From Rehnquist to Roberts: Has Informational Privacy Lost a Friend and Gained a Foe?

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FROM REHNQUIST TO ROBERTS: HAS INFORMATIONAL PRIVACY LOST A FRIEND AND GAINED A FOE?

SUSAN M. GILLES*

Each one of us desires to keep our personal information private: to lead what Chief Justice Rehnquist once called a "private life." Though Rehnquist has been labeled as an enemy of privacy, throughout his years on the bench, he was a consistent supporter of informational privacy. He punished those who published private information and blocked those who sought access to private records. Today, as threats to privacy increase, informational privacy needs a new champion on the Court. Many presume that Chief Justice Roberts will step into the shoes of his predecessor and mentor Chief Justice Rehnquist. But, while the record is incomplete, the signs are ominous. Chief Justice Roberts has shown little concern for informational privacy and may undo, not expand, Rehnquist's legacy.

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I. INTRODUCTION

During his confirmation hearings, Chief Justice Roberts was repeatedly asked about his views on the “right to privacy” and how they compared to those of his predecessor and mentor, Chief Justice Rehnquist. The members of the Judiciary Committee appeared to assume, as have commentators, that Roberts’s views on privacy will mirror those of Rehnquist. This assumption may be justified with regard to Roe v. Wade. But the scope of privacy law extends well beyond abortion rights, and yet, not one senator asked Roberts about his willingness to protect private information. This may have been a crucial omission, for the issue of informational privacy is likely to come before the Court with increasing frequency during Roberts’s tenure. If the senators had asked, they would have discovered that while Chief Justice Rehnquist was a friend to informational privacy, Chief Justice Roberts may well be a foe.

This Article demonstrates that, contrary to conventional wisdom, Chief Justice Rehnquist prized some aspects of privacy. The accepted canon is that Rehnquist was a staunch foe of privacy, once earning him the score of “100% conservative in privacy cases.” It is true that

2. See infra note 11.
4. This Article illustrates that Rehnquist’s judicial decisions consistently favored informational privacy. Rehnquist also prized privacy in his personal life: in an interview in May 2004, Rehnquist commented that one of the “most appealing things” about serving as a Justice was that “it enables you to participate in some way and to some extent in the way the country is governed, but you’re able to maintain a private life as well.” Tony Mauro, The Chief and Us: Chief Justice William Rehnquist, The News Media, and the Need for Dialogue Between Judges and Journalists, 56 SYRACUSE L. REV. 407, 417 (2006) (reporting a May 2004 C-SPAN2 interview with Rehnquist).
5. Scott P. Johnson & Robert M. Alexander, The Rehnquist Court and the Devolution of
Rehnquist's notion of privacy did not embrace any right to an abortion, to consensual sexual activity, or to assisted suicide. Equally, Rehnquist extended little protection to expectations of privacy under the Fourth Amendment.

This Article does not dispute that Rehnquist was a vocal opponent of many important privacy claims. But focusing on his opposition to a general right of privacy has led scholars to overlook his support of an increasingly important form of privacy—informational privacy. This Article sets the record straight: Rehnquist was a strong proponent of a right to informational privacy.

In contrast to Chief Justice Rehnquist's long record on the Court, relatively little is known about Chief Justice Roberts's views on this aspect of privacy law. However, the signs for informational privacy are ominous. As discussed in the final section of this Article, the record so far indicates that the new Chief Justice will not be an advocate for informational privacy and indeed may well undo Rehnquist's legacy in this area.


9. As one scholar put it, Rehnquist's “consistent rejection of claims of individual rights over more than thirty-three years shows much narrower concern for the property and privacy interests protected by the Fourth Amendment than has been exhibited by the sixteen other Justices with whom he has shared the Supreme Court bench.” Craig M. Bradley, The Fourth Amendment: Be Reasonable, in THE REHNQUIST LEGACY 81, 93–94 (Craig M. Bradley ed., 2006).


II. REHNQUIST: AN ADVOCATE FOR INFORMATIONAL PRIVACY

"Informational privacy" was not a term that Rehnquist used.\(^{12}\) Rather, in *Bartnicki v. Vopper*,\(^{13}\) he described a right to hold "private conversation[s]"\(^{14}\) and to control information about ourselves.\(^{15}\) For Rehnquist, "some of the most egregious violations of privacy" occur when we cannot prevent "access to our personal and business e-mails, our medical and financial records, or our cordless and cellular telephone conversations."\(^{16}\)

"Informational privacy" is thus shorthand for each individual's ability to keep information about himself private—to lead, as Rehnquist once put it, a "private life."\(^{17}\) The law can enhance such privacy in two ways: it can punish people who reveal the information (by imposing post-publication penalties), and it can try to safeguard the information in the first place (by denying access). Rehnquist consistently voted to do both. Moreover, he did so whether the offender was the press or the government. Section A discusses his record of protecting privacy by punishing the publication of private information, and Section B addresses his record of denying access. Section C offers an overarching assessment of Rehnquist's dedication to privacy.

A. Championing Privacy by Punishing Publication

1. Punishing the Press When It Publishes Private Facts

   a. Advocating for Privacy in "Private Fact" Cases

   In the Rehnquist era, the Court heard five cases addressing the press's publication of true private information, and in each one the majority sided with the press on First Amendment grounds.\(^{18}\) While the

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12. The term is suggested by the Court's language in *Whalen v. Roe*, 429 U.S. 589 (1977). The majority recognized an "interest in the nondisclosure of private information." *Id.* at 600.
14. *Id.* at 555 (Rehnquist, C.J., dissenting).
15. *Id.* at 541–42.
16. *Id.* at 541.
18. The five cases, listed in the order they reached the Court, are *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975); *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977); *Smith v. Daily Mail Publishing Co.*., 443 U.S. 97 (1979); *Florida Star v. B.J.F.*, 491 U.S. 524 (1989); and *Bartnicki v. Vopper*, 532 U.S. 514 (2001). Intermittently, the Court has included a sixth case, *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978), as part of this series. Some of the cases concerned statutes that criminalized the publication of
majority never adopted the absolutist position urged by the press, the test it fashioned, the *Daily Mail* test, precludes recovery in the absence of "a state interest of the highest order." In case after case, despite seemingly compelling privacy interests—for instance, a rape victim's right to not be named by the media, or the right to a private telephone conversation—the majority never found that privacy outweighed speech interests.

In stark contrast, Rehnquist repeatedly valued privacy over speech. Admittedly, in *Oklahoma Publishing Co.*, the first privacy case he faced after joining the Court, Rehnquist voted for the press and against the state's efforts to protect the name of an accused juvenile. But, as the Court's per curiam opinion noted, the state was seeking to punish a newspaper for publishing information that the state itself had already released in open court. The state's actions seemed designed to censor the press, not to safeguard the juvenile's privacy.

Two years later, in *Daily Mail*, Rehnquist started to part company private information. See, e.g., *Daily Mail*, 443 U.S. at 98. Others concerned tort actions for the publication of private facts based on common law or statute. See, e.g., *Fla. Star*, 491 U.S. at 526; *Cox Broad.*, 420 U.S. at 471–72.

19. The press, citing to the First Amendment, has repeatedly argued that it "may never be punished, civilly or criminally, for publishing the truth." *Fla. Star*, 491 U.S. at 531; see also *Cox Broad.*, 420 U.S. at 489.


22. *Bartnicki*, 532 U.S. at 517.

23. *Id.* at 535; *Fla. Star*, 491 U.S. at 526, 541; *Daily Mail*, 443 U.S. at 105–06; *Okla. Publ'g Co.*, 430 U.S. at 310; *Cox Broad.*, 420 U.S. at 496–97.


26. *Id.* at 310. An eleven-year-old boy was charged with murder and his name revealed in open court. *Id.* at 309. After several stories appeared identifying the boy, the trial court enjoined subsequent publication of the boy's name. *Id.* at 308–09.

