Privacy, right to

THE WORD *privacy* cannot be found in the Constitution of the United States. Yet Americans have tended to believe in a constitutional right to privacy—the right to be secure against unlawful intrusions by government into certain protected areas of life. Ever since the founding era, most Americans have recognized public and private domains of society. The public domain is open to regulation by government. For example, the people expect their police officers to keep order on the streets of a community, a function that involves certain limits on the free movement of people. The private domain, by contrast, is generally closed to invasion and control by government and can be entered and regulated by police officers only for a compelling public purpose and according to due process of law.

There are continuing legal issues about the boundaries between the public and private domains of society because these two realms of life are inextricably bound together. Thus, for example, the government can constitutionally justify certain regulations of private property owners to protect the public against abuses, such as pollution of the environment. Further, the government may constitutionally enter a person's home to prevent individuals from conducting activities that violate the public interest, such as molesting children. When, and under what circumstances, does a person's right to privacy end and the public's authority to regulate behavior in the public interest begin? This is an ongoing problem in the courts.

Justice Louis D. Brandeis argued for a general constitutional right to privacy in a famous dissent in *Olmstead* v. *United States* (1928): "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. . . . They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." Justice Brandeis pointed to the 4th Amendment protections against "unreasonable searches and seizures" and the 5th Amendment guarantees against self-incrimination as examples of constitutional protection against "unjustifiable intrusion by the Government upon the privacy of the individual."

For more than 30 years after the *Olmstead* case, the Court avoided serious discussions of a constitutional right to privacy. Then, in *Poe* v. *Ullman* (1961), Justices John Marshall Harlan and William O. Douglas argued in dissent for the individual's right to privacy against a Connecticut law banning the use of birth control devices, even by married couples. Harlan pointed to the 14th Amendment's provision that "no State shall make or enforce any law which shall. . . deprive any person of life, liberty, or property, without due process of law." According to Harlan, the state law at issue unconstitutionally deprived individuals of their liberty, without due process of law, to use birth control devices, which was "an intolerable and unjustifiable invasion of privacy." Thus, Harlan linked the 14th Amendment's guarantee of liberty to the right to privacy.

In *Griswold* v. *Connecticut* (1965), the Court overturned the decision in *Poe* v. *Ullman* (1961). The Court decided that the Connecticut law against contraception was unconstitutional and based its decision on a constitutional right to privacy. However, the justices disagreed about where in the Constitution this right to privacy could be found.

Justice William O. Douglas found a general right to privacy which, he believed, can be interpreted from the words of parts of the Bill of Rights (the 1st, 3rd, 4th, and 5th Amendments). He argued that the state of Connecticut had specifically violated the right to marital privacy, which fits within the "zone of privacy" one can infer from the text of the Bill of Rights.

Justice Arthur Goldberg's concurring opinion in *Griswold* emphasized the 9th Amendment: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." Justice Goldberg held that the right to privacy in marital relationships was one of those rights not written in the Constitution that was nonetheless "retained by the people." Justice Goldberg wrote, "To hold that a right so basic and fundamental and so deep-rooted in our society as the right to privacy in marriage may be infringed because the right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no

effect whatsoever."

Justice John Marshall Harlan also concurred with the Court's opinion in the *Griswold* case. However, Harlan based his decision on the due process clause of the 14th Amendment, as he had done in his dissent in the *Poe* case four years earlier.

Justices Hugo L. Black and Potter Stewart dissented from the Court's opinion in *Griswold.* They argued that a general right to privacy cannot be inferred from any part of the Constitution. Further, they criticized the Court's majority for deciding this case according to personal opinion instead of following the text of the Constitution. Justice Black wrote, "I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision." In *Griswold,* Black found no "specific constitutional provision" that prohibited the state government's regulation of the private behavior at issue in this case.

Support for a right to privacy has continued since the *Griswold* decision. In *Katz* v. *United States* (1967), the Court overturned the decision in *Olmstead* v. *United States* (1928). The Court held that the 4th and 5th Amendments protect an individual's right to privacy against electronic surveillance and wiretapping by government agents, even in a place open to the public, such as a telephone booth on a city street. In *Roe* v. *Wade* (1973), the Court ruled that the right to privacy included a woman's choice to have an abortion during the first three months of pregnancy.

While continuing to recognize a constitutional right to privacy, the Court has acted recently to set limits on it. In *Skinner* v. *Railway Labor Executives Association* (1989) and *National Treasury Employees Union* v. *Von Raab* (1989), the Court has upheld federal regulations that provide for drug testing of railroad and customs workers, even without warrants or reasonable suspicion of drug use. In these cases, the Court decided that the need for public safety was a compelling reason for limiting the individual's right to privacy against government regulation.

Since the 1960s the often-contested right to privacy has been established in a line of Supreme Court decisions. As Justice Harry A. Blackmun wrote in *Thornburgh* v. *American College of Obstetricians and Gynecologists* (1986), "Our cases long have recognized that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government."

An individual's right to privacy was reinforced in *Reno* v. *Condon* (2000), in which South Carolina challenged a federal law, the Driver's Privacy Protection Act (DPPA). This statute prevents states from releasing personal information in motor vehicle records without consent. The South Carolina attorney general claimed that the DPPA violated the constitutional powers and rights of a state within the federal system of the United States. The Court rejected the claim and upheld the DPPA as a constitutional means of protecting the privacy of licensed drivers. In this case, an individual's privacy rights were upheld over states' rights.

The exact meaning and limits of this widely recognized right to privacy, however, will continue to be controversial. Every extension of the right to privacy limits the power of government to regulate behavior for the public good, which citizens of a constitutional democracy expect. By contrast, every expansion of government's power to regulate the behavior of individuals diminishes the "private sphere of individual liberty" cherished by citizens of a constitutional democracy. How to justly balance and blend these contending factors, so that both are addressed but neither one is sacrificed to the other, is an ongoing issue of the Supreme Court and the citizenry of the United States.