I. INTRODUCTION

The rise of American privacy law over the years reflects the profound importance of this fundamental value in modern society. The notion of citizens living under surveillance or governmental interference with personal decisions and behavior runs counter to democratic principles and traditions. Since 1890, when a New York court first recognized a legal right to privacy, privacy law has grown vast and complex. Although privacy law developed slowly during the 20th century, by the late 1970s, the right to privacy stretched broadly across the landscapes of tort law, statutory law, and the Bill of Rights.

The rise of American privacy law over the years reflects the profound importance of this fundamental value in modern society. The notion of citizens living under surveillance or governmental interference with personal decisions and behavior runs counter to democratic principles and traditions. Since 1890, when a New York court first recognized a legal right to privacy, privacy law has grown vast and complex. Although privacy law developed slowly during the 20th century, by the late 1970s, the right to privacy stretched broadly across the landscapes of tort law, statutory law, and the Bill of Rights.

1. Martin E. Halstuk, Ph.D.*

I. INTRODUCTION

The rise of American privacy law over the years reflects the profound importance of this fundamental value in modern society. The notion of citizens living under surveillance or governmental interference with personal decisions and behavior runs counter to democratic principles and traditions. Since 1890, when a New York court first recognized a legal right to privacy, privacy law has grown vast and complex. Although privacy law developed slowly during the 20th century, by the late 1970s, the right to privacy stretched broadly across the landscapes of tort law, statutory law, and the Bill of Rights.

* The author (Ph.D., University of Florida; M.A., University of Florida; B.A., Loyola University, Chicago) is an assistant professor of communications in the College of Communications at The Pennsylvania State University and a Senior Fellow of The Pennsylvania Center for the First Amendment.

1 See Katz v. United States, 389 U.S. 347, 352 (1967) (a person who speaks on the phone is "surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world."); Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 559, 559 (1985) ("There is necessarily, and within suitably defined areas, a . . . freedom not to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect.") (cititing Estate of Hemingway v. Random House, Inc., 244 N.E.2d 250, 255 (N.Y. 1968)). See also President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 202 (1967).

2 In a democratic society privacy of communication is essential if citizens are to think and act creatively and constructively. Fear or suspicion that one's speech is being monitored by a stranger, even without the reality of such activity, can have a seriously inhibiting effect upon the willingness to voice critical and constructive ideas.

3 Individual rights to "zones of privacy" have origins in the Bill of Rights. Griswold v. Connecticut, 381 U.S. 479, 484 (1965). Lawrence H. Tribe, leading constitutional law scholar, observed that "the [F]ourth [A]mendment, more than any other explicit constitutional provision reflects the existence of an individual's right to privacy." Lawrence H. Tribe, American Constitutional Law 1390 (1988) [hereinafter Tribe]. The language of 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.

4 See Don R. Pember, The Burgeoning Scope of "Access Privacy" and the Portent for a Free Press, 64 Iowa L. Rev. 1155, 1156 (1979) [hereinafter Pember]. Tortious claims for invasion of privacy have been recognized in state statutes and in the common law and have given rise to four civil causes of action: intrusion, appropriation, publicity about private information and false light. See Keeton, supra note 3, at 849-68.

5 In 1903, New York became the first state to legislate a right to privacy when it enacted a statute that prohibited the exploitation of an individual for commercial purposes. There are numerous examples of federal privacy statutes. See, e.g., the Drivers Privacy Protection Act of 1994, 18 U.S.C. §2721 (2000) (restricting the sale of information compiled by state departments of motor vehicles to marketing and advertising companies); the Video Privacy Protection Act of 1988, 18 U.S.C. §2710 (2000) (restricting disclosure by video-service providers of individual consumer uses and customers' per-
Over the past generation, the term "privacy" has captured the American imagination as never before. Unprecedented advances in information technology make it possible for strangers to pry electronically into our lives and for corporations and the government to accumulate vast stores of personally identifiable information; the Privacy Act of 1974, 5 U.S.C. §552a (2000) (restraining the misuse of personal data compiled by the federal government); the Freedom of Information Act ("FOIA") of 1966, 5 U.S.C. §552 (2000) (permitting federal executive branch agencies to deny FOIA requests for records based on specific privacy exemptions found in the Act). See also L.A. Police Dep't v. United Reporting Publ'g Corp., 528 U.S. 32 (1999) (holding that a California statute, which closes access to police records, does not violate the First Amendment when the request was by companies that sought to use the information for commercial purposes).

See, e.g., Bartnicki v. Vopper, 532 U.S. 514 (2001) (holding that state and federal wiretap statutes may not bar news media disclosures of a conversation between public officials that was illegally taped by a third party); Wilson v. Layne, 526 U.S. 603 (1999) (holding that law enforcement agencies violate an individual's Fourth Amendment privacy rights when officers permit news media representatives to accompany officers into a home during execution of an arrest warrant); Hanlon v. Berger, 526 U.S. 808 (1999) (holding that law enforcement officers or personnel violate an individual's Fourth Amendment privacy rights when they permit news media representatives to accompany officers onto private property during execution of a search warrant); Whalen v. Roe, 429 U.S. 589 (1977) (upholding the constitutionality of a New York statute that required physicians to report to the state identifying information of individuals prescribed certain drugs that had a potential for abuse); Nixon v. Adm'r of Gen. Serv., 433 U.S. 425 (1977) (upholding the constitutionality of a federal law that required former President Nixon to turn over his personal papers and other materials, such as tape recordings, to federal archivists for review to determine if they should be made public); Roe v. Wade, 410 U.S. 115 (1973) (holding that the Constitution does not permit the government to prohibit a woman from terminating her pregnancy before the fetus is viable); Stanford v. Georgia, 394 U.S. 557 (1969) (holding that the "mere private possession of obscene matter cannot constitutionally be made a crime"); Griswold v. Connecticut, 381 U.S. 479 (1965) (striking down an unconstitutional a Connecticut statute that prohibited the use and distribution of contraceptives).


See infra note 6.

See, e.g., Sanders v. American Broad. Cos., Inc., 978 P.2d 67 (Cal. 1999) (holding that a plaintiff can sue a news program for intrusion for hidden camera taping inside a psychic telemarketing business under news media investigation); Shulman v. Group W Prods., 955 P.2d 469 (Cal. 1998) (holding that an auto accident victim can bring a claim for intrusion against a television program that filmed her rescue without her consent).


11 Fear of disclosures of this kind of information, heightened by media reports about computer hacking and identity theft, have enhanced the acceptability of permitting the government and the courts to control the flow of information about citizens of the United States. Indeed, the 107th Congress considered at least forty privacy bills, ranging from spyware control and telemarketing practices, to student privacy and video-voyeurism protection.

12 James T. O'Reilly, author of the leading practice guide on the Freedom of Information Act and the Privacy Act, observed that to oppose efforts to "protect" or "enforce" privacy rights is tantamount to being against "apple pie and motherhood." JAMES T. O'REILLY, FEDERAL INFORMATION DISCLOSURE: PROCEDURES, FORMS, AND THE LAW §20.01, 20-2 (1999).

The difficulty is that as the ambit of privacy law expands, the amount of information available to the public diminishes, thus blocking access to potentially valuable information that the electorate may need to make informed decisions about self-rule. Striking an appropriate balance between an individual's need for privacy and society's need for information is necessary to preserve the accountability principle of democracy. As privacy pioneer Alan F. Westin observed in his seminal 1967 work, Privacy and Freedom, democracies must "set a balance between government's organizational needs for preparatory and institutional privacy and the need of the press, interest groups, and other governmental agencies for the knowledge of government operations required to keep government conduct responsible." The purpose of this article is to examine how the rise of constitutional privacy is affecting press and public access to information under the government's control. Part II outlines the development of constitutionally protected personal and behavioral privacy. In addition, Part II discusses how the Supreme Court has applied this form of constitutional privacy to restrict certain longtime newsgathering practices when balanced against the public's legitimate interest in the information. Part III examines the impact of information privacy on public access to government records. This section analyzes the Sixth Circuit Court of Appeals' decision that made information privacy grounds to change an open-records law enacted by the Ohio legislature. Part IV discusses the latest development in information privacy, a 2001 Supreme Court decision that recognized for the first time a constitutional interest in private facts in a press context. Part V offers examples of current statutory and regulatory trends that illustrate recent official actions taken to strengthen privacy law and also reflects an increasing willingness to trade transparent governance for enhanced privacy protection. Part VI concludes that a special problem arises when constitutional privacy is raised to block access to governmental operations or records. Constitutional privacy trumps the federal or state laws that may allow access to information, thereby circumventing the benefit of judicial balancing that would consider whether the democratic value of access (a public right to know for the purposes of self-rule and to ensure accountability) outweighs the individual value in privacy (one's right to control information about oneself).

II. THE RISE OF CONSTITUTIONAL PRIVACY

A. Personal and Behavioral Privacy Interests

Constitutional scholar Thomas I. Emerson has expressed a modern and widely accepted meaning of the right of privacy:

"Privacy [law] attempts to draw a line between the individual and the collective, between self and society. It seeks to assure the individual a zone in which to be an individual, not a member of the community. In that zone he can think his own thoughts, have his own secrets, live his own life, reveal only what he wants to the outside world."