27. See *id.* at 310. The Court viewed the case as a relatively simple application of its prior restraint doctrine: "the First and Fourteenth Amendments will not permit a state court to prohibit the publication of widely disseminated information obtained at court proceedings which were in fact open to the public." *Id.* Later, in *Bartnicki*, Rehnquist argued that the *Daily Mail* test should always be limited to cases where the government itself released the information, the information was already available to the public, and there was a demonstrated risk of press censorship. *Bartnicki*, 532 U.S. at 546–47 (Rehnquist, C.J., dissenting).
with the Court's majority, writing a concurrence that revealed his commitment to privacy and his growing discomfort with the trend of the Court's rulings. In Daily Mail, two newspapers were indicted for including the name of the juvenile gunman as part of their coverage of a school shooting. The majority, creating what would later become known as the Daily Mail test, struck down the statute, finding the State's interest in protecting juvenile offenders insufficient to justify the limits on free speech.

Rehnquist's concurrence accused the majority of overvaluing the speech interest and undervaluing the privacy interest at stake:

In my view, a State's interest in preserving the anonymity of its juvenile offenders—an interest that I consider to be, in the words of the Court, of the "highest order"—far outweighs any minimal interference with freedom of the press that a ban on publication of the youths' names entails.

Rehnquist only concurred in the majority's finding that the statute was unconstitutional because, as written, the statute applied solely to newspapers and left radio and television free to publish the juvenile's name. Rehnquist made clear that he would uphold a revised statute because, for him, privacy outweighed any asserted First Amendment right.

Rehnquist's reluctant concurrence in Daily Mail had, by 1989,

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28. 443 U.S. at 106-10 (Rehnquist, J., concurring in judgment).
29. Id. at 99-100 (majority opinion). The newspapers learned the name of the fourteen-year-old shooter from witnesses and police on the scene. Id. at 99.
30. Id. at 103-04. The test provides 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." Id. at 103.
31. Id. at 107 (Rehnquist, J., concurring in judgment). Rehnquist reiterated his general view that the First Amendment did not guarantee "the right to speak on any subject at any time," but rather required a "careful weigh[ing] of the conflicting interests to determine which demands the greater protection under the particular circumstances presented." Id. at 106. He argued that the State had a strong interest in rehabilitating young people by protecting them from the stigma of early misconduct. Id. at 107-08. Moreover, it was "only a minimal interference with freedom of the press" to preclude the publishing of a juvenile's name. Id. at 108.
32. Id. at 110.
33. Id. ("[A] generally effective ban on publication that applied to all forms of mass communication, electronic and print media alike, would be constitutional.").
become a dissent. In *Florida Star*, the police erroneously posted, and a newspaper then published, the name of a rape victim in violation of a Florida statute that made it unlawful to report the name of a victim of a sexual offense. The majority again held the victim’s claim was barred by the First Amendment. Although the majority cautioned that it was not holding that there was “no zone of personal privacy within which the State may protect the individual from intrusion by the press,” for Justice White in dissent—a dissent Rehnquist joined—the *Florida Star* decision rang the death knell of any effective protection for private facts: “If the First Amendment prohibits wholly private persons (such as B.J.F.) 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 published in the newspapers or broadcast on television.”

Rehnquist’s desire to protect informational privacy was evident again in his dissent in the Court’s most recent privacy case, *Bartnicki*. The majority again applied the *Daily Mail* test to strike down another statute designed to protect privacy, this time the Federal Wiretap Act’s prohibition of the disclosure of an illegally recorded telephone conversation. In dissent, Rehnquist argued that the *Daily Mail* test should not be expanded to immunize the press from replaying a private telephone conversation. He sought to limit the precedential power of *Daily Mail*, arguing that it applied only when the information was

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35. Id. at 526 n.1, 527–28 (majority opinion).
36. Id. at 526. Applying the *Daily Mail* test, the majority acknowledged that “the privacy of victims of sexual offenses” was a “highly significant” interest but struck down the statute as flawed because it lacked a fault requirement and sought to punish the press for information released by the government itself. Id. at 537–41.
37. Id. at 541.
38. Id. at 550 (White, J., dissenting) (commenting that the decision “inevitably” “obliterate[s] . . . the tort of the publication of private facts”).
39. Id. at 550–51. For the dissent, the Court was correct to balance free speech and privacy interests, but it accorded “too little weight” to privacy and “too much” weight to free speech. Id. at 551. Thus, the dissent would strike a pro-privacy balance and “draw the line higher on the hillside: a spot high enough to protect B.J.F.’s desire for privacy and peace-of-mind in the wake of a horrible personal tragedy.” Id. at 553.
40. 532 U.S. 514, 541–56 (2001) (Rehnquist, C.J., dissenting). In *Bartnicki*, two union leaders sued a radio station when it played an illegally recorded tape of their cell phone conversation. Id. at 518–19 (majority opinion).
41. Id. at 517–18. The Court also struck down a parallel state statute. Id. at 520 n.3, 535.
42. Id. at 545–49 (Rehnquist, C.J., dissenting).
already "publicly available," had been released by the "government itself," and there was danger of government suppression. In contrast, in Bartnicki, Rehnquist argued, the state was protecting, not undermining, the privacy of its citizens by making wire-tapping illegal.

Finding Daily Mail inapplicable, and applying only intermediate scrutiny, Rehnquist would have upheld the statute because of the state's interest in both deterring those who tape calls and protecting the privacy of millions of cellular telephone users. For Rehnquist, privacy was a "venerable right," and "[i]n a democratic society privacy of communication is essential if citizens are to think and act creatively and constructively." Rehnquist argued that with the growing technology of intrusion, unless the government was left free to enact laws protecting privacy, the confidentiality of our emails, our personal records, and even our telephone conversations would be lost. Rehnquist would protect the right to have "private conversation[s]" over any claimed First Amendment right to debate matters of public concern.

These cases reveal that Rehnquist was an ardent advocate for privacy, an advocate whose voice grew stronger with each case he considered. While his earliest decision showed that Rehnquist was

43. Id. at 546 (citation omitted).
44. Id. Rehnquist acknowledged that in Daily Mail itself, the press received the information from witnesses and not the government; however, Rehnquist still argued that the Daily Mail test should be limited to cases where the state is the source of the information. Id. at 546 n.3.
45. Id. at 547.
46. Id.
47. Id. at 548–49.
48. Id. at 553.
49. Id. at 543 (quoting President's Commission on Law Enforcement and Administration of Justice, in THE CHALLENGE OF CRIME IN A FREE SOCIETY 202 (1967)).
50. See id. at 541–42.
51. Id. at 555.
52. Rehnquist's dissent in Bartnicki, also, as we have seen before, devalued the speech at issue. Id. at 556. There was only a "marginal claim" to free speech, id., and indeed, there was a First Amendment right to keep speech private, id. at 553–55.
53. Of the four cases that he decided on the merits, in the first, Oklahoma Publishing Co., in 1977, Rehnquist joined the per curiam decision and voted to protect the press's right to publish. 430 U.S. 308, 308–09 (1977). By 1979, in Daily Mail, he still voted in favor of the press, but only because of a flaw in the statute, and wrote a separate concurrence expressly emphasizing that privacy is an interest of the highest order. 443 U.S. 97, 106–10 (1979) (Rehnquist, J., concurring in the judgment). Then in Florida Star, 491 U.S. 524, 542–53 (1989) (White, J., dissenting), and Bartnicki, 532 U.S. at 541–56 (Rehnquist, C.J., dissenting), decided decades later, he wrote or joined dissents that sought even greater protection of privacy. Thus, his voting pattern may reflect a growing recognition of the importance of privacy.
unsympathetic to privacy claims where the state had affirmatively released the information to the public (such cases involved little "privacy" and the state's action bore all the hallmarks of governmental suppression), Rehnquist zealously supported the state when it genuinely sought to protect privacy. In his eyes, the majority's rulings in *Daily Mail*, *Florida Star*, and *Bartnicki* were erroneous: by striking down statutes that attempted to keep facts private, the decisions severely hampered the states' ability to ensure that private information remained confidential. For Rehnquist, the need to effectively protect private facts easily outweighed any free speech concerns.

b. Using Libel Law to Deter the Press from Reporting on Private Figures and Private Facts

The libel cases repeat the same theme: Rehnquist actively protected privacy and routinely rejected First Amendment claims. Ostensibly, libel cases do not concern privacy, but rather harm to reputation. However, libel is tied to privacy in a very practical way: if the press is deterred from reporting on private individuals or private facts for fear of libel, the result is less press coverage and more privacy. By making the press leery of reporting any facts, true or false, about private persons, Rehnquist used the libel cases to create powerful protections for privacy.

