognized fundamental rights, like the right to travel, the Court has only subjected to heightened scrutiny state action that impedes long-recognized privacy or autonomy interests of an individual. See *supra* note 92 and accompanying text (listing fundamental "privacy" rights).

94. The Fourth Amendment states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

95. 267 U.S. 132, 153 (1925) (holding that there is a protected privacy interest in an automobile under the Constitution, but the ready mobility of the vehicle means that it is afforded a lesser degree of protection than stationary objects or structures).

96. *Id.* at 162.

97. 471 U.S. 386, 391-93 (1985) (holding that there is a reduced expectation of privacy in automobiles because of the amount of regulation that vehicles are subject to, especially in comparison with one's home).

seizures of automobiles are based upon probable cause, they are reasonable under the Fourth Amendment.⁹⁸

Before reaching the question of probable cause, however, it must be established that the use of photo enforcement programs constitutes a search or seizure.⁹⁹ To that end, the plaintiff must show that he has a reasonable expectation of privacy in the area searched or the item seized by the cameras.¹⁰⁰ In *United States v. Knotts*, the Supreme Court held that “[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.”¹⁰¹ Although the Supreme Court in *Carroll* established that there is an expectation of privacy in one’s automobile, current Fourth Amendment law seems prepared to recognize an individual’s privacy interests in his automobile as reasonable only where the vehicle is parked within the “cartilage” of the home.¹⁰² The use of automated cameras to photograph drivers, although intuitively intrusive to privacy interests of the individual, does not invoke the protections of the Fourth Amendment because no search or seizure has occurred.¹⁰³

98. *Carroll*, 267 U.S. at 162. Additionally, in *United States v. Ross*, the Supreme Court further tightened its grip on an individual’s privacy rights with respect to automobiles. See *United States v. Ross*, 456 U.S. 798, 824 (1982) (extending the automobile exception to include searches and seizures, without a warrant, of closed containers located within an automobile, so long as the search is limited in scope to areas in which probable cause as to a particular thing inheres).

99. U.S. CONST. amend. IV.

100. See *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (noting that there is a two-step requirement for determining the protection afforded to individuals with respect to a place: (1) “that a person ha[s] exhibited an actual (subjective) expectation of privacy, and (2) that the expectation be one that society is prepared to recognize as reasonable”).

101. 460 U.S. 276, 281-82 (1983) (holding that there is no reasonable expectation of privacy in that which is exposed to public view).

102. See *Coolidge v. New Hampshire*, 403 U.S. 443, 472 (1971) (holding that the seizure of an automobile parked outside the suspect’s house was unreasonable without the initial procuring of a warrant because none of the concerns with flight of the suspect were present, and the car’s close proximity to the house created a stronger expectation of privacy than if the car had been seized while on the road).

103. As an aside, if under unique circumstances an individual successfully argues that her reasonable expectation of privacy has been violated by a photo enforcement program, the far more interesting question is whether the state has probable cause to search or seize the thing over which the reasonable expectation lies. The answer, almost invariably, must be no. Photo enforcement programs are limited by the technology with which they are programmed (detecting red-light, speeding, or toll violations). With regard to police enforcement, mere red-light, speeding, or toll violations do not give rise to probable cause to search and seize the vehicle without more. See Stanek, *supra* note 13, at 1240-41 (explaining that photo enforcement programs do not implicate fourth amendment concerns). Thus, automated cameras have

2. *Photo Enforcement Statutes Are Unconstitutional Under Justice Steven's Right to Privacy Analysis in Whalen v. Roe*

Returning to the substantive due process argument introduced above, the fundamental liberty right at issue here is essentially the individual's right to control his or her own personal information. Where an individual travels in his automobile, his appearance, his personal belongings, and the need to be free from the state capturing all of the above on its cameras, justifies the need for protection against photo enforcement invasions of privacy under substantive due process.¹⁰⁴ In *Whalen v. Roe*, the Court declined to recognize the right to control personal information as fundamental under the Due Process Clause where the state maintained a database of computer files listing the names and addresses of patients that were prescribed drugs with the potential for abuse.¹⁰⁵ Significantly, Justice Stevens, for the majority, held out the possibility of recognizing, as fundamental, the right to control personal information under the Due Process Clause, given the threat inherent in the compilation of considerable amounts of personal information in government databases.¹⁰⁶