According to the Supreme Court, privacy rights have roots that can be traced back to the Bill of Rights and the concept of personal liberty embodied in the Fourteenth Amendment. A legal right to privacy was first recognized in 1890 when a New York court responded to Samuel D. Warren's and Louis D. Brandeis' famed Harvard Law Review article, which called for privacy protection and a "right to be let alone." The two Boston law partners wrote the article after a society column in the Boston Saturday Evening Gazette carried an item that described a lavish breakfast party hosted by Warren for his daughter's wedding. Warren and Brandeis were outraged that a gossip column...
would disclose a private family event. In their article they declared that news reports by the popular yellow press too often violated the privacy of individuals. "The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world," Warren and Brandeis wrote, "and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual." 26

Although the term "privacy" cannot be found in the Constitution, over time the Supreme Court has recognized an implicit constitutional protection for a limited right to privacy. 27 The Court first found an implied right of privacy in the Constitution in 1965 when it held that a state government may not interfere with a married couple's right to use contraceptives. 28 In Griswold v. Connecticut, 29 the Court struck down a Connecticut statute that prohibited the sale of contraceptive devices. The Court held the state law violated a right of privacy implied in the Bill of Rights, specifically in the First, Third, Fourth, Fifth and Ninth Amendments. 30 Collectively, these Amendments establish "zones of privacy" where individuals are protected from governmental intrusion. 31 Justice William O. Douglas, writing for the Court, said "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy." 32

The Court reinforced this implied constitutional right of privacy, which protects individuals from incursions by the state, in 1973 in Roe v. Wade, 33 when the justices struck down a Texas law making abortion illegal except to save the life of the mother. 34 Justice Harry A. Blackmun, who wrote the opinion for the Court, included Fourteenth Amendment protections for fundamental liberties among those penumbras of privacy identified in Griswold. 35 In a line of cases relying on Griswold and Roe, the Court over the years also has established constitutional protection for intimately personal and autonomous decisions in the areas of sexual relations, 36 marriage, 37 child rearing and education. 38

The Court's recognition of privacy protection in these rulings reflects a belief that governmental incursions into certain areas of private life and personal decisions are contrary to American traditions and law. A separate theory of privacy, also grounded in personal and behavioral privacy deriving from Griswold, but focusing instead on Fourth Amendment interests, emerged in a series of 1999 cases concerning governmental cooperation with journalists in search of news stories. 39

B. FOURTH AMENDMENT PRIVACY AND FREEDOM OF THE PRESS

Law enforcement authorities were deemed in Wilson v. Layne to have violated citizens' Fourth Amendment rights to privacy by permitting journalists to have access to a private residence during

---

26 Id.
28 Griswold, 381 U.S. at 485. According to Lawrence Tribe, Griswold represents, among other ideas, a rule against cramped construction and permits an implied right of privacy that can be found in the Constitution's "spirit and structure." Tribe, supra note 2, at 1908-09.
29 Griswold, 381 U.S. at 485.
30 Id. at 484.
31 Id.
32 Id. (internal citations omitted).
34 Id. at 117-18, 152-54.
35 Id. at 152-53.
36 See Eisenstadt v. Baird, 405 U.S. 438, 453-55 (1972) (expanding sexual privacy by striking down as unconstitutional a Massachusetts statute that prohibited distribution of contraceptives to unmarried individuals). But see Bowers v. Hardwick, 478 U.S. 186, 190-92 (1986) (holding that the right to privacy under the Constitution does not include a right for consenting adults to engage in homosexual activity, even in the privacy of their homes).
37 See Loving v. Virginia, 388 U.S. 1, 12 (1967) (recognizing marriage as a fundamental right and striking down as unconstitutional a Virginia statute that prohibited a white person from marrying anyone other than another white person).
38 See Wisconsin v. Yoder, 406 U.S. 205, 232-34 (1972) (holding that Amish parents had a constitutional right, based on their right to control their children and their religious rights, to exempt their children from a Wisconsin compulsory school-attendance law); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1929) (striking down as unconstitutional an Oregon law that required children to attend public schools); Meyer v. Nebraska, 262 U.S. 390, 401-02 (1923) (striking down as unconstitutional a Nebraska statute that prohibited teaching in any language other than English on grounds that the law violated the rights of parents to make decisions for their children).
an authorized search for a fugitive, and in *Lauro v. City of New York*, for arranging a "perp walk" so journalists could film a criminal suspect for a news program. In a third case, *Hanlon v. Berger*, law enforcement authorities were held in violation of the Fourth Amendment for allowing CNN reporters to accompany them onto privately owned land during a criminal investigation. However, they were entitled to the defense of qualified immunity.

Several years later, Chief Justice Warren Burger explicitly acknowledged the link between the Fourth Amendment and personal/behavioral privacy, writing that "[t]he Constitution extends special safeguards to the privacy of the home, just as it protects other special privacy rights such as those of marriage, procreation, motherhood, child rearing and education." The Fourth Amendment concept of privacy that was raised in the aforementioned three cases served to block time-honored journalistic newsgathering practices. In *Wilson*, the Supreme Court unanimously held that law enforcement officers violated privacy rights implicit in the Fourth Amendment when they permitted news reporters to accompany them into a home during the execution of a search warrant.

The events that prompted the suit began with an early morning raid by U.S. Federal Marshals on a home in Montgomery County, Maryland, that was believed to be the residence of a fugitive named Dominic Wilson. Wilson was a target of "Operation Gunsmoke," a national crackdown on dangerous criminals who were wanted for serious drug offenses and violent felonies. A Gunsmoke team of U.S. Marshals and local police raided the residence where Wilson was believed to be hiding on April 16, 1992. Officers were accompanied by a reporter and photographer from *The Washington Post*. These so-called press "ride-alongs" were a common and longstanding practice in which news reporters accompanied law enforcement officials on arrests and property searches.

The occupants of the home, Charles and Geraldine Wilson, the parents of the suspect, were in bed when they heard police enter the residence. Charles Wilson investigated the situation while still dressed in his sleepwear. When he saw several men in street clothes brandishing guns, he angrily demanded that they explain what they were doing in his house. Believing that Charles Wilson was the suspect, officers wrestled him to the floor. After Charles Wilson's identity was determined, the Gunsmoke team and the *Washington Post* journalists left. During the raid, the *Washington Post* photographer took numerous photographs, and the reporter observed the confrontation between officers and Charles Wilson.

The Wilsons brought suit against the federal government in U.S. District Court on a claim that their Fourth Amendment privacy rights were violated. The district court denied a motion for summary judgment filed by the U.S. Marshal's Office and the Montgomery County Sheriff's Department. On appeal, the Third Circuit ruled that the officers had a "qualified immunity" from damages because the question of "media presence during a police entry into a residence" as a violation of the Fourth Amendment had never been clearly established.

The U.S. Supreme Court upheld the Third Circuit's ruling, but the Court also considered the Fourth Amendment question, which the appeals
court had sidestepped in its ruling. The Court held that "it is a violation of the Fourth Amendment for police to bring members of the media or other third parties into a home during the execution of a warrant when presence of the third parties" was not necessary to aid in the warrant's execution. The Court acknowledged that "the constitutional question presented" in the case was "by no means open and shut." Recognizing that "[a]ccurate media coverage of police activities serves an important public purpose," and "ride-alongs" were a common police practice, the Court observed, however, that privacy rights in one's home have a tradition that can be traced back to 1604 when an English court made the declaration that the "house of every one is to him as his castle and fortress." The Court said the Fourth Amendment "embodies this centuries-old principle of respect for the privacy of the home." Although the officers had a warrant that lawfully permitted them to enter the Wilsons' home, "it does not necessarily follow that they were entitled to bring a newspaper reporter and a photographer with them." Reasoning that the "presence of reporters inside the home was not related to the objectives of the authorized intrusion" — the arrest of Dominic Wilson — the Court concluded that police violated the Fourth Amendment rights of the fugitive's parents.

In deciding a similar privacy-rights issue at the same time as Wilson, the Court ruled that a rancher's Fourth Amendment rights were violated when CNN joined federal agents who raided a 75,000-acre ranch in Montana. In Hanlon v. Berger, the Court held that U.S. Fish and Wildlife Service agents, who executed a search warrant on a rancher suspected of killing eagles, violated the rancher's constitutional rights because agents permitted a CNN news crew to accompany them on the raid. The Wildlife Service had agreed to give CNN exclusive rights to the story. A CNN news crew joined the agents when the warrant was served and also filmed the search for evidence on the ranch's property and outbuildings. The news crew did not enter the Berger's residence, but the lead agent who entered the home of Paul Berger wore a transmitter so that the crew could hear the conversation between the agent and Berger. The Court concluded that the facts alleged in Berger constituted a Fourth Amendment violation as established under Wilson. However, the Court also held that the U.S. Fish and Wildlife Service was protected from civil liability under the "qualified immunity doctrine" — they were law enforcement officers serving a properly executed search warrant. CNN did not qualify for such protection, however, and thus it was civilly liable for damages for intrusion even though its photographers accompanied the agents with the agents' permission and cooperation.

The Fourth Amendment principle of privacy also was successfully invoked in a 1999 news media case concerning a New York "perp walk." A "perp walk" is a police term that refers to escorting a criminal suspect outside a precinct station for the news media. In Lauro v. City of New York, the court found that a burglary suspect's privacy rights were violated when police took him on a "perp walk," which was filmed and later broadcast by a local television station. John Lauro, Jr., a Manhattan doorman, had been accused of burglarizing a residence in the building where he worked while the tenants were on vacation in September 1995. The alleged burglary took place while Lauro was checking the unit at the request of the tenant, who had asked Lauro to drop off mail and water plants. Unknown to Lauro, the tenant had set up a hidden baby camera that taped Lauro's movements in the apartment. After the tenant returned, he viewed the twenty-minute tape and saw Lauro looking in several drawers.

56 Id. at 609-11.
57 Id. at 614.
58 Id. at 615.
59 Id. at 615-16.
60 Id. at 609-10 (citing Semayne's Case, 77 Eng. Rep. 194, 5 Co. Rep. 91a, 91b, 195 (K.B. 1604)). See also 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 223 (Wayne Morrison ed., Cavendish Pub'g Ltd. 2001) (1765).
61 Wilson, 526 U.S. at 610.
62 Id. at 611.
63 Id.
64 Hanlon, 526 U.S. at 809.

65 Id. The U.S. Fish and Wildlife Service had obtained the warrant for the ranch due to the owner's unlawful taking of wildlife. Id.
66 Id.
68 Id. at 357.
69 Id. at 354.
70 Id. at 354-55, 357.
71 Id. at 355.
72 Id.
in the unit on different occasions. The tenant sold the tape to New York’s Fox 5 News for $200 and then filed burglary charges against Lauro with the New York police.

After Lauro’s arrest, a local television station asked the police to take him on a “perp walk” outside the precinct station. Journalists often are notified of a “perp walk” in advance by police seeking publicity in an arrest; sometimes, “perp walks” are staged at the request of the news media, usually local television stations in search of easy film footage to accompany televised news reports. Lauro’s “perp walk” was requested by Fox 5 News, which later filmed a handcuffed Lauro as officers took him from a police cruiser into the station. That footage was later broadcast on the news program, along with the baby-camera footage of Lauro rifling through the apartment. Lauro brought suit against the City of New York, claiming the “perp walk” violated his Fourth Amendment rights. The District Court for the Southern District of New York held that police violated Lauro’s privacy rights under the Fourth Amendment, which prohibits “unreasonable searches and seizures.” The district court said the filming and publication of Lauro’s image during the “perp walk” was an unlawful seizure of his “image” and invaded the suspect’s privacy. The court reasoned that in addition to one’s person and residence, illegal seizures under the Fourth Amendment also apply to “intangibles such as plaintiff’s own image and the sound of his voice.” The court asserted further that the “perp walk” was conducted to humiliate the suspect, and it offered no legitimate law enforcement objective or justification:

In addition to the indignity of the walk itself is the fact that the police were aware that the walk was to be featured on the Fox 5 News and exposed to the entire New York metropolitan area. All this in a nation where an accused is presumed to be innocent until proven otherwise.