When Rehnquist joined the Court, the epic decision of *New York Times v. Sullivan* was settled law. *Sullivan*, which applied the First Amendment tests to libel cases, confirmed that private people did not have the same protection from defamatory statements as public figures. To Rehnquist, this was a mistake: he believed that private individuals deserved the same protection as public figures. He argued that the First Amendment was not intended to protect private individuals from libel.

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54. *Okla. Publ'g Co.*, 430 U.S. at 310–11. This is consistent with Rehnquist's argument in *Bartnicki* that the *Daily Mail* principle should be limited to cases where there was a risk of press censorship. *Bartnicki*, 532 U.S. at 546–47 (Rehnquist, C.J., dissenting).

55. *Bartnicki*, 532 U.S. at 541–42 (Rehnquist, C.J., dissenting); *Fla. Star*, 491 U.S. at 547 (White, J., dissenting); *Daily Mail*, 443 U.S. at 109–10 (Rehnquist, J., concurring). As Justice Rehnquist put it in his concurrence in *Daily Mail*, "in this case the State took every step that was in its power to protect the juvenile's name." *Id.* at 109 n.2.

56. *Bartnicki*, 532 U.S. at 541–42 (Rehnquist, C.J., dissenting); *Fla. Star*, 491 U.S. at 547 (White, J., dissenting); *Daily Mail*, 443 U.S. at 109–10 (Rehnquist, J., concurring). In his concurrence in *Daily Mail*, Rehnquist pointed out that unless the states were given the power to punish publications, they could not effectively ensure that information remained private. *Id.* at 109 (Rehnquist, J., concurring).


Amendment to libel actions, required public officials to prove falsity and a high degree of fault ("actual malice") when they sued the press for libel. However, the scope of that decision, in particular what kind of libel suits the actual malice standard applied to, was the subject of intense debate and division on the Court. A plurality opinion authored by Justice Brennan in *Rosenbloom v. Metromedia, Inc.* had rejected the idea that private persons should be exempt from the exacting actual malice standard: any plaintiff, "famous or anonymous," must prove actual malice to recover.

Thus, when Rehnquist arrived, private figures received no special treatment. Within a decade, Rehnquist had transformed the law: while the public official and all-purpose-public-figure doctrines remained largely untouched, a new private figure doctrine had emerged. First, Rehnquist's vote in *Gertz* helped form a new majority, which rejected *Rosenbloom* and announced that when private figures sued for libel, they were exempt from the strict proof requirements of *Sullivan*.

Then, in a series of rulings in the 1970s, Rehnquist subtly moved the dividing line between public and private figures, so that more and more plaintiffs were classified as private. Many apparently "public" people now qualified as private figures. For instance, in *Time, Inc. v. Firestone*, Rehnquist argued that Mary Alice Firestone, a wealthy Palm Beach socialite, whose divorce was such a cause célèbre that she made frequent press appearances and retained a clipping service, remained a

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60. *Id.* at 283.


64. 418 U.S. at 324.

65. *Id.* at 346–47. Rather than proof of actual malice, the *Gertz* Court held that private plaintiffs need only prove some level of fault, such as negligence. *Id.* This was a significant shift because, while the actual malice standard is almost impossible for plaintiffs to prove, negligence does not pose such an insurmountable barrier to recovery. See Susan M. Gilles, *Taking First Amendment Procedure Seriously: An Analysis of Process in Libel Litigation*, 58 OHIO ST. L.J. 1753, 1774–79 (1998).


private figure. Rehnquist helped create the concept of private figures in *Gertz* and then drastically expanded that concept in the decade that followed.

Finally, in a third step, Rehnquist helped create the private facts doctrine, which stripped almost all First Amendment protection from reports on private matters. Rehnquist joined the plurality in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, holding that where a private person sued about a report on a private matter, the press received almost no constitutional protection. The plurality explained that where the matter was simply one of private concern, any First Amendment interest was easily outweighed by the state's strong interest in protecting individual dignity.

The net effect of these rulings is not simply to expose the press to greater liability, but also to deter the press from reporting on private individuals. The more the press is deterred from reporting about private persons, the greater the informational privacy those people enjoy.

c. Added Inducements

One clarification is in order: it is likely that Rehnquist's record in the privacy and libel cases was due to both a desire to protect privacy and a general antipathy to First Amendment claims. Rehnquist was an unfailing opponent of free speech claims. Thus, even if Rehnquist did

68. *Time, Inc.*, 424 U.S. at 454-55. Three years later in *Wolston*, Rehnquist again adopted a broad reading of “private figure” to conclude that the plaintiff, the nephew of a Russian spy subpoenaed to testify about his uncle, was a private person. 443 U.S. at 161-62.


71. *Id.* at 760-61, 763. While the Court conceded that speech about the private matters of private persons was “not totally unprotected by the First Amendment,” it held that such a plaintiff could recover presumed and punitive damages without proof of actual malice, and hinted that such speech might not merit any of the other constitutional safeguards crafted in *Gertz* and *New York Times*. *Id.*

72. *Id.* at 757-58.

73. Geoffrey R. Stone, *The Hustler: Justice Rehnquist and “The Freedom of Speech, or of the Press,”* in *THE REHNQUIST LEGACY* 11, 13 (Craig M. Bradley ed., 2006). Stone's comprehensive review of First Amendment decisions led him to conclude that “[d]uring the course of his tenure, Justice Rehnquist has been, by an impressive margin, the member of the Supreme Court least likely to invalidate a law as violating ‘the freedom of speech, or of the press.’” *Id.* at 13; see also *Sue Davis, Justice Rehnquist and the Constitution* 70 (1989) (discussing Rehnquist's First Amendment record as an Associate Justice and concluding that Rehnquist was “the [J]ustice who was least supportive of First Amendment
not support privacy, the low value Rehnquist placed on speech made it likely that the press would lose these cases. Equally, as a strong supporter of states' rights, his votes undoubtedly reflected his belief that democratically elected governments should be free to legislate on issues of public policy.

However, Rehnquist's position in the private fact and libel cases is best explained only if we credit his love of privacy, along with his antipathy to free speech and his distaste for judicial encroachment on local democratic power. In the libel area, while Rehnquist gutted the protection offered to reports on private persons and private facts, he left untouched, and indeed arguably extended, the protection offered to the press when it reported on public officials and all-purpose-public figures. Rehnquist's one pro-press decision, *Hustler Magazine, Inc. v. Falwell,* has left commentators bemused, driven to explain the decision as an "easy case" or a reflection of Rehnquist's sense of humor or boyish love of cartoons. *Hustler* concerned an admitted all-purpose-public figure, nationally known televangelist and political activist Jerry Falwell, and a cartoon that contained parody, not "actual facts." Such

74. In the private fact cases, Rehnquist expressly devalued the speech interest at stake. *See supra* notes 31, 39, 52; Stone, *supra* note 73, at 13-16 (demonstrating that Rehnquist consistently opposed First Amendment rights in diverse areas).

75. Richard W. Garnett, *Less Is More: Justice Rehnquist, the Freedom of Speech, and Democracy,* in THE REHNQUIST LEGACY 26, 42 (Craig M. Bradley ed., 2006) (arguing that Rehnquist's reluctance to expand First Amendment freedom was driven by a desire to avoid increasing the range of policy questions subject to judicial scrutiny: "[A]s the civic, social and political territory controlled by the Free Speech Clause grows, the amount shrinks that is governed democratically and experimentally by the people and their representatives . . ."); *see also* DAVIS, *supra* note 73, at 93 (concluding Rehnquist's commitment to state legislative power was so strong that "when it is the state that regulates speech, the First Amendment speaks with a voice so faint that Rehnquist fails to hear it").