Although no constitutional right to control personal information was recognized under the due process clause in *Whalen*, a challenge to the constitutionality of photo enforcement programs provides the perfect opportunity to reconsider that result for three reasons. First, unlike *Whalen*, which dealt only

probable cause to search or seize only that which would indicate that a red-light, speeding, or toll violation has occurred. *Id.* The difference is that police officers are not limited in the way that photo enforcement is, because the former have the ability to interact with the driver, use their police training, and utilize their senses to determine whether something is amiss that gives the officer probable cause to conduct a search or seizure of the automobile. This is not so with photo enforcement. Thus, unless the search or seizure relates to the underlying action giving rise to probable cause (in these cases evidence of a red-light, speeding, or toll violation), the search or seizure will almost invariably be a violation of the driver's Fourth Amendment rights.

104. Like the Fourteenth Amendment Privileges and Immunities Clause argument above, courts will only invalidate photo enforcement statutes if they are subject to heightened scrutiny. Once again, heightened scrutiny applies only where there is discrimination against a "discrete and insular minority," or where there is infringement of a fundamental right. *Carolene Products*, 304 U.S. at 152 n.4. A right is fundamental if it is "deeply rooted in this Nation's history and tradition." *Moore*, 431 U.S. at 503.

105. *Whalen v. Roe*, 429 U.S. 589, 603-04 (1977) (holding that disclosure of private medical information is an important part of a medical practice, and the mere fact that disclosure may cast the patient in a negative light as a past drug abuser does not amount to an unconstitutional invasion of privacy).

106. *See id.* at 605 (stating, in pertinent part, that "the enforcement of criminal laws requires the orderly preservation of great quantities of information, much of which is personal in character and potentially embarrassing or harmful if disclosed").

with the intrusiveness of the database itself, photo enforcement programs are highly intrusive even before any personal information is entered into a database.¹⁰⁷ Second, *Whalen* was decided in 1977; thirty years later, the potential for privacy intrusion via technologically advanced surveillance equipment has increased exponentially; photo enforcement programs are only one example.¹⁰⁸ Third, unlike the database in *Whalen*,¹⁰⁹ photo enforcement programs have been notorious for compilation errors and disclosure flaws in the administration of the databases¹¹⁰ because photo enforcement programs cannot identify the driver of

107. Photo enforcement has the capability of monitoring where you go, who you're with, what you are wearing, and what is in your car. Although patients must first disclose information to their doctors prior to its entry into a government database, this system of disclosure is much less intrusive than photo enforcement "disclosures" for two reasons. First, disclosures to physicians are voluntary. Second, disclosures to physicians are confidential. Although the physicians in *Whalen* were required by law to disclose (to the database) information about prescriptions given to their patients that have the potential for abuse, the disclosures remained accessible only by "doctors, hospital personnel, insurance companies, and public health agencies." *Id.* at 602. On the other hand, photo enforcement "disclosures," depending on the enabling statute, may be accessible by the general public simply by filling out a Freedom of Information Act request. See Freedom of Information Act, 5 U.S.C. § 552(a)(2)(D) (1996):

Each agency, in accordance with published rules, shall make available for public inspection and copying . . . copies of all records, regardless of form or format, which have been released to any person under paragraph (3) and which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records.

Agencies may refuse disclosure if "specifically exempted from disclosure by statute." *Id.* § 552(b)(3). There is also a broad exception to the general rule of disclosure for "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information could, [*inter alia*], reasonably be expected to constitute an unwarranted invasion of personal privacy." *Id.* § 552(b)(7)(C). Regardless of the particular exception invoked, the burden is on the government to justify withholding the requested document, not the requesting party. *Id.* § 552(b). Without a statutory provision exempting disclosure, as in the California statute, it is easier for the government to simply disclose than to use up precious time and resources arguing that the request falls under one of the exceptions.