The cases discussed in this section are among a growing list of legal challenges in which the news media have come under attack on grounds that their newsgathering practices were impermissible. The difference is that Wilson, Hanlon and Lauro were decided on constitutional grounds, whereas other rulings have been grounded in tort and statutory jurisprudence. For example, courts have allowed a traffic accident victim to sue a television program for intrusion after the program broadcast her rescue without her consent; permitted a supermarket company to recover damages for “breach of duty of loyalty” and trespass after reporters working undercover took jobs in one of its stores and secretly filmed unsanitary conditions; allowed a psychic hotline employee to sue a TV news program after a reporter took a job as a “psychic” and secretly taped conversations on the premises of the psychic telemarketing business; and upheld a California statute that blocks access to police records by companies that seek the information for commercial purposes.

Collectively, the body of constitutional privacy law from Griswold to Hanlon represents a form of privacy that shields individuals from unwanted governmental incursions into the most deeply personal and intimate areas of people’s lives. In the period between Griswold and Hanlon, the Supreme Court also recognized that constitutional protections extend beyond personal and behavioral privacy into so-called information privacy. This form of constitutional privacy presents a new and special problem for the ability of the press to

---

73 Id. at 356.
74 Id.
75 Id. at 357.
76 Id. at 357.
77 Id. at 357.
78 Id.
79 Id. at 354.
80 Id. at 354. See also U.S. CONST. amend. IV.
81 Lauro, 389 F. Supp. 2d at 363-64.
82 Id.
83 Id.
84 Id. at 363.
85 See, e.g., Food Lion v. Capital Cities/ABC Inc., 194 F.3d 505 (4th Cir. 1999) (holding that a supermarket company can recover damages for “breach of duty of loyalty” and trespass in a case in which two ABC reporters assumed false identities to get jobs and used hidden cameras to expose un-sanitary food-handling practices); Sanders v. American Broad. Cos., Inc., 978 P.2d 67 (Cal. 1999) (holding that a plaintiff can sue a news program for intrusion for using a hidden camera that taped the inside of a psychic telemarketing business under news media investigation); Shulman v. Group W Productions, 955 P.2d 469 (Cal. 1998) (holding that an auto accident victim can bring a claim for intrusion against a TV program that filmed her rescue without her consent). For a comprehensive account of these and other cases that deal with privacy issues and media, see Clay Calvert, Voyeur Nation: Media, Privacy, and Peeping in Modern Culture (2000).
86 Shulman, 955 P.2d at 475.
87 Food Lion, 194 F.3d at 510.
88 Sanders, 978 P.2d at 69.
gather information and for the general public—
including special-interest groups, researchers, scholars, businesses and attorneys—to seek access to government-held information. As Part III will show, information privacy can be raised as a constitutionally bar to deny public access to government-held records that otherwise would be disclosable under statutory open-records laws.90

III. SHIELDING PERSONAL INFORMATION FROM DISCLOSURE

A. The Court Recognizes a Second Stream of Privacy

The Supreme Court first recognized a constitutionally protected right of information privacy in 197791 when it decided Whalen v. Roe92 and Nixon v. Administrator of General Services.93 In these two cases, the Court declared that the constitutional right to privacy, which could be outweighed by the public interest in disclosure, applied not only to individual autonomy in intimately personal matters, but also to the individual's interest in avoiding disclosure of highly personal information.94

In Whalen, the Supreme Court considered a challenge to a New York statute, which required that doctors and pharmacies provide the state with forms pertaining to prescriptions of legal, yet dangerous drugs.95 Under the law, the identifying information on these forms, including the names and addresses of patients, doctors and pharmacists, would be entered in a centralized computer database.96 The legislature passed this statute due to concerns that these drugs were being "diverted into unlawful channels."97 The law was intended to prevent individuals from stealing or revising prescriptions; to prevent unscrupulous pharmacists from filling prescriptions unlawfully; and to prevent doctors from authorizing excessive or multiple prescriptions.98 The law was challenged on privacy grounds by a group of patients and prescribing doctors who argued that the law infringed on doctor-patient confidentiality and violated one of the constitutionally protected "zones of privacy."99 The challengers argued that individuals have a right to avoid disclosure of personal matters.100

Justice John Paul Stevens, writing for a unanimous Court in Whalen,101 explicitly identified two different forms of constitutional privacy interests.102 Until Whalen, the Court had recognized only the form of personal and behavioral constitutional privacy that derived from the Griswold and Roe line of cases.103 Stevens said the constitutional right of privacy also recognizes information privacy, or the "individual's [privacy] interest in avoiding disclosure of personal matters."104 He wrote:

We are not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files. The collection of taxes, the distribution of welfare and social security benefits, the supervision of public health, the direction of our Armed Forces, and the enforcement of the criminal laws all require the orderly preservation of great quantities of information, much of which is personal in character and potentially embarrassing or harmful if disclosed.105

The Court, however, rejected the privacy argument, noting that the state had an important interest in tracking the use of potentially dangerous prescription drugs that had a history of abuse.106 Additionally, the state had taken security precautions and provided procedural safeguards to keep the database information from being deliberately or unintentionally disclosed.107 Nonetheless, Whalen remains the principal decision concerning constitutional protection of information privacy.108 The Whalen Court's recognition of consti-

90 See, e.g., Kallstrom v. City of Columbus, 136 F.3d 1055 (6th Cir. 1998).
95 Whalen, 429 U.S. at 603-44.
96 Id. at 591.
97 Id. at 591-92.
98 Id. at 592.
99 Id. at 595-96.
stitutionally protected information privacy has been followed by the Second, Third, Fifth, Sixth and Ninth Circuits. In these cases, which involved disclosure of personnel information, medical records and financial information, courts recognized that individuals have a constitutionally protected right of privacy (which must be weighed against the state's interest) not to have personal information disclosed. For example, the Sixth Circuit, relying on *Whalen*, said “[P]rivacy cases have developed along two distinct lines. The first line of cases involves the individual’s interest in independent decision making in important life-shaping matters, while the second line of cases recognizes the individual’s interest in avoiding disclosure of highly personal matters.”

Likewise, in *Nixon v. Administrator of General Services*, the Court also discussed the privacy interest in nondisclosure of personal information when it acknowledged the personal and private nature of some of President Nixon’s confidential papers, tape recordings and other materials. Nixon brought the suit to challenge the constitutionality of a federal statute that controlled public access to presidential papers. He was required under the Presidential Recordings and Materials Preservation Act (“the Act”), which was signed into law by President Ford after Nixon resigned, to submit his personal papers and recordings to the Administrator of General Services so the materials could be processed and screened to determine which ones would be subject to public access and which were personal and private and would be returned. Nixon argued he could withhold the materials under executive privilege and that the Act was a constitutional violation of the separation of powers. As the Court did in *Whalen*, the Nixon Court recognized informational privacy in nondisclosure of personal information. However, the Court ruled seven-to-two against Nixon. In an opinion written by Justice William J. Brennan, the Court held that under the circumstances in that particular case, informational privacy rights did not apply because of Nixon’s public-figure status and the high public interest in Nixon’s materials.

Although the Court did not recognize information privacy until *Whalen*, the history of this stream of privacy can be traced to issues that came before the Court several times before and after *Whalen* and *Nixon* were decided. In a 1967 wiretapping case, the Court recognized a privacy interest in an individual’s telephone conversation, declaring that the Fourth Amendment extends beyond “tangible items.” In *Katz v. United States*, one of the earliest informational privacy cases, Justice Potter Stewart, writing for the Court, clarified the privacy interest in the Fourth Amendment by declaring that it “protects people, not places.” However, in this case about an FBI wiretap of a national illegal-gambling operation, the seven-to-one majority stopped short of establishing a general right to information privacy.

Nearly a decade later, the Court specifically declined to expand privacy protection beyond those areas recognized in the *Griswold* line of cases.

---


110 See generally Kallstrom v. City of Columbus, 136 F.3d 1055 (6th Cir. 1998).


112 See generally Barry v. City of N.Y., 712 F.2d 1554 (2d Cir. 1983); Plante v. Gonzalez, 575 F.2d 1119 (5th Cir. 1978).

113 Kallstrom, 136 F.3d at 1060 (citing *Whalen*, 429 U.S. at 598-600). *Kallstrom* is an important case in this analysis, and it will be discussed in detail later in the text. In *Kallstrom*, the Sixth Circuit Court of Appeals cited *Whalen* when it held that a constitutional right of information privacy can trump the disclosure requirements in Ohio’s open records law. *Id.* at 1061-63.


115 Id. at 457 (citing *Whalen*, 429 U.S. at 599).

116 Id. at 430.


118 Nixon, 433 U.S. at 429.

119 Id. at 439-41.

120 Id. at 457.

121 Id. at 465.


123 *Katz*, 389 U.S. at 353.


125 Id. at 351.

126 See Bunker, supra note 122.

In *Paul v. Davis*, a shoplifting suspect asserted that police violated his constitutional rights when police included his photo and name on a flyer of "active shoplifters." Chief Justice Rehnquist, writing for the five-to-three majority, noted that in *Griswold* and its progeny, the Court found "limitations on the States' power to substantively regulate conduct." However, the Court concluded that the shoplifting suspect's privacy claim, contending that the state may not publicize a record of an official act such as an arrest, was "far afield from this line of decisions... and we decline to enlarge them in this manner."

In the same year that the Court decided *Paul*, the Court voted seven-to-two to reverse a Fifth Circuit decision that held that an individual's bank records could not be subpoenaed. The Fifth Circuit reasoned that the documents fell within a constitutionally protected zone of privacy. The respondent, who was tried for running a moonshine-whiskey still, was convicted, in part, on the basis of his subpoenaed bank records. The Fifth Circuit relied on the "reasonable expectation of privacy" rationale argued in *Katz*. Justice Powell, writing for the Court and reversing the court of appeals, rejected the bootlegger's reasonable expectation of privacy claim. The Court sidestepped the question of whether the bootlegger had a right of information privacy, declaring that the records were not confidential communications at all, but rather were negotiable instruments used in commercial transactions, which were voluntarily submitted to the bank and exposed to bank employees in the ordinary course of business.