76. Rehnquist expanded the press protection for reporting on all-purpose-public figures and public officials when he held in *Hustler Magazine, Inc v. Falwell* that even when such public plaintiffs sued for intentional infliction of emotional distress, they had to meet the actual malice standard. 485 U.S. at 56.

77. *Id.*

78. Stone, *supra* note 73, at 23-24 (discussing Rehnquist's position in *Hustler*).

79. *Hustler,* 485 U.S. at 57 n.5.
political cartoons raise none of the privacy issues present when the press publishes true facts about private persons. Perhaps, while Rehnquist was no friend to the press, he was its worst enemy only when privacy was threatened.

2. Punishing the Government When It Publishes Private Facts

Additional evidence of Rehnquist's support for informational privacy comes in a pair of cases that recognized a constitutional right to the nondisclosure of private information enforceable against the government. In *Whalen v. Roe*, patients and doctors challenged a state statute that, in an effort to limit the misuse of certain drugs, required copies of prescriptions to be filed with the state, which then created a computerized database. The Court unanimously upheld the statute, noting that doctors had always provided this type of information to the state and that the state had adopted extensive safeguards that prevented release of the data.

The Court's solicitude for informational privacy is notable. The Court unanimously presumed that privacy covers not only the right to make "certain kinds of important decisions" (the *Roe v. Wade* line of decisions), but also an "individual interest in avoiding [state] disclosure of personal matters." The Fourteenth Amendment's protection of privacy included a right to the "nondisclosure of private information." Applying this right to the state's creation of a drug use database, the Court found that the mere gathering of data, if accompanied by sufficient safeguards, was not unconstitutional. However, the Court expressed concern about "the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive governmental files." The Court suggested that either proof of disclosure of private data or of a "system that did not contain comparable security provisions" would raise grave constitutional concerns.

We would expect Rehnquist to have had two objections to such a

80. *Id* at 50.
82. *Id.* at 600-04.
83. *Id.* at 599-600.
84. *Id.* at 600.
85. *Id.* at 605-06.
86. *Id.* at 605.
87. *Id.* at 605-06.
holding: the decision recognized an unwritten, constitutional right, and it limited the power of the states to govern, violating his avowed commitment to enhancing democratic decision making. Yet, Rehnquist joined the majority opinion without reservation.

The Court’s development of a constitutional right of nondisclosure of private information continued in Nixon v. Administrator of General Services, a case concerning President Nixon’s multi-faceted challenge to the Presidential Recordings and Materials Preservation Act, which ordered Nixon to turn over all presidential papers to the archivists so that papers of public interest could be preserved and private papers be returned to Nixon. Decided a few months after Whalen, the Nixon majority again acknowledged a constitutional right to prevent government disclosure of private information. However, the Court again found no violation of that right, adopting a multi-factor balancing test to conclude that Nixon’s diminished privacy claim and the Act’s carefully constructed confidentiality provisions rendered the Act constitutional.

Rehnquist dissented, finding the Act unconstitutional on separation of powers grounds. In a lengthy footnote, Rehnquist chastised the Court for failing to adequately protect the President’s privacy interest. He argued that the Act’s promise that papers lacking “general historical significance” would be returned was so vague as to imperil Nixon’s individual privacy interest. In short, in both Whalen and Nixon, .

88. See infra note 170 (discussing Rehnquist’s opposition to the recognition of unwritten rights). The majority argued that the right was not born in “the shadows cast by a variety of provisions in the Bill of Rights,” but rather was “founded in the Fourteenth Amendment’s concept of personal liberty.” Whalen, 429 U.S. at 598–99 n.23.

89. See supra note 75 (discussing Rehnquist’s commitment to narrowly construing constitutional limitations on state power).

90. Rehnquist did not even join Justice Stewart’s concurrence, which sought to address these concerns by emphasizing that “there is no ‘general constitutional “right to privacy.”’” Whalen, 429 U.S. at 607–08 (Stewart, J., concurring) (citation omitted). Stewart argued that protection of a person’s right to be left alone was “left largely to the law of the individual States.” Id. at 608 (citation omitted).

91. 433 U.S. 425, 440 (1977). The Court also considered and rejected a number of other challenges to the Act. Id. at 440–41.

92. Id. at 457.

93. Id. at 465.

94. Id. at 545–61 (Rehnquist, J., dissenting).

95. Id. at 545 n.1.

96. Id. Rehnquist also argued that the executive privilege’s protection of confidential advice was based in part on concerns for privacy, and thus, even tapes and papers addressing public affairs presented a “serious intrusion” upon privacy. Id.
Rehnquist supported a claim of privacy against the government, a claim that required the recognition of a new constitutional right and a claim that limited the legislative freedom of both the states and the federal government.

As the above journey through the case law has revealed, Rehnquist valued privacy and sought to protect it by penalizing publication. He urged the expansion of tort remedies, both in privacy and in libel, and supported the creation of a constitutional limit on government dissemination of private data. Both his votes and the language of his opinions reflect a deep-seated belief in the value of a private life.

B. Protecting Privacy by Denying Access to Information

An alternative method of protecting privacy is to deny access, keeping the information secret. As set out below, Rehnquist consistently voted to close courtrooms, to block release of records on privacy grounds under the Freedom of Information Act (FOIA), and to empower Congress and the states to keep private facts secret.

1. Protecting Privacy by Keeping the Press Out of the Courtroom and Other Governmental Proceedings

When people appear in court or in other governmental proceedings, their private lives are often exposed. From the first, Rehnquist consistently and vocally opposed press claims of a First Amendment right of access to governmental proceedings. He was one of the few Justices to oppose the recognition of a press right of access to observe criminal and civil trials.


98. In Richmond, the Court had voted seven to one, over Rehnquist’s lone dissent, to
When his battle to close courtrooms was lost, he joined opinions that, while recognizing a right of access, gave the lower courts the power to close when necessary to protect privacy. For instance, in *Press Enterprise I*, Chief Justice Burger overturned a trial court's closure of almost every day of a six-week jury voir dire, but the opinion, which Rehnquist joined, was full of concern for jury privacy. The Court expressly held that the privacy interests of prospective jurors could be a compelling interest that justified closure and emphasized that the trial court should inform jurors of the right to answer sensitive questions in private. Indeed, Burger's praise of juror privacy was so strong that Justice Blackmun wrote a separate concurrence arguing that the Court had not and should not recognize a distinct constitutional right of juror privacy. Thus Rehnquist's only pro-access vote, one made after his battle for no-access was already lost, was in a case where the opinion recognized that the privacy rights of prospective jurors justified closure under certain circumstances.

2. Protecting Privacy by Denying Access to Government Records

In his 1974 law review article on privacy, Rehnquist posited that one of the greatest threats to privacy was the amount of information that the government, in the era of the welfare state, had gathered about its residents. He argued that the government's collection of data had outpaced its ability to protect privacy. In response, he called for a comprehensive approach to privacy protection, including the adoption of strong privacy laws and the implementation of policies to limit government access to personal information.

recognize a right of access to criminal trials. 448 U.S. at 558. The missing Justice, Justice Powell, recused, id. at 581, but had previously signaled his willingness to recognize such a right. First Amendment right, see *Gannett*, 443 U.S. at 397-403, leaving Rehnquist as the lone vote against any access right.