108. See generally Werbach, *supra* note 3 (discussing technology expansion in the last few decades).

109. See *Whalen*, 429 U.S. at 605-06 (discussing that a different situation would be before the Court if evidence of unwarranted disclosures of personal information were present, or if the database itself did not contain security provisions that rendered it free from compromise).

110. See Bryant, *supra* note 12 (noting that the inability of photo enforcement to identify the driver, the concomitant burden of placing the burden on the innocent driver to clear the ticket, and the commonly cited shortcoming that tickets are frequently lost or severely delayed, all add to the flawed ticketing process that photo enforcement programs employ).

the automobile and therefore hold a vehicles' registered owner responsible for the violation.¹¹¹ This makes it difficult for the registered owner to control his or her personal information, since not even the state knows whose information is in its database.¹¹² Disclosing sensitive personal information is one thing, but disclosing sensitive, inaccurate information is quite another.

Compilation flaws are also prevalent in photo enforcement programs because of the unreliability of the system itself. Individuals are sometimes ticketed for forces beyond their control, including malfunctioning of the particular photo enforcement unit, following in a funeral procession, maneuvering to avoid emergency vehicles, or car theft.¹¹³ These incidences all add to compilation anomalies that preclude individuals from exercising their right to control information about their personal lives and which provide support for the argument that the right to control information, first raised in *Whalen*, now has a much stronger leg upon which to stand.

IV. PROPOSAL

Although photo enforcement statutes should be held unconstitutional, courts will incur several barriers in invalidating these statutes. If courts are able to invalidate these laws, this Comment proposes other, more effective alternatives to using automated cameras. However, if courts are unable to invalidate these statutes, then states should implement procedural safeguards to ensure that a driver's rights are protected.

A. Barriers to Photo Enforcement Statutes' Complete Repeal by States and Localities Where They Are in Effect

1. Separation of Powers

Photo enforcement is bad policy.¹¹⁴ This assertion alone,

111. See Photocop, *supra* note 6 (explaining the policy arguments against photo enforcement of traffic laws); see also National Motorist's Association, *supra* note 16 (listing additional policy arguments against photo enforcement of traffic laws).

112. This situation is exacerbated in "home-rule" jurisdictions subject to Freedom of Information Act requests by parties seeking disclosure of photo enforced violations. See Freedom of Information Act, 5 U.S.C. § 552 (1996) (laying out the general rule of disclosure); see also *supra* note 107 and accompanying text (discussing the lack of incentive for local government to do anything but disclose).

113. See *Agomo v. Fenty*, 916 A. 2d 181, 186 (D.C. 2009) (noting that while there are some statutes that provide for exceptions based on funeral processions, emergency vehicles, and reported stolen cars, there are others that do not).

114. See National Motorist's Association, *supra* note 16 (listing the many

however, even if capable of a black and white determination, does not make photo enforcement unconstitutional. In a democratic society, policy decisions reflected in law must be determined through the political process, not the courts. Thus, in the context of construing a state photo enforcement law under the U.S. Constitution, the role of the courts must be limited to determining whether the state statute violates a provision of the Constitution. Carrying out that role necessarily requires balancing two competing interests. Courts must be careful to respect their traditional role under our system of checks and balances by deferring to the legislature on matters of policy. But, equally important, courts must not abrogate their responsibility to uphold the Constitution in doing so. Thus, although photo enforcement may be bad policy, courts can invalidate statutes only if they offend constitutional principles.