Almost two decades after the *Whalen* and *Nixon* decisions, the Court held that the First Amendment protected the right of anonymity for the author of a political pamphlet. In a 1995 opinion that struck down as unconstitutional an Ohio statute that prohibited distribution of anonymous campaign literature, the Court found an implicit and constitutionally protected right of privacy in political communications. In *McIntyre v. Ohio Elections Commission*, the state argued that the statute served a state interest by providing a means to identify persons responsible for fraud and libel. In a seven-to-two opinion written by Justice John Paul Stevens, the Court stated, "The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible." As such, the privacy afforded by anonymity in political communications "exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation— and their ideas from suppression— at the hand of an intolerant society."

The right of information privacy emerged again in 1998, clashing this time with the right of public and press access to government-held information. The Sixth Circuit held that an individual's right of nondisclosure of private information also means that private information contained in a government record may be withheld, despite the fact that the record would otherwise be disclosable under a state open-records law.

B. Information Privacy Clashes with Public Access

Philosophers, legal scholars and other commentators have written extensively about the close relationship between public access to government-held information and democracy. Alexander Meiklejohn, a philosopher and educator who was a leading figure in the modern development
of democratic political theory and the First Amendment, wrote that for people to be their own rulers, it is essential that "whatever truth may become available shall be placed at the disposal of all the citizens of the community." Professor Meiklejohn believed "public discussions of public issues, together with the spreading of information and opinion bearing on those issues, must have a freedom unaided by our agents.

However, unlike the First Amendment right to publish lawfully obtained information, particularly information pertaining to governmental and public affairs, the Court has refused to recognize any superior constitutional rights for the press to gather news or for the public or press to gain access to government-held information or operations, regardless of public-interest value. In order to provide for such public access, Congress and the legislatures in all fifty states have enacted freedom of information statutes, which, to varying degrees, open government records to public inspection. The Freedom of Information Act ("FOIA") is the federal records-disclosure statute. The FOIA requires that federal executive branch agencies provide any person access to all records, unless the records fall under any one of the nine statutory exemptions. Congress created the exemptions to balance the social

---

144 See Lillian R. BeVier, An Informed Public, An Informing Press: The Search for a Constitutional Principle, 68 CAL. L. REV. 483, 503 (1980) ("The conception of democracy apparently embraced by proponents of the 'right to know' echoes the view of Alexander Meiklejohn, whose insights into the relevance of self-government to the First Amendment analysis have been of seminal importance."); Thomas I. Emerson, Legal Foundations of the Right to Know, 1976 WASH. U. L. Q. 1, 4 ("It has been suggested that the right to know be adopted as the sole, or at least the principal, basis for the constitutional protection afforded by the First Amendment. Alexander Meiklejohn is the primary source of this theory.").

145 See Meiklejohn, The First Amendment, supra note 143, at 257.

146 See NAACP v. Claiborne Hardware Co., 458 U.S. 866, 913 (1982) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.") (quoting Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964)); Carey v. Brown, 447 U.S. 455, 467 (1980) ("The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.") (quoting Stromberg v. California, 283 U.S. 359, 369 (1931)); Mills v. Alabama, 384 U.S. 214, 218 (1966) ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs."); New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (There is a "profound national commitment" to the principle that "debate on public issues should be uninhibited, robust, and wide-open."); Roth v. United States, 354 U.S. 476, 484 (1957) ("The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.").

147 See generally Houchins v. KQED, 438 U.S. 1 (1978); Pell v. Procunier, 417 U.S. 817 (1974); Saxelby v. Washington Post, 417 U.S. 843 (1974). In a series of cases during the 1980s, the Supreme Court held that the general public has a qualified First Amendment right of access to criminal court proceedings and records. See generally Richmond Newspapers v. Virginia, 448 U.S. 555 (1980); Press-Enterprise v. Superior Court, 464 U.S. 501 (1984); Press-Enterprise v. Superior Court, 478 U.S. 1 (1986). But even this presumed that the First Amendment right of access to criminal court proceedings and records is a qualified one and does not automatically stop all court closures. See Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606-07 (1982). "The presumption [of a public trial] may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.


149 See, e.g., CAL. GOVT. CODE §§6250-64 (West 1995); COLO. REV. STAT. §§24-72-205 (2001); CONN. GEN. STAT. §§1-212 (1998); D.C. CODE ANN. §§2-531 to -539 (2002); FLA. STAT. ANN. §§119.01 to .15 (West 2002); IND. CODE ANN. §§14-15-1 to -10 (Michie 2001); KY. REV. STAT. ANN. §§611-810 to 850 (Michie 1993); MO. REV. STAT. §§610.10 to .030 (West 2000); NEB. REV. STAT. §§84-712.01 to .09 (1999); N.Y. PUB. OFF. LAW §§84-90 (McKinney 2001); N.C. GEN. STAT. §§132-1 to -10 (2001); N.D. CONST. art. XI, §6; ORLK. STAT. ANN. tit. 51, §§4A1.1 to .19 (West 2000); OR. REV. STAT. §§192.410 to .505 (2001); SD. CODE ANN. §§16-14.2 to -205 (Michie 2001).

150 5 U.S.C. §552 (2000). The federal government first attempted legislation to provide for access to federal records in 1946 when it enacted Section 3 of the Administrative Procedure Act. See 5 U.S.C. §1002 (1946) (original version at ch. 924, §3, 60 Stat. 238 (1946)) (revised by 5 U.S.C. §552 (1966)). However, that legislation was full of gaping loopholes that enabled government agencies to use it as a withholding statute. See EPA v. Mint, 410 U.S. 73, 79 (1975); H. REP. No. 1497, 89th Cong., 2d Sess. at §3 (1966) (stating that "[f]or more than 10 years, through the administrations of both political parties, case after case of improper withholding based upon [the APA] has been documented. The Administrative Procedure Act provides no adequate remedy to members of the public to force disclosures in such cases."). In 1966, as a response to the flawed APA disclosure section, Congress passed the Freedom of Information Act, which opened to public inspection the records of the executive branch administrative agencies.

152 5 U.S.C. §552(b)(1)-(9) (2000). The FOIA does not apply to matters that fall under the categories of: (1) classified information and national security; (2) internal agency personnel information; (3) information exempted by statute; (4) trade secrets and other confidential business information; (5) agency memoranda; (6) disclosures that invade personal privacy; (7) law enforcement investigation records;
and democratic value of the public’s statutory right to know against the government’s need to keep some information secret. Two of those exemptions concern privacy. All the states have analogous open-records statutes, many of which are modeled after the FOIA. Similarly, state statutes have some form of exemption that allows withholding of a record if its disclosure would pose an invasion of privacy.

Conflicts commonly arise when the need of some citizens to obtain government-held information results in the disclosure of private information of other citizens. Typically, courts decide legal challenges to requests for government records by weighing the democratic value of access to the information against the individual value of privacy. This calculus for determining whether a record should be released was significantly altered by the Sixth Circuit in a dispute over an Ohio public records law that said police personnel files qualified as disclosable records. The Sixth Circuit, relying on Whalen and Nixon as precedent, held that the records were shielded from access on the basis of information privacy.

In Kallstrom v. City of Columbus, three undercover officers sought damages from the City of Columbus when the city released copies of the officers’ personnel files to a defense attorney during a criminal trial. The city said the records fell under the disclosure requirements of the Ohio Public Records Act. The officers argued that releasing the files violated the officers’ rights to...
formation privacy under the Fourteenth Amendment. After the officers sued, several Ohio newspapers and broadcasters also requested the officers’ files, but the city refused to release the records while the case was pending. The U.S. District Court for the Southern District of Ohio denied the officers’ motion for a preliminary injunction, and the officers appealed. The Sixth Circuit, explicitly following Whalen, reversed and held that information privacy can impose restrictions on the state open-records law.

The facts in the case go back to an investigation by the undercover officers into drug dealing by a notorious and violent gang in Columbus. In all, the city prosecuted 41 gang members, and the three officers testified at a trial for eight of the defendants. One of the defense lawyers requested and received the personnel file of undercover officer Melissa Kallstrom, and the lawyer allowed a defendant to review the file during the trial. Personel files typically include officers’ addresses, phone numbers, other identifying information, contact information on family members, bank account information and other private materials. Her fellow undercover officers, Thomas Coelho and Gary Householder, believed the lawyer also obtained their files. In addition, Coelho’s file was released to Police Officers for Equal Rights, an organization that was investigating “possible discriminatory hiring and promotion practices by the city.”

The officers sued the city for invasion of privacy under a civil rights section of the United States Code. The officers sought damages and an injunction barring further release of the files. The city argued that it released the files to the defense lawyer and to the police organization after determining the personnel files did not fall under any of the exemptions to the Ohio Public Records Act. Additionally, the city had redacted most of the personal identifying information from the copies it released. The U.S. District Court for the Southern District of Ohio denied the officers’ motion for a preliminary injunction and ruled for the city. On appeal, the Sixth Circuit reversed the district court’s decision and remanded the case for retrial. Citing Whalen, the appeals court declared that privacy law has developed along two distinct lines. The first concerns independent decision-making over deeply personal matters and behavior. The second recognizes an individual’s right to avoid disclosure about personal information.