100. *Press-Enter. I*, 464 U.S. at 503-05.
101. See generally id. at 503-13.
102. Id. at 511-12.
103. Id. at 512. The Court cautioned the trial courts to only release a transcript “if the judge determin[es] that disclosure can be accomplished while safeguarding the juror’s valid privacy interests.” Id.
104. Id. at 513-14 (Blackmun, J., concurring).
105. Rehnquist's support for privacy was also on display in the only other court access case to address privacy, *Globe Newspaper v. Superior Court*, where the majority struck down a Massachusetts statute that mandated closure during the testimony of minor victims of sexual assault. 457 U.S. 596, 610-11. The majority agreed that the state's interest in protecting the minor victims of sex crimes was compelling, but found that a mandatory closure rule, requiring closure in all cases without any finding of need, was unconstitutional. Id. at 602, 607-09. In dissent, Burger (joined by Rehnquist) argued that it was error to limit the states' ability to protect minor victims of sexual assault. Id. at 612-13 (Burger, C.J., dissenting). Burger's dissent included a lengthy footnote recognizing the privacy rights of the child rape victims. Id. at 612 n.1.
citizens: "the government will know more about each of us than it did 50 years ago and . . . in a very real sense we will have that much less privacy." Faced with requests for access to information held by the government, Rehnquist consistently refused release and joined opinions that adopted wide privacy protections.

The FOIA requires the federal government to release information to the public, unless the information falls within one of the exemptions set out in the Act. Two such exemptions concern privacy: § 552(b)(6) exempts "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," and § 552(b)(7) exempts "law enforcement" records where disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy."

Rejecting any "cramped notion" of privacy, the Rehnquist Court repeatedly took an expansive view of these exemptions. Most notably, the Court openly adopted a definition of privacy under the FOIA that was broader than the right to privacy recognized by common law or the Constitution. Equating privacy with the right to "control . . . information concerning his or her person," the Court applied the privacy exemption not just to confidential information, but also to information already made public, even information contained in other public records. Indeed, the Rehnquist Court once boasted that "none

106. Rehnquist, supra note 10, at 15.
113. Id. at 763 (emphasis added).
114. Id. at 762-65. Thus, the Court has found privacy interests in rap sheets (even if
of our cases construing the FOIA” have upheld “a FOIA request for information about a particular private citizen.”

Rehnquist has been a strong supporter of this trend. He voted against the release of records and for a broad reading of privacy in every FOIA case before the Court during his tenure. Of note is his dissent in *Rose* where the Court considered a FOIA request by law review editors for summaries of honor code hearings at the Air Force Academy. The majority held that the case summaries could be produced if, after an *in camera* inspection, the trial court concluded that the redaction of the names of the participants would be “sufficient to safeguard privacy.” Yet, in the eyes of the three dissenters, Chief Justice Burger and Justices Blackmun and Rehnquist, any release, even after *in camera* redaction, violated the privacy objectives of the exemption.

Rehnquist’s influence, if not his voice, can also be felt in the Court’s key case in this area, *Reporters Committee for Freedom of the Press.* In an opinion joined by Justice Rehnquist, the Court held that the release of FBI rap sheets would constitute an unwarranted invasion of the personal privacy of the suspect. Justice Stevens’s opinion for a unanimous Court was replete with praise for privacy, including citation to Rehnquist’s *Rose* dissent and his University of Kansas Law Review article. The case also echoed Rehnquist’s concern that absent a broad

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115. See id. at 762, 775 (rap sheets); Fed. Labor Relations Auth., 510 U.S. at 502 (home addresses); Wash. Post Co., 456 U.S. at 600-01 (passport applications).


117. 425 U.S. at 389–90 (Rehnquist, J., dissenting).

118. Id. at 354–55 (opinion of the Court).

119. Id. at 381 (Rehnquist, J., dissenting) (citation omitted). The Court was highly protective of privacy, concluding that there was a valid privacy claim, which could not be “rejected as trivial,” even though the original summaries had been posted by the Air Force and even though the request was only for records with names redacted. Id. at 380–81.

120. Rose, 425 U.S. at 389–90 (Rehnquist, J., dissenting); id. at 382–85 (Burger, C.J., dissenting); id. at 388–89 (Blackmun, J., dissenting). Rehnquist’s dissent sought to distinguish his ruling in *Paul v. Davis*, 424 U.S. 693 (1976), discussed infra in Part II.C.


122. Id. at 762–63.

123. Id. at 769.

124. Id. at 770–71.
exception for privacy, the vast amount of information on private individuals collected by the many arms of the federal government would become open to public inspection "transform[ing]" the federal government "in one fell swoop into the clearinghouse for highly personal information, releasing records on any person, to any requester, for any purpose."\(^{125}\)

In sum, faced with FOIA requests, Rehnquist consistently refused release and joined opinions that crafted wide privacy exceptions reflecting his long-held concerns about government databases.

3. Protecting Privacy by Upholding Statutes That Keep Information Secret

Rehnquist has been equally supportive of government efforts to deny access to government records, thus, de facto, protecting privacy. For instance, in *Los Angeles Police Department v. United Reporting Publishing Corp.*,\(^{126}\) Rehnquist rejected a First Amendment challenge to California’s refusal to release arrest records.\(^{127}\) While the opinion focused on the validity of a facial (versus an “as applied”) challenge,\(^{128}\) Rehnquist went out of his way to note that not only did California’s current limit on access to arrest records pass muster, but that “California could decide not to give out arrestee information at all without violating the First Amendment.”\(^{129}\) This proposition, which drew the agreement of the entire Court,\(^{130}\) reflected Rehnquist’s belief that governments are free to deny access to information in their possession, especially information that infringes on privacy.\(^{131}\)

Rehnquist’s willingness to uphold statutes that limit access to private information was illustrated again in the 2000 case of *Reno v. Condon*.\(^{132}\)

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125. *Id.* at 761 (quoting Reporters Comm. for Freedom of the Press v. U.S. Dep’t of Justice, 831 F.2d 1124, 1130 (D.C. Cir. 1987) (Starr, J., dissenting)). The Court saw this threat compounded by the advent of computerized databases: information that would once have been forgotten would now be stored and potentially released, increasing the threat to personal privacy. *Id.* at 771.


127. *Id.* at 37.

128. *Id.* at 37–40.

129. *Id.* at 40.

130. See *id.* at 43 (Ginsburg, J., concurring); *id.* at 45 (Stevens, J., dissenting) (agreeing with the proposition, but dissenting in the judgment).

131. Chief Justice Rehnquist’s opinion, focusing as it does on facial challenges, does not address privacy, but as Justice Stevens’s dissent notes, the state’s only asserted interest in limiting access to arrest records is to protect privacy. *Id.* at 46.

The federal Driver’s Privacy Protection Act restricted the ability of states to disclose a driver’s personal information. Most states required citizens applying for driving licenses to disclose extensive personal information and then resold this information for millions of dollars. The federal Act, however, barred state disclosure of the personal information absent the driver’s express consent. The federal Act was challenged by the State of South Carolina on two federalism grounds: that Congress exceeded its power under the Commerce Clause and that the restrictions on the State violated the Tenth Amendment by requiring states, in their sovereign capacity, to regulate their own citizens. Rehnquist, the father of federalism, writing for a unanimous Court, rejected both challenges and upheld Congress’s efforts to protect privacy. While his opinion sought to reconcile his holding with prior federalism cases, one explanation of his temporary betrayal of federalism is that the statute promoted the informational privacy of almost every citizen, a value Rehnquist held dear, although one he never mentioned in his opinion. Read together, the lesson of Los Angeles and Reno is that states may deny access to private information, and if the states fail to protect this privacy, Congress may step in and fill the void.

One final group of cases shows Rehnquist’s support of state efforts to protect privacy by limiting access—the anonymous speaker cases. Fairly consistently in his years on the Court, Rehnquist rejected claims that the First Amendment encompassed a right to speak anonymously. In McIntyre v. Ohio Election Commission, he joined Justice Scalia’s dissent refusing to invalidate a statute that barred the distribution of

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133. Id. at 143.
134. Id. The information typically included name, address, telephone number, vehicle description, social security number, medical background, and photograph. Id.
135. Id. at 143–44.
136. Id. at 144–45. There were also a series of statutory exceptions. Id.
137. Id. at 147–51.
138. Id. at 151.
139. Id. at 148–49.
anonymous campaign literature, and in *Watchtower Bible & Tract Society v. Village of Stratton*, he was the lone dissenter who would have upheld a village ordinance requiring all canvassers to register prior to going door-to-door. Rehnquist, in his *Watchtower* dissent, argued that the state should have been permitted to limit canvassers and protect the privacy of the village home owners. Their privacy was a "significant" and "important" governmental interest: The "home is one place where a man ought to be able to shut himself up in his own ideas if he desires." In Rehnquist's eye, because the ordinance enhanced privacy by ensuring "fewer uninvited knocks," it was constitutional. Thus, Rehnquist, once again, sought to protect a private life.