Invalidation of statutes restricting the exercise of fundamental rights upon strict judicial review does not raise serious separation of powers concerns.¹¹⁵ Of course, the separation of powers issue can be wholly avoided if the legislature repeals the statute itself. Although, as mentioned before, some jurisdictions have done exactly that,¹¹⁶ others have been blinded by the revenue-making capabilities of photo enforcement and will continue to “milk the system” until it is politically inexpedient to do so. For the time being, it is unlikely that state and local government will repeal their own photo enforcement statutes. Therefore, the fate of photo enforcement lies with the courts. Because making and enforcing traffic laws has traditionally been a police power reserved to the states, a federal court decision interpreting the Constitution to forbid photo enforcement raises important questions of federalism.

2. Federalism

The virtues of federalism are numerous and varied. Principal among them is the idea that different states have different

objections to photo enforcement programs).

115. See *Carolene Products*, 304 U.S. at 153 n.4 (holding that government action which restricts the exercise of a fundamental right is subject to a heightened form of judicial review). Because the right to interstate travel and the right to control information are fundamental liberties, courts have broad authority to scrutinize the constitutionality of government actions interfering with their use. *Id.* It is unlikely that a separation of powers problem will emerge in this context.

116. See Stanton, *supra* note 11 (explaining that Alaska suspended its program because of its ineffectiveness in deterring speeding, its failure to generate revenue, and its overall unpopularity among the public); see also Harrie, *supra* note 10 (explaining that the Utah legislature did not ban photo enforcement completely, but restricted it to school zones, effectively ending its use).

problems that require different techniques to solve them. A federal ban on a particular method of accomplishing an important state interest fails to adequately consider the magnitude of the problem or the method's success rate in any given jurisdiction. It is clear that a federal court decision declaring photo enforcement unconstitutional would subvert principles of federalism. Nonetheless, such a decision is required because photo enforcement severely undermines the historical rights to privacy and travel that this country has provided, and because the states have at their disposal numerous, equally effective, alternatives for dealing with the problem of traffic safety.¹¹⁷ For these reasons, the use of photo enforcement technology to enforce traffic laws should be abolished.¹¹⁸ There are a number of alternative safety measures that are just as effective at reducing red-light, speed, and toll violations, but without the negative side-effects of photo enforcement.

B. Solutions to the Problem of Photo Enforcement (Other Than

117. Another reason a federal ban on photo enforcement programs is in the nation's best interests, despite its subversion of our federalist system, is because this kind of technology represents a slippery slope. Every time a court upholds the use of a new, privacy depriving technological contraption (like photo enforcement) on the grounds that it meets rational basis review, an individual's travel and privacy rights are eroded, and the precedents set make it harder and harder to reverse the course. For this reason, a court must apply heightened review of laws that utilize travel or privacy-restricting technologies that are not sufficiently narrowly tailored. The challenge of photo enforcement technology under the Constitution is the last best chance to reverse the course of unbridled legislative power to enact liberty-depriving laws, reviewed with unthinking deference by the courts.

118. Pragmatically, some drastically limited form of photo enforcement which neither burdens individual privacy nor interstate travel rights would be ideal. Government authorities that have implemented photo enforcement have done so at great public expense, and a complete ban on its use would likely cost the public a substantial sum of money. See Steven T. Naumchik, *Stop! Photographic Enforcement of Red Lights*, 30 MCGEORGE L. REV. 833, 848-49 (1999) (stating the high costs associated with photo enforcement cameras in California). Although the cameras are in most cases leased from the private contractor, the administrative and start-up costs of implementation would be difficult to recover and not easily translatable to other government uses. *Id.* Although monetary concerns are important, they are subordinate to concerns of privacy and travel rights. At the very least, any system employing automated cameras should be programmed to preclude capturing certain subject matter, including the vehicle itself, the driver, the passenger, and any other intimate details of the vehicle's interior. Essentially anything apart from the vehicle's license plate should be precluded. Additionally, no penalties, either civil (monetary) or criminal (points) should attach for a violation of a photo enforcement program. Finally, the confidentiality of the violations should be preserved for all but the most exceptional circumstances. These safeguards would adequately and constitutionally serve the interests of personal privacy and interstate travel, while recycling and reusing important public resources.