Writing the opinion for the Sixth Circuit panel, Judge Karen Nelson Moore found that when the release of private information “places an individual at substantial risk of serious bodily harm, possibly even death,” the governmental action is subject to strict scrutiny under the Fourteenth Amendment and will be upheld only in instances when the government demonstrates “a compelling state interest, and [the action] is narrowly drawn to further that state interest.” The court held that release of the officers’ addresses, phone numbers and other personal information along with identifying information of family members could place the officers or their family members in a zone of danger. Thus, the Sixth Circuit ruled that prior notice must be given in all future instances when police files are requested. This holding placed a condition on disclosure that is not in the Ohio law. The appeals court said the

The purpose of requiring prior notice is to allow persons who are the subjects of the records opportunities to ask for an injunction to block disclosure.\textsuperscript{182} Significantly, the Sixth Circuit never considered the fact that the city had redacted the objectionable personal and identifying information in the officers' files before it disclosed copies of the files.\textsuperscript{183}

On remand, a reluctant district court panel held in September 2001 that, pursuant to the Sixth Circuit decision, prior notice must be given to police officers before the disclosure of their personnel files to a member of the public.\textsuperscript{184} The district court clearly signaled its concern over the Sixth Circuit's decision by beginning its own opinion with a quotation from Thomas Jefferson, stating "Our liberty depends on the freedom of the press, and that cannot be limited without being lost."\textsuperscript{185} Acknowledging that a number of Ohio newspapers and broadcasters also requested access to the officers' files,\textsuperscript{186} the district court framed the issue as one implicating press rights:

In this case, the court is being asked to limit the freedom of the press by preventing the news media from obtaining public information contained in the city's personnel files. City police officers fear its publication may endanger themselves and their families. To deny members of the press access to public information solely because they have the ability to disseminate it would silence the most important critics of governmental activity.\textsuperscript{187}

Complying with the Sixth Circuit's ruling, the district court rejected the arguments of the news media that the court of appeals was wrong in recognizing the federal nondisclosure privacy right, stating, "Establishing new law for the Sixth Circuit, the panel held the Officers had a constitutionally protected privacy right in the information contained in their personnel files, specifically their interest in preserving their lives and the lives of their family members, as well as preserving their personal security and bodily integrity."\textsuperscript{188}

The Court in \textit{Whalen} and \textit{Nixon} seemed to expand the original definition of constitutional privacy as articulated in the \textit{Griswold-Roe} line. But, it is noteworthy that the Court's recognition of information privacy was not essential in either of those holdings. Although the \textit{Whalen} Court recognized the individual's right of nondisclosure of personal information, the Court held that the statute in question did not "pose a sufficiently grievous threat to either [privacy] interest to establish a constitutional violation."\textsuperscript{189} After the decisions were handed down, privacy scholar Don R. Pember observed, "The question remains whether recognition of this disclosure interest is an indication of a new basis for constitutional privacy or merely tantalizing dictum that could be ignored when the issue is placed squarely before the Court."\textsuperscript{190}

An individual's interest in avoiding disclosure of private information and the concept of constitutionally protected information privacy were raised before the Supreme Court in a 2001 clash between the First Amendment right of freedom of the press and the First Amendment right of private speech.\textsuperscript{191}

IV. EXPANDING INFORMATION PRIVACY: \textit{BARTNICKI} v. \textit{VOPPER}

A. The Latest Development: First Amendment Protection for Private Facts

In the first Supreme Court decision in a decade involving press content,\textsuperscript{192} a six-to-three Court
majority ruled that the First Amendment protected a Pennsylvania radio station from liability and punishment for broadcasting a secretly taped cell phone conversation between two teachers union representatives.\footnote{Bartnicki, 582 U.S. at 525.} The ruling in Bartnicki v. Vopper\footnote{Id. at 514.} represents a free press victory, but a very limited one. The Court repeatedly emphasized the decision was narrowly drawn and limited to only the facts presented in that case.\footnote{Id. at 524-25, 528-29.} Although Bartnicki recognizes constitutional protection for private facts, it differs notably from the aforementioned privacy cases because the Bartnicki questions do not pertain to state action. Rather, Bartnicki focuses on third-party incursions and statutory privacy violations by the news media.

The events that triggered the Bartnicki suit began in May 1993 when an unknown person intercepted and taped a conversation between Anthony F. Kane, a Wilkes-Barre area school teacher and union president, and Gloria Bartnicki, the union’s chief negotiator. It was a time of contentious contract negotiations, and they discussed whether the teachers would receive the raise offered by the Wyoming Valley West School District or the raise proposed by the teachers union.\footnote{Id. 517, 527-28. See James C. Goodale, Bartnicki: Publish News That’s Private But True?, New York L. J., Aug. 3, 2001, at 3 [hereinafter Goodale].} Kane was taped as saying, “If they’re not going to move for three percent, we’re gonna have to go to their homes . . . to blow off their front porches. We’ll have to do some work on some of those guys.”\footnote{Bartnicki, 532 U.S. at 518-19.}

The tape mysteriously ended up in the mail-box of Jack Yocum, the head of a local taxpayers’ organization, who disagreed with the union’s demands during contract negotiations.\footnote{Id. Bartnicki and Kane brought suit against the radio station for playing the tape. They sought actual damages and punitive damages under federal and state wiretapping laws.\footnote{They based their federal claims on the Electronic Communications Privacy Act of 1986. See infra note 275 for an explanation of laws.}} Yocum said he played the tape and recognized the voices of Bartnicki and Kane. He then gave it to Wilkes-Barre WILK Radio talk show host Fred Williams (whose actual name is Frederick W. Vopper). Williams-Vopper, a vocal critic of the teachers’ union, repeatedly played the tape on the air in the Fall of 1993 after the school district and teachers union accepted an arbitration proposal that was generally favorable to the teachers.\footnote{Bartnicki v. Boehner, 532 U.S. 1050, 1050 (2001).}

Bartnicki and Kane brought suit against the radio station for playing the tape. They sought actual damages and punitive damages under federal and state wiretapping laws. They based their federal claims on the Electronic Communications Privacy Act of 1986. See infra note 275 for an explanation of laws.
Privacy Act of 1986 and their state claims on the Pennsylvania Wiretapping and Electronic Surveillance Control Act. The laws apply not only to any person who intercepts phone conversations, but also to any person who discloses the information knowing, or having reason to know, that the communication was unlawfully obtained. The radio station argued that to penalize disclosure would violate its right to broadcast under the First Amendment. The station noted that it did not participate in the unlawful taping, that its access to the information was acquired legally; and the information was of public concern.

The U.S. District Court for the Middle District of Pennsylvania dismissed a motion by the radio station for summary judgment and held that the case should go to trial. The court reasoned that "a violation of these acts can occur by the mere finding that a defendant had a reason to believe that the communication that he disclosed or used was obtained [illegally]." On appeal, the Third Circuit Court of Appeals disagreed and reversed the judgment. In its analysis, the Third Circuit found the wiretapping laws to be content-neutral and applied intermediate scrutiny as the standard of review. The court of appeals concluded that the First Amendment precludes imposition of civil damages against the news media for disclosing a taped conversation containing "information of public significance" when the news media "played no direct or indirect role in the unlawful interception."

Although the Third Circuit recognized a significant state interest in protecting the privacy of cell phone conversations, it held that "the government's significant interest in protecting privacy is not sufficient [in this instance] to justify the serious burdens the damages provision of the Wiretapping Acts place on free speech." The appeals court reasoned that to apply the damages provision to the news media would "deter the media from publishing even material that may lawfully be disclosed under the Wiretapping Acts." The appeals court said, "Reporters often will not know the precise origins of information they receive from witnesses and other sources, nor whether the information stems from a lawful source." The Third Circuit emphasized that the public interest in the taped conversation and the newsworthiness of the story were important standards to be considered.

On appeal to the Supreme Court, the majority held in a narrowly focused opinion that the radio station was free to publish private information under the facts presented in this case, namely that the conversation concerned a matter of public interest; the news media were not participants in the unlawful taping; and the news media did not unlawfully gain access to the tape. Justices William H. Rehnquist, Antonin Scalia and Clarence Thomas dissented.

The Bartnicki Court majority agreed with the lower court that the wiretap statutes are content-neutral laws of general applicability, but the Court did not agree with the lower court's application of intermediate scrutiny. The Bartnicki Court, relying on Smith v. Daily Mail Publishing Co., instead reviewed the federal and Pennsylvania statutes under the strict scrutiny standard of review, finding. "As a general matter, 'state action to punish the publication of truthful information sel-

---

202 Bartnicki, 532 U.S. at 525.
203 See Bartnicki v. Vopper, 200 F.3d 109 (3d Cir. 1999).
204 Id. at 115.
205 Id. at 121.
206 Id. at 112, 129.
207 Id. at 129.
208 Id. at 126-27.
209 Id. at 127.
210 Id.
211 Bartnicki, 532 U.S. at 529, 540.
212 Id. at 525, 527-28.
213 Id.
214 Id. at 521-22, 526.
216 See Bartnicki, 532 U.S. at 527-28 (citing Daily Mail, 443 U.S. at 103). Under the strict scrutiny standard of review the government can only compel disclosure of information if the government can prove its use of the information would advance a legitimate state interest, and that its action is nur-
dom can satisfy constitutional standards. . . [I]f a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need . . . of the highest order." 221

The majority of six justices held that the federal and Pennsylvania statutes’ prohibitions on disseminating intercepted communications did not serve a need of the highest order. 222 Writing for the Court majority, Justice John Paul Stevens rejected the government’s two arguments: 1) that the government has an interest in removing incentives for people to intercept private conversations; and 2) that the government has an interest in minimizing the harm to people whose conversations have been illegally intercepted.223 The Court held that the interest in removing incentives for the interception of private conversations would not be served by punishing someone other than the party who intercepted the call.224 In its analysis of the second interest (minimizing harm), which the Court noted was constitutionally stronger than the first interest (removing incentive), the Court acknowledged that privacy of communication is an important value, and the fear of public disclosure of private conversations might well have a chilling effect on private speech. 225 The majority concluded, however, that under the facts in this particular case, the governmental interest in protecting citizens from the publication of their private communications - while strong enough to be an interest of the highest order – had to “give way when balanced against the interest in publishing matters of public importance.” 226

The Court noted that even Warren and Brandeis conceded that “[t]he right of privacy does not prohibit any publication of matter which is of public or general interest.” 227 The Bartnicki Court thus refused to allow “a stranger’s illegal conduct . . . to remove the First Amendment shield from speech about a matter of public concern.” 228 In Justice Stevens’s view, a key point was that the taped phone conversation was of high public concern. Although the statutes could possibly apply to unlawful “disclosures of trade secrets or domestic gossip or other information of purely private concern,” 229 the Court reserved this question. Stevens said privacy interests do not bar publication of information of public interest. 230 The Court found that the disclosed conversation between the two teachers’ union representatives was “unquestionably a matter of public concern.” 221

In reaching its conclusion, the Court made a significant finding. Stevens, who also wrote the Whalen v. Roe 231 opinion twenty-four years earlier, said the right of individual privacy and the right to publish information concerning public issues are deserving of equal constitutional protection and, therefore, “present a conflict between interests of the highest order – on the one hand, the interest in the full and free dissemination of information concerning public issues, and, on the

rowly tailored to meet that legitimate interest. The Court has said this standard should be applied in issues involving certain fundamental rights that deserve special protection. This highest level of protection is generally applied to content-based regulations of speech. Under this standard, the courts presume a regulation is unconstitutional. The government must bear the burden of proving that the regulation is closely related to a compelling government interest and show that the regulation achieves its intended purpose by the least restrictive means possible. KERMIT L. HALL, ED., THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 845 (1992) [hereinafter HALL]. Under intermediate scrutiny, a governmental regulation must pass the O’Brian test as introduced in United States v. O’Brien, 391 U.S. 367 (1968). Under this test: (1) the government regulation must be “within the constitutional power of the government;” (2) the regulation must further an “important or substantial governmental interest;” (3) the government interest must be “unrelated to the suppression of free expression;” and (4) the “incidental restriction on alleged First Amendment freedoms” must be “no greater than is essential to the furtherance of that interest.” Id. at 377. See also Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 189 (1997). There is a third level of scrutiny known as ordinary or minimum scrutiny that is less rigorous. Under ordinary scrutiny, courts presume the regulation is constitutional, and the plaintiff challenging the regulation must prove the offending regulation or action is unconstitutional. The government is required to show only that the regulation or action is “reasonably related to a "legitimate" government interest and only incidentally affects speech. Ordinary scrutiny is typically applied to social and economic regulations. HALL, supra note 220, at 845.