C. Limitations, Contradictions, and Explanations

The above sections evidence that Rehnquist wrote and voted in favor of informational privacy throughout his time on the Court. He sought to give remedies to those whose privacy was invaded as well as to block access to private information. But it is not the thesis of this Article that Rehnquist viewed informational privacy as an absolute. Rather, as he did in so many other areas, Rehnquist advocated that privacy be balanced against competing interests: as he put it in his 1974 article, "privacy is a value that competes with other values." The prior

142. Id. at 371–85 (Scalia, J., dissenting).
143. 536 U.S. 150 (2002).
144. Id. at 172, 180 (Rehnquist, C.J., dissenting).
145. Id. at 172–80. Neither the majority nor Rehnquist in dissent focused on the potential privacy claim of the speaker. The majority did acknowledge that the speaker who seeks anonymity may be motivated by the "desire to preserve as much of one's privacy as possible," id. at 166 (quoting *McIntyre*, 514 U.S. at 341–42); nevertheless, the Court has viewed the right to canvas anonymously not as a part of privacy, but rather as "an aspect of the freedom of speech protected by the First Amendment." *McIntyre*, 514 U.S. at 342.
147. Id. at 178.
148. Id. at 176 (citation omitted).
149. Id. at 178. Rehnquist also extolled the privacy of the home in his dissent in *Carey v. Brown*, 447 U.S. 455, 478–79 (1980) (Rehnquist, J., dissenting). Rehnquist's dissent both emphasized the importance of protecting the privacy of the home, id. at 478–79, and, quoting Justice Frankfurter, urged the Court that "it is not for us to supervise the limits the legislature may impose in safeguarding the steadily narrowing opportunities for serenity and reflection." Id. at 489 (quoting *Kovacs v. Cooper*, 336 U.S. 77, 97 (1949) (Frankfurter, J., concurring)).
150. Rehnquist, supra note 10, at 2. He continued:

Increased privacy of the individual may mean less effective enforcement of the laws or a less well-informed citizenry. Recognizing that claims for
sections reveal that privacy prevailed in this balancing with surprising frequency. This section attempts to explain how privacy fared when it competed with some of Rehnquist's other core values.

1. Privacy Versus Effective Law Enforcement

In Rehnquist's hierarchy of values, privacy never trumped the state's interest in effective law enforcement. In his 1974 article, while Rehnquist admitted that the Fourth Amendment protects a "very strong core-area" of privacy, he insisted that such privacy must be balanced against the "even stronger societal interest in permitting police . . . to apprehend and convict a criminal." His record on the Court was consistent with this philosophy: he repeatedly rejected privacy claims by accused, showing less concern for the protection of Fourth Amendment privacy rights than any of his contemporaries on the Court. Under Rehnquist's philosophy, criminals or even suspected criminals did not have privacy rights that could outweigh the needs of "effective law enforcement.”

increased privacy might produce these results does not by any means suggest that the claims should be rejected, but it does suggest that they should be carefully analyzed not only in terms of the values they would advance, but in terms of the values they would displace.

Id. at 2-3 (citations omitted).

151. Bradley, supra note 9, at 93-94 (summarizing Rehnquist's record in Fourth Amendment cases).

152. Rehnquist, supra note 10, at 14 (emphasis added).

153. Bradley, supra note 9, at 93-94 (summarizing Rehnquist's record in Fourth Amendment cases).

154. Rehnquist, supra note 10, at 21. Some authors have suggested that Rehnquist's position in Fourth Amendment cases was driven, in part, by a lack of empathy with accused. See, e.g., Bradley, supra note 9, at 103 (reviewing Rehnquist's record and suggesting that "[t]o the extent that personal feelings and experiences underlie a Justice's attitudes about the law, the prospect of being stopped or searched by police would not seem to be a personal concern of Rehnquist's. Nor does he empathize with those people for whom it is a more realistic possibility."). However, the privacy cases show that, while Rehnquist opposed any privacy rights that would interfere with police work, he was willing to protect the privacy interests of accused and criminals when doing so did not conflict with law enforcement goals. See also Rehnquist, supra note 10, at 8 (acknowledging that individuals have some privacy interest in their arrest records). Compare Paul v. Davis, 424 U.S. 693, 713 (1976) (holding there was no privacy claim against police for the release of an arrest record as part of crime prevention efforts), with U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 766-67 (1989) (holding that individuals have a privacy interest in their rap sheets, which will support the government's decision not to disclose under the FOIA), Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 107-08 (Rehnquist, J., dissenting) (holding that the state may protect the anonymity of juvenile accused), and Wolston v. Reader's Digest Ass'n, 443 U.S. 157, 168-69 (1979) (suggesting that participation in criminal conduct was not sufficient to lose private
This "trump card" effect of law enforcement may explain Justice Rehnquist's early opinion in *Paul.* The facts of *Paul* were relatively simple: the plaintiff was arrested for shoplifting, was arraigned and pled not guilty, and later the charge was dismissed. After the arrest and arraignment, but prior to the dismissal, two police departments distributed a flyer alerting store owners to possible shoplifters who might be active during the holiday season. The flyer included the plaintiff's mug shot and labeled him as an "active shoplifter[]."

Plaintiff filed a § 1983 action against the police chiefs alleging that the flyer deprived him of his "liberty" in violation of the Fourteenth Amendment. Writing for the Court, Rehnquist rejected the plaintiff's constitutional claim, holding that reputational harm, by itself, is insufficient to trigger the constitutional protections of the due process clause. However, the complaint also asserted a constitutional privacy claim, and in a brief section at the end of his opinion, Rehnquist rejected this claim too.

Rehnquist noted that there was "no 'right of privacy' found in any specific guarantee of the Constitution," but admitted, citing to the Court's recent decision in *Roe v. Wade,* that the Court had "recognized that 'zones of privacy' may be created by more specific constitutional guarantees and thereby impose limits upon government power." Rehnquist, however, found that the plaintiff's privacy claim...
came "within none of these areas"\textsuperscript{166} because it triggered neither the zone of privacy relating to marriage and procreation recognized by \textit{Roe v. Wade}, nor the protections against search and seizure spelled out in the Fourth Amendment.\textsuperscript{167} According to Rehnquist, "[n]one of [the Court's] substantive privacy decisions" covered the release by the state of a "record of an official act such as an arrest."\textsuperscript{166} Thus, in \textit{Paul}, Rehnquist refused to recognize a constitutional right to informational privacy, closing the door on what Justice Brennan, in dissent, reported to be a growing set of lower court decisions recognizing a "substantive limit[] on the power of the government to disseminate unresolved arrest records outside the law enforcement system."\textsuperscript{169}

The simplest explanation\textsuperscript{170} of Rehnquist's decision in \textit{Paul} is that the

\begin{itemize}
\item \textsuperscript{166} Id. at 713.
\item \textsuperscript{167} Id.
\item \textsuperscript{168} Id.
\item \textsuperscript{169} Id. at 735 n.18 (Brennan, J., dissenting).
\item \textsuperscript{170} There are two other possible explanations for Rehnquist's vote in \textit{Paul} that I do not find as convincing as those canvassed in the text, but they should be mentioned. First, it is possible that Rehnquist thought arrest records were public records, and thus, there was no privacy interest. Indeed, Rehnquist specifically described the arrest record at issue in \textit{Paul} as "a record of an official act." Id. at 713.