*Complete Abolishment)**1. Photo Enforcement Alternatives*

The National Motorist's Association ("NMA") is one of the biggest supporters of ending government's reliance on photo enforcement as a traffic safety measure.¹¹⁹ Particularly in the red-light camera context, the NMA identifies a host of options that have proven to be extremely effective in reducing accidents caused by red-light violations, including: (1) increasing yellow-light time;¹²⁰ (2) adding a clearance interval (or a longer clearance interval) after a light turns red;¹²¹ (3) making traffic lights more visible;¹²² (4) improving intersections for motorists;¹²³ and (5) retiming traffic signals.¹²⁴

Additionally, there are alternatives to using cameras for enforcing speed and toll violations, including mounted or stand-

119. See National Motorist Association, *supra* note 16 (stating that the National Motorists Association opposes the use of cameras to issue tickets).

120. *Id.* The NMA cites two studies conducted by the Texas Transportation Institute and the Virginia Department of Transportation finding that even a "modestly longer yellow light" significantly decreases red-light violations and accidents at intersections where in effect. *Id.* The NMA also cites research refuting those against using longer yellow lights because drivers grow accustomed to them. *Id.* Even if drivers grow accustomed to them, red-light camera technology is subject to a similar critique.

121. *Id.* An all-red clearance interval, a period where the lights in all directions at an intersection are red, has been found to be an effective way to reduce traffic accidents caused by red-light violations. *Id.* The NMA cites a project conducted by the Automobile Association of America ("AAA") of Michigan and the city of Detroit for this proposition. *Id.* The project consisted of implementing an all-red clearance interval, among other non-camera techniques, at high-crash intersections in Detroit. *Id.* "During the first twenty-seven months of the [project], crashes decreased by forty-seven percent with a fifty percent reduction in injuries." *Id.* Red-light violations also decreased by fifty percent during this period; no red-light cameras were utilized to achieve these results. *Id.*

122. *Id.* This improvement was also made to the traffic lights at the high-risk intersections studied during the AAA of Michigan project identified above. *Id.* AAA of Michigan, in conjunction with the City of Detroit made the actual lenses of the traffic lights fifty percent larger so that they would be brighter and more visible. *Id.* Other improvements to increase the visibility of traffic lights themselves included removal of any obstructions (signs, trees, cameras) that make the light difficult to see, and installing devices that eliminate glare caused by the sun. *Id.*

123. *Id.* Some high-risk intersections are denominated as such as a result of the dilapidated condition of the roadways. *Id.* Making expenditures to improve signage, roadway pavement markers, and turn-lanes would not only help maintain the character of the neighborhood, but, as indicated by the above study, have profound effects on traffic safety and accident reduction. *Id.*

124. *Id.* Retiming traffic signals to reduce the number of red-lights that a driver encounters during a trip will reduce red-light violations. *Id.* Retiming traffic signals has also been found to reduce traffic congestion, travel time, gas consumption, and road rage. *Id.*

alone speed trailers, additional patrolling officers, installation of speed humps, and increased expenditures on defensive-driving education. The use of speed monitors, which utilize radar technology to determine the speed of an approaching vehicle, and then display that speed to the driver, have also been found to be very effective in deterring speeding.¹²⁵

2. *Additional Procedural Safeguards for Existing Photo Enforcement Statutes*

It is likely that the government will continue to use photo enforcement technology to enforce its traffic laws. In the meantime, additional procedural safeguards should be in place to ensure the fairness of the system to as many drivers as possible. This includes, at a minimum, California-like notice requirements that inform drivers that photo enforcement is used in the state.¹²⁶ It also includes limiting the subject matter of the photographs taken to minimize disclosures of potentially sensitive information.¹²⁷ Further, photo enforcement systems should be administered exclusively by the government to avoid any claims of impropriety and to avoid situations where government actors could be prone to mischief.¹²⁸

Next, the “innocent owner” problem must be mitigated to the extent possible under a photo enforcement process. This includes providing the registered owner of a vehicle adequate opportunity to contest liability through an “affidavit of non-responsibility” and recognizing a wide array of acceptable excuses under the law, including: “I wasn’t driving.” Finally, the system should not be set up as a means by which to assess points or other criminal penalties against the registered owner.