221 Bartnicki, 532 U.S. at 527-28 (quoting Daily Mail, 443 U.S. at 102403) (emphasis added).
222 Id. at 531-32.
223 Id. at 529.
224 Id.
225 Id. at 32-33 (quoting Estate of Hemingway v. Random House, Inc., 244 N.E.2d 256, 255 (N.Y. 1968)).
226 Id. at 533-34 (emphasis added).
227 Id. at 534 (quoting Warren and Brandeis, supra note 23, at 214).
228 Id. at 535 (emphasis added).
229 Id. at 533.
230 Id. at 534.
231 Id. at 535.
other hand, the interest in individual privacy and, more specifically in fostering private speech."\textsuperscript{235} Stevens noted that the "fear of public disclosure of private conversations might well have a chilling effect on private speech," and, "[a]ccordingly, it seems to us that there are important interests to be considered on both sides of the constitutional calculus."\textsuperscript{234}

Justice Stephen G. Breyer, whose concurrence was joined by Justice Sandra Day O'Connor, focused more on the specific content of the disclosed remarks and also on the limited public figure status of the speakers themselves.\textsuperscript{235} Breyer emphasized that he concurred in the majority opinion because, among other factors, the conversation "involved a matter of unusual public concern, namely a threat of potential physical harm to others."\textsuperscript{236} He said Bartnicki and Kane had "little or no legitimate interest in maintaining the privacy of the particular conversation" because the conversation "ra[es][e]d a significant concern for the safety of others."\textsuperscript{227} Reasoning that the speakers’ "legitimate privacy expectations are unusually low, and the public interest in defeating those expectations is unusually high,"\textsuperscript{238} Breyer concluded that the statutes’ enforcement would "disproportionately harm media freedom."\textsuperscript{220} He also emphasized that the majority holding was narrow and "limited to the special circumstances present" in this case.\textsuperscript{240}

Breyer, however, disagreed with the majority’s use of strict scrutiny as its level of review. He said that he believed strict scrutiny is not automatically appropriate in analyzing an issue in which one constitutional right is pitted against another, as was the conflict in \textit{Bartnicki}.\textsuperscript{241} Instead, he suggested that a more flexible balancing test is the appropriate standard in cases like these.\textsuperscript{242} Breyer explicitly declined to recognize any preference for press rights over private speech, noting that the Court’s holding "does not imply a significantly broader constitutional immunity for the media."\textsuperscript{243} Finally, Breyer made a point of expressing particular concern over "the challenges future technology may pose to the individual’s interest in basic personal privacy" and suggested that they be more appropriately addressed by the legislature.\textsuperscript{244}

For dissenter Chief Justice Rehnquist, the facts in \textit{Bartnicki} demonstrated that technology already threatens personal privacy and that legal curbs are necessary to prevent such incursions.\textsuperscript{245} In his dissenting opinion, joined by Justices Scalia and Thomas, Rehnquist pointed out there are 49.1 million cell phones in operation in the United States,\textsuperscript{246} along with 20 million scanners capable of intercepting cell phone conversations.\textsuperscript{247} He argued that the majority opinion "diminishes, rather than enhances, the purposes of the First Amendment: chilling the speech of the millions of Americans who rely upon electronic technology to communicate each day."\textsuperscript{248} Rehnquist’s dissent, which favored the interests of private speech over public speech in a First Amendment tug-of-war, comes as no surprise.\textsuperscript{249} His position was consistent with a philosophy he has expressed at least as far back as 1974 when he wrote, "Privacy in today’s lexicon is a ‘good’ word; that which increases privacy is considered desirable, and that which decreases it is considered undesirable. It is a ‘positive’ value."\textsuperscript{250}

Rehnquist echoed this view in his dissenting opinion in \textit{Bartnicki} when he stated, "The Court concludes that the private conversation between Gloria Bartnicki and Anthony Kane is somehow a ‘[public] debate . . . worthy of constitutional protection.’”\textsuperscript{251} The Constitution, he argued, "should not protect the involuntary broadcast of personal conversations. Even where the communications involve public figures or concern public matters, the conversations are nonetheless private and

\begin{itemize}
\item \textsuperscript{233} \textit{Bartnicki}, 532 U.S. at 518.
\item \textsuperscript{234} Id. at 533.
\item \textsuperscript{235} See \textit{Bartnicki}, 532 U.S. at 539-40 (Breyer, J., concurring).
\item \textsuperscript{236} Id. at 535-36 (Breyer, J., concurring).
\item \textsuperscript{237} Id. at 539 (Breyer, J., concurring).
\item \textsuperscript{238} Id. at 540 (Breyer, J., concurring).
\item \textsuperscript{239} Id. (Breyer, J., concurring).
\item \textsuperscript{240} Id. at 535 (Breyer, J., concurring).
\item \textsuperscript{241} Id. at 536 (Breyer, J., concurring).
\item \textsuperscript{242} Id. at 541 (Breyer, J., concurring).
\item \textsuperscript{243} Id. at 536 (Breyer, J., concurring).
\item \textsuperscript{244} Id. at 541 (Breyer, J., concurring).
\item \textsuperscript{245} \textit{Bartnicki}, 532 U.S. at 541-42, 549 (Rehnquist, C.J., dissenting).
\item \textsuperscript{246} Id. at 554 (Rehnquist, C.J., dissenting).
\item \textsuperscript{247} Id. at 549 (Rehnquist, C.J., dissenting).
\item \textsuperscript{248} Id. at 542 (Rehnquist, C.J., dissenting).
\item \textsuperscript{249} Id. at 547, 551-54 (Rehnquist, C.J., dissenting).
\item \textsuperscript{251} \textit{Bartnicki}, 532 U.S. at 554 (Rehnquist, C.J., dissenting).
\end{itemize}
worthy of protection." The dissenters sharply criticized the majority opinion for failing to explicitly define the kinds of information that would fall under the category of matters of public concern or interest. The dissenters also criticized the majority for applying strict scrutiny in their analysis.

Rehnquist would have permitted enforcement of the wiretap statutes on the theory that punishment would "dry up the market." He argued that enforcement would deter persons from illegally intercepting communications in the same way that prosecutions for possession of stolen goods deters theft by drying up the market for stolen goods. Rehnquist acknowledged that the wiretap laws may create an incidental burden on speech but concluded "these statutes further the 'uninhibited, robust, and wide-open' speech of the private parties."

B. The Bartnicki Court Settles One Issue—But Raises Many Questions

Although the Court majority emphasized that the Bartnicki opinion is narrow and limited to the facts in that particular case, the decision advances press rights in one important way. It settles the important question of whether the press may publish information it lawfully acquired from a source who obtained the information unlawfully. This so-called "stolen goods" issue was raised but not resolved in the 1971 Pentagon Papers case. In New York Times v. United States, the Court held that the United States government did not meet its heavy burden of proof under the circumstances in that case to halt publication of a New York Times series that traced the history of the United States' involvement in the Vietnam war. The newspaper series was based on a 47-volume history that was commissioned by the Department of Defense and came into The Times' unauthorized possession. After The Times ran the first story on June 13, 1971, the government protested the publication of the information. The Times refused to stop publication and the U.S. government sued, seeking an injunction to bar further publication.

The U.S. government argued that the government was entitled to an injunction halting publication of the Pentagon Papers series because the President had power to conduct foreign affairs and protect national security. The government argued further that publication would do irreparable harm to the nation and its ability to conduct foreign affairs. The Court said in a six-to-three vote that an order to permanently enjoin The New York Times from publishing the series would be a violation of the First Amendment right of freedom of the press. Although each justice wrote a separate opinion, the majority agreed in a per curiam opinion that in a case involving the prior restraint of a publication, the government bears a heavy burden to justify censorship. The Court concluded that under the facts in this particular case, the government failed to show why such a restraint should be imposed on The New York Times. The Court, however, did not settle the question of whether the press may publish unlawfully obtained information when the press itself was not involved in the unlawful acquisition.

By resolving the "stolen goods" question, the Bartnicki Court added another decision to a series of four important privacy cases that advanced press rights over the past quarter-century. In the 1975 decision of Cox Broadcasting Corporation v. Cohn, the Court held that the news media cannot be punished or held civilly liable for publishing private information that exists in an official court record available to the public. Three years later, the Court held in Landmark v. Communications, Inc. v. Virginia, 435 U.S. 829 (1978); Cox Broad. Corp. v. Cohn, 420 U.S. 469 (1975).