However, such a theory is contradicted by Rehnquist's writings and opinions, which consistently recognized a limited privacy interest in records of official conduct. In his 1974 article on privacy, Rehnquist concluded that even though an "arrest is not a 'private' event" and is "ordinarily a matter of public record," an individual did have an "interest in limiting disclosure or dissemination of the information." Rehnquist, \textit{supra} note 10, at 8. Rehnquist's record in the other privacy cases also reflected a belief that a claim of privacy could be made for records that report government acts. It is true that in the private fact cases Rehnquist held that once the state officially released a record, for instance in open court, it could not then publish punishment by the press. See \textit{Okla. Publ'g Co. v. District Court}, 430 U.S. 308, 310-12 (1977). However, Rehnquist never held that, just because records detailed official acts or reported previously public facts, there was no privacy interest. To the contrary, in the FOIA cases he repeatedly argued that there was a privacy interest in preventing the release of official records of wrongdoing, even if they had been previously public. See U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 764-65 (1989) (recognizing a privacy interest in a rap sheet compiled by the FBI from public records); Dep't of the Air Force v. Rose, 425 U.S. 352, 389-90 (1976) (Rehnquist, J., dissenting) (recognizing a privacy interest in previously posted reports of honor code hearings); see also \textit{Nixon v. Adm'r of Gen. Servs.}, 433 U.S. 425, 545 n.1 (1977) (Rehnquist, J., dissenting) (arguing that Nixon retained a privacy interest in the records of his actions as President). Equally, Rehnquist held there was a strong state interest in protecting the anonymity of juveniles accused, even though the states only reported official action. See \textit{Smith v. Daily Mail Publ'g Co.}, 443 U.S. 97, 107 (1979) (Rehnquist, J., concurring). Because Rehnquist consistently recognized some kind of privacy interest, even in records that report official government acts, it is unlikely that this explains his vote in \textit{Paul}.

A second possible explanation is that the \textit{Paul} case is collateral damage in Rehnquist's war against the recognition of unwritten constitutional rights in general and \textit{Roe v. Wade} in
privacy claims by accused always yield to the needs of effective law enforcement. Indeed, in his 1974 article on privacy, Rehnquist had discussed various privacy claims that might arise when law enforcement released arrest records. While acknowledging that an individual has some “interest in limiting disclosure or dissemination of the information,” Rehnquist concluded that such claims must fail when balanced against the needs of law enforcement. After all, arrest records, while not “conclusive evidence of wrongdoing,” did indicate “probable cause to arrest” and were an important tool in police work. Rehnquist’s vote in Paul reaffirmed that privacy claims never trumped society’s interest in effective law enforcement.

2. Does Privacy Ever Limit Government Action?

The more fundamental question is whether Rehnquist was ever willing to protect privacy if it meant imposing limitations on the government’s freedom to act. Overall, Rehnquist’s constitutional philosophy was marked by an unwillingness to limit the power of
democratically elected governments to make policy decisions.\footnote{175} He opposed the judicial expansion of individual rights, especially those not spelled out in the Constitution.\footnote{176} Such expansion both limited states’ rights and smacked of judicial activism, rather than the strict constructionism Rehnquist had sworn to uphold.\footnote{177}

Most of the time, Rehnquist could protect privacy while also remaining true to these other goals. It is unsurprising that Rehnquist protected privacy when his love of privacy \textit{coincided} with his desire to enhance state freedom and to resist the expansion of individual rights. Thus, in private fact and libel cases, Rehnquist could protect privacy by upholding the power of the state to provide tort remedies in the face of novel First Amendment challenges.\footnote{178} Likewise, in the access cases (whether denying access to courts, blocking requests for records under the FOIA, or empowering Congress and the states to limit access), Rehnquist could vote for privacy while also limiting individual rights and empowering the government to act.\footnote{179}

One specter, raised by Rehnquist’s decision in \textit{Paul}, is that perhaps privacy never acted as a limit on government,\footnote{180} and if so, Rehnquist’s privacy right was weak indeed. There is some support for such a reading: in his dissent in \textit{Rose}, the FOIA case, Rehnquist seemed to draw a sharp distinction between cases like \textit{Paul} where the government “chose to disseminate” records—and privacy claims failed—and cases like \textit{Rose} where the government had “chosen \textit{not} to disseminate the records”—and privacy claims succeeded.\footnote{181} Privacy, he implied, only worked to support government decisions, never to second guess them.\footnote{182}

\footnote{175. \textit{See supra} note 74.}
\footnote{176. \textit{See supra} note 170 (discussing Rehnquist as a strict constructionist).}
\footnote{177. \textit{Id.}}
\footnote{178. \textit{See supra} Part II.A.1 for a discussion of these cases.}
\footnote{179. \textit{See supra} Part II.B for a discussion of these cases.}
\footnote{180. \textit{Paul v. Davis}, 424 U.S. 693 (1976).}
\footnote{181. \textit{Dep’t of the Air Force v. Rose}, 425 U.S. 352, 389–90 (1976) (Rehnquist, J., dissenting). In \textit{Rose}, Rehnquist dissented from the Court’s release of redacted reports of Air Force honor code hearings requested under the FOIA. \textit{Id.} Rehnquist argued that releasing the hearing reports failed to protect the privacy of the cadets. \textit{Id.} \textit{Paul} and \textit{Rose} are strikingly similar in one way: both concerned disclosure of government records of past misdeeds. \textit{Paul}, 424 U.S. at 712 (an arrest record); \textit{Rose}, 425 U.S. at 354–55 (honor code reports).}
\footnote{182. \textit{See Rose}, 425 U.S. at 389–90 (Rehnquist, J., dissenting). Rehnquist’s full explanation was:}
However, two cases, Whalen\(^{183}\) and Nixon\(^{184}\) suggest that Rehnquist's support for privacy was more robust. Whalen was the challenge to the state's creation of a computer database of prescriptions,\(^{185}\) and Nixon addressed the federal government's right to seize and archive Nixon's presidential records.\(^{186}\) Whalen and Nixon were both decided in 1977, and both recognized that there was a **constitutional right** to privacy of information and that this right limited the action of government.\(^{187}\)

Rehnquist's pro-privacy vote in these cases is notable for two reasons. First, the cases seemingly read a novel right of privacy into the Constitution, and Rehnquist, as a strict constructionist, was openly critical of judicially created rights.\(^{188}\) Second, the right to nondisclosure, recognized in Whalen and Nixon, limited the actions of government, and indeed, imposed liability on government, if privacy rights were violated.\(^{189}\) While neither Whalen nor Nixon found any unjustified disclosure,\(^{190}\) their holdings have spawned a series of cases imposing liability on government for wrongful disclosure of private information, particularly about governmental employees.\(^{191}\)

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**Id.** at 389 (citation omitted).


185. 429 U.S. at 591–95.

186. 433 U.S. at 430–36.

187. See Whalen, 429 U.S. at 598–600; Nixon, 433 U.S. at 457. Both were decided within a year of *Paul*, 424 U.S. 693 (1976). In both Whalen and Nixon, Rehnquist supported the privacy right: in Whalen he joined the majority opinion, 429 U.S. at 590, and in Nixon he dissented, in part because the majority failed to protect Nixon's privacy, 433 U.S. at 545 n.1.

188. See *supra* note 170 (discussing Rehnquist as a strict constructionist).

189. In Whalen, the Court found no evidence that the state had disclosed the information in its drug database. Whalen, 429 U.S. at 605–06. In Nixon, the majority also held that there was no constitutional violation after performing a multi-faceted balancing test. 433 U.S. at 465. Rehnquist dissented in Nixon. *Id.* at 545 (Rehnquist, J., dissenting). While most of his opinion focused on separation of powers issues, Rehnquist argued, in an extensive footnote, that the majority was too quick to reject Nixon's privacy claim. *Id.* at 545 n.1.

190. Whalen, 429 U.S. at 598–600; Nixon, 433 U.S. at 457 (majority opinion).

Whalen and Nixon suggest that when informational privacy was aligned against two of Rehnquist's core values—his unwillingness to create constitutional rights and his unwillingness to limit state activity—privacy could still win. Privacy lost out in Paul only because of the strong law enforcement goals that were also aligned against privacy. That privacy could win out when arrayed against strict constructionism and states' rights demonstrates that for Rehnquist, while informational privacy was not absolute, it was a core value.