Jurisdictions contemplating enacting photo enforcement programs should incorporate these safeguards, not only to protect against the multitude of legal claims that accompany their use,

125. *See id.* (noting that the AAA conducted a study in 1995 which established that photo enforcement technology has been no more effective than speed trailers in reducing speed violations, and its use is far less cost-effective).

126. *See* CAL. VEH. CODE § 21455.5(a)(1) (2008) (requiring that the governmental agency “identify the system by signs that clearly indicate the system’s presence and are visible to traffic approaching from all directions, or posts signs at all major entrances to the city, including, at a minimum, freeways, bridges, and state highway routes”).

127. Disclosure of photographs, tickets, and other information compiled through the administration of a photo enforcement program should be limited to exceptional situations in which the party requesting the documents shows substantial need.

128. *See* CAL. VEH. CODE § 21455.5(c) (authorizing “only a governmental agency, in cooperation with a law enforcement agency, [to operate] an automated enforcement system”).

but also to ensure a measure of fairness in a law enforcement device that is fundamentally unfair.

V. CONCLUSION

Despite the number of legal challenges to photo enforcement, courts thus far have been unwilling to intervene and invalidate photo enforcement statutes.¹²⁹ Similarly, the legislatures themselves have been, for the most part, unwilling to repeal photo enforcement once implemented.¹³⁰ Unless the proposed new constitutional attack is successful, the preservation of fundamental liberty rights must be procured the old-fashioned way. That is, the voice of opposition must be brought to bear against those who support laws which flout our most cherished rights. Politicians must know that continued adherence to liberty-restricting laws do not only carry stark consequences for the Constitution, but stark consequences for their re-election bids as well.

129. This is a result of the deference given to the legislature, as long as it satisfies rational basis review. Under the “levels of scrutiny” test, the governing authority need only utter the words “public safety” in response to a plaintiff’s attempt to prove a less noble, but equally probable purpose for the enactment of the law, and the government will win. *See, e.g., Pennell v. City of Sane Jose*, 485 U.S. 1, 14 (1988) (finding the safety and protection of tenants by landlords to be a legitimate purpose when a city ordinance allowed certain tenants to be treated differently than others); *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 160, 175 (1980) (noting that social and economic laws will be judged under the rational basis review test and will not be found to violate the Constitution simply because they are imperfect, so long as there is some reasonable basis for the statute); *Allied Stores v. Bowers*, 358 U.S. 522, 528 (1959) (stating that it is not important for a state legislature to declare its purpose, motive or policy behind enacting a certain law because under rational basis, any legitimate interest will be upheld as constitutional); *Williamson v. Lee Optical*, 348 U.S. 483, 487 (1955) (holding that the proper avenue to contest a new law is not the courts, but through the legislature since it is not unconstitutional under rational basis review); *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952) (stating that a court will not overturn a statute that does not burden a suspect class or a fundamental interest, unless it fails the very deferential standard of rational-basis review). This is the case in almost every case construing a photo enforcement statute under the Constitution. *See, e.g., Idris*, 2008 U.S. Dist. LEXIS 3933, at *19 (rejecting the plaintiff’s substantive due process claim because he was unable to rebut the presumption of validity with which the courts review statutes under rational-basis review). This will change if courts agree that such statutes impinge upon fundamental rights.

130. This is a result of the less noble purpose for the enactment of photo enforcement law: money. *See Shannon, supra* note 4, at 613 (arguing that “while camera proponents often tout the safety benefits of cameras, the evidence strongly suggests that many municipalities use them to generate revenue”).