252 Id. at 554-55 (Rehnquist, C.J., dissenting).
253 Id. at 554 (Rehnquist, C.J., dissenting).
254 Id. at 550 (Rehnquist, C.J., dissenting).
255 See id. at 550-52 (Rehnquist, C.J., dissenting).
256 Id. at 554 (Rehnquist, C.J., dissenting).
257 Id. at 554 (Rehnquist, C.J., dissenting) (quoting New York Times v. Sullivan, 376 U.S. 254, 270 (1964)).
258 Bartnicki, 532 U.S. at 548. See also Goodale, supra note 196, at 3.
259 Bartnicki, 532 U.S. at 550-51 (Rehnquist, C.J., dissenting).
261 403 U.S. 713 (1971).
262 See id. at 714.
263 See id. at 759-60.
264 See id. at 714, 759-60.
265 See id. at 732.
266 See id.
267 See id. at 714.
268 See id.
270 Cox, 420 U.S. at 491. This privacy suit was brought against an Atlanta television station by the family of a rape and murder victim. The station, in violation of a Georgia law
tion, Inc. v. Virginia that a newspaper cannot be punished for printing information about a confidential judicial inquiry because of the public interest value in such an inquiry.\textsuperscript{271} Constitutional protection for publishing truthful information was extended further in 1979 in Smith v. Daily Mail Publishing Co., when the Court asserted that if a newspaper lawfully obtains truthful information about a matter of public significance then state officials "may not constitutionally punish publication of the information, absent a need to further a state interest. . . . of the highest order."\textsuperscript{272} The fourth important ruling was handed down in 1989 in Florida Star v. B.J.F., when the Court held that when a newspaper publishes truthful but private information that was lawfully acquired and of public interest "punishment may be lawfully imposed. . . . only when narrowly tailored to a state interest of the highest order," which was an interest that was not asserted by the state in this case.\textsuperscript{273}

Bartnicki differs from these four cases in a significant way. Each of these four cases involved publication of truthful information obtained from governmental sources, whereas Bartnicki for the first time considered liability for invasion of privacy in an instance where the broadcast information came from a nongovernmental source.\textsuperscript{274} Although Bartnicki makes a contribution to press rights, the Court sidestepped two overarching questions of tremendous importance. Like its predecessor cases discussed above, Bartnicki did not settle the issue of whether the news media can ever be penalized for publishing truthful information. Further, the Court again left open the corollary question of whether the press has the right to publish truthful information if the press itself was involved in the unlawful acquisition of the information. In other words, the Court ignored the question of exactly what level of press involvement may lead to culpability. In fact, the Court denied certiorari to a separate wiretapping case that came up for review at the same time as Bartnicki and that posed this precise question.\textsuperscript{275} Historically, the Court has stopped short of asking whether the First Amendment protects the news media from punishment and liability if the press itself directly participated in unlawfully acquiring information.\textsuperscript{276} In Florida Star v. B.J.F., Justice Thurgood Marshall noted:

The Daily Mail principle does not settle the issue whether, in cases where information has been acquired unlawfully by a newspaper or by a source, government may ever punish not only the unlawful acquisition, but the ensuing publication as well. This issue was raised but not definitively resolved in New York Times Co. v. United States, and reserved in Landmark Communications. We have no occasion to address it here.\textsuperscript{277}

Further casting doubt as to the weight of the

\textsuperscript{271}See Florida Star, 491 U.S. at 541. A Florida newspaper identified a rape victim in violation of a state law that prohibited naming sexual assault victims. A reporter lawfully obtained the woman's identity from a sheriff's department press release. Id. at 526-27.

\textsuperscript{272}See Peavy v. WFAA-TV, Inc., 221 F.3d 158 (5th Cir. 2000), cert. denied, 532 U.S. 1051 (2001). The Peavy case also arose out of a school board dispute. A Dallas, Texas couple, Charles and Wilma Harmon, used a police scanner in 1994 and 1995 to intercept and tape cordless-telephone conversations of a neighbor who was a Dallas Independent School District board member who they believed was corrupt. Id. at 164. The Harmon's offered the tapes to WFAA television reporter Robert Riggs. Riggs was advised by the station's counsel that it was lawful to accept and broadcast them. Id. The taping of the board member, Carver Dan Peavy, continued for several months. Id. at 165. The reporter continued accepting tapes until the station's counsel revised its opinion and concluded that the taping was illegal under federal and Texas wiretap statutes. Id. at 166. Three news reports were broadcast about school board corruption involving school district employees' insurance programs that Peavy controlled. The news reports included information obtained from the tapes that was confirmed by other sources. The reports did not include excerpts of the tapes. Id. The district court dismissed Peavy's claims on grounds that the First Amendment protects the use and disclosure of truthful and lawfully obtained information. Id. at 167. However, the Fifth Circuit reversed in part, stating that summary judgment for the defendants was inappropriate, because the television station defendants "participated in the interceptions. The reporter had told the Harmon's that he would like copies of the tapes that were being made and asked the couple not to edit the tapes. Id. at 171, 194. Peavy was settled out of court after the Supreme Court handed down the Bartnicki opinion.\textsuperscript{276}See Florida Star, 491 U.S. at 532-33, 541; Daily Mail, 445 U.S. at 105; Landmark, 455 U.S. at 837.

\textsuperscript{277}See Florida Star, 491 U.S. at 535 n.8 (citations omitted).
Bartnicki Court's affirmation of press freedom, the Court repeatedly emphasized that the decision was a very narrow one and limited to the particular facts of that case. Stevens stressed that the issue in Bartnicki asked only, "[I]f the punished publisher of information has obtained the information in question in a manner lawful in itself but from a source who has obtained it unlawfully, may the government punish the ensuing publication of that information based on the defect in a chain?" Echoing opinions in Florida Star and Landmark Communications, Stevens said the Court purposefully framed the issue narrowly in Bartnicki as, "Our refusal to construe the issue presented more broadly is consistent with this Court's repeated refusal to answer categorically whether truthful publication may ever be punished consistent with the First Amendment." Breyer's concurrence reiterated and underscored this view.

The limited focus of the Bartnicki issue and its narrow decision means that in another similar case, but one with slightly different circumstances, the decision could go the other way. The Breyer-O'Connor concurrence made clear that the news media prevailed in this instance mainly because the radio station was not implicated in the unlawful taping itself and because the taped conversation was of unusually high public significance – not simply because of the newsworthiness of the material. The reasoning in the Breyer-O'Connor concurring opinion strongly suggests that they could easily cast their key votes with Rehnquist, Scalia and Thomas, forming a new majority in the future. Breyer pointedly refused to recognize any preference for press rights of private speech. And it was O'Connor who cast one of three dissenting votes in Florida Star, along with Rehnquist and White, who wrote, "If the First Amendment prohibits wholly private persons... from recovering for the publication of the fact that she was raped, I doubt that there remain any 'private facts' which persons may assume will not be" the subject of news media reports.

Arguably, Bartnicki stands for the proposition that a right of privacy may be grounds to punish publication of the truth, but the case will most likely "limit the maxim of 'publish and be damned' in future privacy cases." In noting that the Bartnicki Court recognized a First Amendment-based right of privacy in truthful facts, First Amendment attorney James C. Goodale, the current Communications Law chair of the Practicing Law Institute and the former general counsel for The New York Times in the Pentagon Paper Case, wrote in the New York Law Journal:

It may come as a shock to many that the Supreme Court has never before [Bartnicki] decided there is such a right of privacy in the publishing context. While the Court has recognized a right of privacy in other contexts such as in connection with a woman's right to choose and a right to be free from unreasonable searches, the Court has never said, as far as I know, there is a right of privacy that may penalize the publication of the truth. Writing for the majority, Justice John Paul Stevens concludes there is such a right, on the grounds that privacy laws foster private speech.

In the final analysis, Bartnicki v. Vopper advances press rights modestly, while also enhancing the concept of information privacy.

The rise of constitutional privacy has not taken place in a legal vacuum. Concerns about personal privacy, fueled in great part by unprecedented technological advances, are abundantly evident in statutory and regulatory actions on the federal and state levels. Besides the more than 40 bills considered by the 107th Congress, at least a dozen of which deal with online privacy, the federal executive branch and individual states have been taking action to protect the public and preserve the right to be let alone.

---

278 Bartnicki, 532 U.S. at 517, 528; Id. at 535-36, 541 (Breyer, J., concurring).
279 Id. at 528 (quoting Boehner v. McDermott, 191 F.3d 463, 484-85 (D.C. Cir. 1999) (Sentelle, J., dissenting)).
280 Bartnicki, 532 U.S. at 529. See also Florida Star, 491 U.S. at 532-33; Landmark, 435 U.S. at 837.
281 See id. at 535-36, 541. (Breyer, J., concurring).
282 See id. at 535-36, 540 (Breyer, J., concurring).
283 See id. at 536 (Breyer, J., concurring).
284 Florida Star, 491 U.S. at 550-51 (White, J., dissenting).
285 See Goodale, supra note 196.
286 Id.
287 The narrow focus of the Bartnicki opinion prompted veteran New York Times Supreme Court reporter Linda Greenhouse to write, "While the decision favored the media defendants, it could be read as a cautionary tale for the nation's newsrooms." Linda Greenhouse, Supreme Court Roundup: Court Says Press Isn't Liable for Use of Illegally Tapes, N.Y. Times, May 22, 2001, at A14.
288 As Goodale observed, "While media lawyers and press barons let out a collective sigh of relief at the decision, there may be pain for them in the future." Goodale, supra note 196.
289 See infra note 13.
V. CURRENT STATUTORY AND REGULATORY TRENDS FAVOR PRIVACY OVER OPEN GOVERNMENT

The rise of constitutionally protected information privacy carries especially troubling implications in the current national political climate, which is increasingly marked by governmental secrecy. For example, the Bush Administration has established a new Freedom of Information Act policy that urges the executive branch federal agencies to use the Act’s privacy exemptions to resist disclosure of agency records. In a memorandum issued on October 12, 2001, Attorney General John Ashcroft rescinded the previous standard set by former Attorney General Janet Reno. The Reno FOIA policy emphasized “maximum responsible disclosure of government information” unless “disclosure would be harmful.” Ashcroft replaced Reno’s foreseeable-harm standard with a test that encourages withholding based on a “sound legal basis.” Although shifts in FOIA policy are traditional whenever a President from a different party is elected, Ashcroft’s approach represents a significant restriction even by Republican standards, which are typically less FOIA-friendly than those of Democratic administrations. For comparison, during the Reagan Administration, Attorney General William French Smith established a “substantial legal basis” test to withhold records. Ashcroft’s “sound legal basis” test suggests an even lower hurdle than a “substantial legal basis” to justify withholding records.