III. CHIEF JUSTICE ROBERTS: FRIEND OR FOE?

Predicting the future votes of a Justice can be difficult at best, but in Chief Justice Roberts's case, the task is made harder by his relatively short tenure on the bench. Yet, recent studies have shown that, at least for the first decade of service, Justices stray little from the ideology they hold upon joining the bench. Thus, it seems valid to ask, even at this early stage, whether Roberts is a supporter of informational privacy.

Roberts has not decided any private fact tort cases, but his vote in the libel case of Lohrenz v. Donnelly suggests an approach at odds with Rehnquist's. In Lohrenz, Roberts joined an opinion for the Court of Appeals for the D.C. Circuit, holding that one of the first female Navy fighter pilots was a public, not a private, figure. The Lohrenz panel ruled that a private person could become a public figure, even if she did

192. Ironically, there are echoes of law enforcement interests in both Whalen and Nixon. In Whalen, the state created the drug prescription database as part of its efforts to control drugs being diverted into illegal channels, 429 U.S. at 597–98, and in Nixon, Congress's passage of the Presidential Recordings and Materials Preservation Act was motivated by the belief that perhaps Nixon was a crook, or at least could not be trusted with the records of his presidency, 433 U.S. at 430–36. However, neither case raised any possibility that the privacy claim would impede law enforcement efforts. In Whalen, the New York statute prohibited the disclosure of prescription information to the public but allowed its use by state investigators. 429 U.S. at 594–95. Indeed, the very purpose of the statute was to aid the detection and prosecution of illegal drug usage. Id. at 591–92. Equally, in Nixon, the records at issue had already been made available to the special prosecutor, 433 U.S. at 430–31, and the issue before the Court was simply their disclosure to the archivist. Id. at 465. Thus, neither case presented the same threat to effective law enforcement posed by Paul.

193. Roberts has served on the bench for almost four years. He served on the Court of Appeals for the D.C. Circuit from June 2003 until his elevation to Chief Justice of the United States Supreme Court in September 2005.

194. Lee Epstein et al., Ideological Drift Among Supreme Court Justices: Who, When, and How Important?, 101 NW. U. L. REV. 1483, 1521 (2007) (concluding that while Justices adhered to contemporaneous expectations "at least during the Justice's first term in office," thereafter Justices grew more liberal or conservative during their tenure on the Court).

196. Id.
not actively seek publicity.\textsuperscript{197} "[A]chiev[ing] a 'special prominence' in the debate," even though such prominence was not affirmatively sought, was enough to trigger public figure status.\textsuperscript{198} This approach contradicts that advocated by Rehnquist who, by requiring a showing that the person voluntarily sought publicity, greatly expanded who qualified as a private figure.\textsuperscript{199} Thus, what little evidence we have shows that Roberts is no clone of Rehnquist in the libel or private facts arena.

Roberts's record also provides no evidence of a sensitivity to the privacy threat posed by government databases. Roberts has not decided any cases concerning claims, under \textit{Whalen} or \textit{Nixon}, that the government's compilation and release of information violated a citizen's right to nondisclosure of private information. However, his support for national identity cards while working in the Reagan White House indicates little concern with government gathering and control of data.\textsuperscript{200} While Roberts asserted that he would "yield to no one in the area of commitment to individual liberty against the spectre of overreaching central authority," in his view, concerns about a national I.D. card were "largely symbolic."\textsuperscript{201} For Roberts, immigration was a "real threat" that easily outweighed the "symbolic" dangers posed by the introduction of a mandatory national identification system.\textsuperscript{202} Roberts's assessment stands in stark contrast to Rehnquist's, who saw government compilation of data as causing, "in a very real sense," a loss of privacy.\textsuperscript{203}

Roberts's record of protecting privacy by denying access to government records and meetings is mixed. Roberts, unlike Rehnquist, seems to presume that courts must operate in the open. During his confirmation hearing, in response to questions about the Foreign Intelligence Surveillance Act (FISA) Court, which operates in secret, Roberts opined that while there were reasons that justified closure for the FISA Court, such closure was a "departure[] from the normal judicial model."\textsuperscript{204} On the court of appeals, Roberts also participated in

\begin{enumerate}
\item \textsuperscript{197} \textit{Id.} at 1280–81. The panel held that the plaintiff assumed the risk of becoming a public figure by choosing combat aviation. \textit{Id.}
\item \textsuperscript{198} \textit{Id.} at 1279 (citation omitted).
\item \textsuperscript{199} See supra Part II.A.1.b (discussing Rehnquist's approach in libel cases).
\item \textsuperscript{200} See Letter from Electronic Privacy Information Center, supra note 11, at 7.
\item \textsuperscript{201} \textit{Id.}
\item \textsuperscript{202} \textit{Id.}
\item \textsuperscript{203} Rehnquist, supra note 10, at 15.
\item \textsuperscript{204} \textit{Hearing, supra} note 1, at 213 (responding to questions from Senator DeWine). However, in response to other questions he did not seem to have a firm grasp, let alone a strong view, on a right of access to government institutions. \textit{Id.} at 303–09.
\end{enumerate}
two cases on access to governmental records, one that granted access and the other denying it. In *Tax Analysts v. IRS*, Chief Justice Roberts joined a unanimous panel to hold that the Tax Reform Act did require the IRS to disclose redacted documentation supporting its denial or revocation of tax-exempt status, concluding that Congress's aim was "to protect taxpayer privacy while requiring the IRS to disclose written determinations." In contrast, in *In re Cheney*, Chief Justice Roberts joined the unanimous en banc opinion of the court of appeals in holding that the Federal Advisory Committee Act did not grant access to the documents or meetings of President Bush's National Energy Policy Development Group. These cases, *Tax Analysts* and *In re Cheney*, focused on questions of separation of powers and of statutory interpretation, and give us little sense of where Roberts stands on access to private information.

By far the largest body of cases that give an inkling of Roberts's views on privacy are in the Fourth Amendment area. Roberts, like Rehnquist, frequently rejects claims under the Fourth Amendment. Of most interest is Roberts's opinion for a unanimous panel of the D.C. Circuit in *Stewart v. Evans*, where a government employee claimed her Fourth Amendment rights were violated after government lawyers reviewed documents relating to a gender discrimination charge she had filed against the then Inspector General. While the employee agreed to allow a review of her documents to see if they were called for by a newspaper's FOIA request, she only shared the records on the express condition that the records not be shown to the lawyers defending against her discrimination charge—a condition the government promptly violated. Roberts held that as soon as she handed over the documents in response to the FOIA claim, she lost all privacy interest in them:

205. 350 F.3d 100, 104 (2003).
206. 406 F.3d 723, 731 (D.C. Cir. 2005). The court found that because the President chose to "form a committee composed only of federal employees," the committee was "exempt from FACA." Id. at 728. The court acknowledged that its ruling enabled the President to "create an advisory body whose internal communications will remain confidential." Id.
207. Roberts did decide a lot of FOIA cases while serving on the D.C. Circuit, but none concerned the privacy exemptions.
210. Id. at 1240–42.
"The reason Stewart transferred the documents is highly pertinent. . . . When the threat of mandatory disclosure accompanies the transfer of documents to a third party, little reasonable expectation of privacy exists." For Roberts, while the "Fourth Amendment protects privacy[,] it does not constitutionalize non-disclosure agreements." Roberts's opinion seems to take a parsimonious view of privacy, but it may simply reflect a general hostility to Fourth Amendment claims, a philosophy that Rehnquist shared.

This, then, is Roberts's record on informational privacy. It is perhaps too early to say that Chief Justice Roberts will prove a foe to informational privacy. However, his record so far gives no indication of any concern for privacy.

IV. CONCLUSION

Chief Justice Rehnquist once wrote that "no thinking person is categorically opposed to 'privacy' in the abstract." As this Article reveals, Rehnquist valued privacy not only in the abstract, but also, repeatedly, in his decisions on the bench. In contrast, while Roberts may resemble his mentor in many ways, his record suggests that he will not fill Rehnquist's shoes as the Court's champion for privacy of information.

211. Id. at 1244.
212. Id.