The new Department of Justice policy has sparked concern among journalists, legislators and open-government advocates who fear the administration’s new direction may mark the beginning of “a new era of governmental secrecy under the guise of protecting [personal] privacy.” Implicit in Ashcroft’s memorandum were concerns over national security and law enforcement in the aftermath of the September 11, 2001 terrorist attacks on Washington, D.C. and New York City. Yet, the policy’s focus on privacy exemptions extends beyond matters related to national security and law enforcement. “The mere mention of a name in a record now... can be used to deny a

292 United States Department of Justice, Attorney General’s Memorandum for Heads of Departments and Agencies Regarding the Freedom of Information Act (Summer/Fall 1993) (reprinted in FOIA Update at 45). It is important to place the Reno memorandum in a context that reflects political realities and the independence of the executive branch federal agencies. In a 1997 report, the Reporters Committee for Freedom of the Press documented widespread violations and abuses of the FOIA by agency officials during the Clinton Administration. For example, it took The Washington Post two years to obtain records detailing Deputy Secretary of State Strobe Talbott’s expenses on a foreign trip, and there were repeated denials of FOIA requests for information pertaining to the White House’s $25 million telephone system. See Mark Tapscott & Nicole Taylor, Few Journalists Use the Federal Freedom of Information Act: A Study by the Center for Media and Public Policy, The Heritage Foundation, at http://www.legacy.org/research (last visited May 1, 2002). During Clinton’s second term, agency delays and denials persisted, according to a study by the Heritage Foundation. See id. For example, the administration rejected a journalist’s FOIA request for presidential guests at Camp David on the grounds that the information “would not significantly contribute to the public understanding of the operations or activities of government.” Id.
293 See DOJ Memo, supra note 291.
The use of FOIA privacy exemptions to restrict access to agency records was already a common practice even before the Ashcroft memorandum, according to the Department of Justice. In a 2002 analysis of recent agency annual reports, the Department of Justice reported that the general privacy exemption, Exemption 6, was the most commonly used of all the FOIA’s nine statutory exemptions. Indeed, the history of FOIA privacy disputes that have reached the Supreme Court over the years shows that the Department of Justice has been extremely effective in defending agency decisions to withhold records; the Court has heard seven FOIA privacy cases since 1976, and it ruled in favor of agency decisions to withhold records in all but one of these cases.

In another move that fosters government secrecy by the Executive Branch, President George W. Bush has issued an executive order that conflicts with the 1978 Presidential Records Act, which had provided that presidential papers may be made public 12 years after a President leaves office. Bush’s order gives the sitting President,
as well as former Presidents, the right to withhold presidential papers. Bush’s executive order takes control of presidential papers away from the National Archives of the United States.

Under Bush’s order, journalists, historians, scholars, public citizens’ groups and the general public now must demonstrate a specific need in order to obtain the presidential documents of Presidents Reagan, George Bush, Sr. and William Jefferson Clinton. The Presidential Records Act, which went into effect in 1981, would have made Reagan’s papers available after the current President Bush was elected. However, those papers were not released because the current Bush Administration undertook a review of the policy shortly after Bush was elected. As a result, 68,000 pages of communications between President Reagan and his advisers were withheld even though officials at the National Archives, including the Reagan Library, wanted them made public. The White House defended the decision, saying that premature disclosure of confidential decision memos could stifle candid conversations among presidential advisers and the President.

Restrictions on access have been imposed recently on the state level as well. In a 2002 Illinois case, the federal government thwarted a newspaper reporter’s efforts to obtain the names of federal inmates in a county jail. The reporter sought the names of all inmates held in the DeWitt County jail under the Illinois Freedom of Information Act. After she obtained the names of the Illinois prisoners, the federal government intervened to prevent the release of the names of federal prisoners. The government removed the case to federal district court in Illinois and the district judge held that the names of federal prisoners could be withheld on privacy grounds. In Brady-Lunny v. Massey, the district court said that providing a list of the names of inmates would constitute “an unreasonable invasion of privacy” because some of the inmates are “merely witnesses and detainees who have not been charged with or convicted of crimes.” The court said releasing their names would “stigmatize these individuals” and may cause “irreparable damage to their reputations.” The district court’s rationale does not, however, explain why the privacy interests of witnesses and detainees in custody justify withholding names of federal inmates who have been charged with and convicted of crimes.

In Florida, a state with open-records laws that have been regarded as a model for other states, a court of appeals last July upheld the constitutionality of a new privacy exemption for autopsy photos. The public-record status of autopsy photos was restricted by the Florida Legislature after the death of race-car driver Dale Earnhardt when a Florida newspaper sought Earnhardt’s autopsy records. He was killed in a crash at Daytona in February 2001. The records were sealed after a judge ruled that release of the photos would violate the privacy of Earnhardt’s widow. The Earnhardt/Family Protection Act now allows release of such materials only by a judge’s order.

In Indiana, the state legislature failed last March in its attempt to override Governor Frank O’Bannon’s veto of an anti-access bill approved overwhelmingly by the legislature. The bill, which had passed 71-28 in the state’s House, would have allowed legislators to decide what leg-

---

909 See id. See also Steven L. Hensen, The President’s Papers Are the People’s Business, WASH. POST, Dec. 16, 2001, at B1 (advocating a return to open presidential records and the importance of access to presidential documents).
913 Id.
914 Richard Reeves, Writing History to Executive Order, N.Y. TIMES, Nov. 16, 2001, at A25.
916 Id.
917 Id.
918 Id. at 931-32.
919 Id. at 932.
920 Id.
921 Campus Communications, Inc. v. Earnhardt, 821 So.2d 388, 394-95 (5th Cir. 2002).
VI. SUMMARY AND CONCLUSION

The tension between individual privacy and public/press access to government-controlled information and activities represents a conflict between important competing values that serve democracy and help structure public discourse. Privacy laws protect individual interests and the right to be let alone. Privacy also is necessary to form intimate relationships and make decisions regarding deeply personal matters. The ability to conceal aspects of one’s identity is necessary for personal freedom and is an integral part of the political process. On the other hand, access laws protect social interests and advance the democratic principle of holding accountable those who govern us. The news media sometimes invade personal privacy when they seek access to government records containing information on private individuals or when they report on the performance of governmental services such as law enforcement agencies. Such newsgathering practices, however, can serve the right to know by advancing the general public’s need for government information for the purpose of making informed decisions concerning self-rule.

The rise of constitutional privacy has increased this tension. Constitutional privacy has taken several forms, deriving mainly from the rationale that zones of privacy, implicit in the First, Third, Fourth and Ninth Amendments, protect individuals from governmental intrusion. Early court opinions that first recognized a right to privacy held that an individual has a right to be free of governmental interference when it comes to those autonomous decisions that enable people to have control over their lives and private behavior. Those same decisions later provided the foundation for a series of court holdings that prohibited certain newsgathering practices on the theory that law enforcement agencies violated Fourth Amendment privacy interests. In these Fourth Amendment privacy decisions, which concerned governmental cooperation with journalists gathering information for news stories, courts held that it was unconstitutional for law enforcement authorities to permit journalists to have access to a private residence or to private property during the execution of a warrant and to arrange a “perp walk” so journalists could film a criminal suspect for a news program.

A second stream of constitutional privacy, information privacy, emerged in a clash with public and press interests in access to government-held information. In a Sixth Circuit decision, a federal court of appeals held that information pri-

---

327 Id.
329 Id.
332 See, e.g., Wilson v. Layne, 526 U.S. 603 (1999); Hanlon v. Berger, 526 U.S. 808 (1999); Lauro v. City of New York, 39 F. Supp. 2d 531 (S.D.N.Y. 1999). It is of historical interest that the Fourth Amendment has roots in disputes between the press and the Crown, first in England and later in the Colonies. See Stanford v. Texas 379 U.S. 476 (1965) (“[W]hile the Fourth Amendment was most immediately the product of contemporary revulsion against a regime of writs of assistance, its roots go far deeper. Its adoption in the Constitution of this new Nation reflected the culmination in England a few years earlier of a struggle against oppression which had endured for centuries. . . . What is significant to note is that this history is largely a history of conflict between the Crown and the press.”) Id. at 482. See also Rodney A. Smolla, Free Speech in an Open Society 274 (1992).
333 See Wilson, 526 U.S. at 605-06.
334 Hanlon, 526 U.S. at 810.
335 Lauro, 39 F. Supp. 2d at 351.
336 See Kallstrom v. City of Columbus, 136 F.3d 1055 (6th Cir. 1998).
vacy overrode the Ohio Public Records Act that had allowed public access to police personnel-file information. Information privacy was first recognized two decades earlier by the Whalen Court, and although some leading legal experts agree that Whalen marks the first time the Court recognized information privacy, this area of constitutional privacy has yet to develop with clearly defined boundaries.

Finally, in Bartnicki v. Vopper, the Court recognized for the first time a constitutional right of privacy concerning disclosure of private information obtained from a nongovernmental source. Arguably, Bartnicki recognizes constitutional protection for "truthful private facts." Bartnicki differs notably from the other constitutional privacy cases examined in this analysis because it does not concern state action, but focuses instead on third-party incursions – the privacy interest being the statutory privacy advanced by the wiretap laws and violated by the news media. The Bartnicki Court acknowledged that this privacy interest qualifies for constitutional protection. However, the majority also ruled that under the facts in this particular case, First Amendment protections must prevail.

Bartnicki resonates with information privacy in that the interest the Court was asked to protect was essentially the right of the individual to avoid disclosure about personal information. Implicit throughout the Court's reasoning is the core idea that there is an important state interest in a law that shields personal information about an individual from disclosure. This concept is analogous to the information privacy interest considered in Kallstrom – the right of the individual to control information about oneself. Bartnicki does not uncontrovertibly establish a new constitutional right for the protection of private facts. As the O'Connor-Breyer concurrence makes clear, the decision easily could have gone the other way. Bartnicki's implications for constitutionally protected private facts privacy or information privacy, therefore, remains elusive. Still, Bartnicki contributes to the emergence of some form of constitutional protection for private information, despite its uncertain and protracted development.

The problem posed by the rise of constitutionally protected privacy is that when constitutional privacy is presented as a bar to access of government-controlled operations or records, judicial reflection to consider the benefits of public and press access is severely constrained, if not eliminated. In a conflict between privacy and access interests, the overarching question should not be whether there has been an invasion of privacy, but, rather, whether there has been an unwarranted invasion of privacy. The trumping power of constitutional privacy can undercut judicial power to make this important distinction. In these times, with concerns about privacy reaching unprecedented levels as current statutory and regulatory trends demonstrate, it becomes apparent how the uniquely powerful force of constitutional privacy can dangerously threaten a crucial balance which, as Professor Westin warned in the years before privacy law mushroomed, must be maintained to preserve democracy and keep government responsible.

---

337 Id. at 1069-70.
340 See Bunker, supra note 122, at 584-87. First Amendment scholar Bunker and his colleagues, in reviewing the development of information privacy in cases up to and including Whalen and Nixon, concluded that "[t]aken together, these cases suggest there is as yet no firm constitutional right to informational privacy." Id. at 587.
341 Bartnicki, 532 U.S. at 535.
342 See Goodale, supra note 196.
343 Bartnicki, 532 U.S. at 540 (Breyer, J., concurring).