

A STRUCTURAL IMPERATIVE: FREEDOM OF INFORMATION,
THE FIRST AMENDMENT, AND THE ACCOUNTABILITY
FUNCTION OF EXPRESSION

*A.Jay Wagner, Marquette University**

I.	INTRODUCTION.....	205
II.	THE FREEDOM OF INFORMATION ACT.....	209
III.	FIRST AMENDMENT ORIGINS AND INFLUENCES.....	214
	<i>A. Early First Amendment Influences</i>	214
	<i>B. Contemporary First Amendment Doctrine</i>	218
IV.	JUDICIAL INTERPRETATION	227
	<i>A. Access to Prisons</i>	233
	<i>B. Access to Courts</i>	237
V.	INTERNATIONAL RIGHTS	245
VI.	CONCLUSION	255

I. INTRODUCTION

In 1983, the local water company discovered that the water of the Wyoming Valley in Eastern Pennsylvania was unsafe to drink.¹ A microscopic organism contaminated the water and caused giardiasis—a severe intestinal illness that causes prolonged diarrhea, nausea, cramps, and weakness—which resulted in 437 cases of individuals whom contracted the disease.² Originally, the Pennsylvania Gas and Water Company placed blame on beavers for the outbreak.³ The real cause for

* Assistant Professor, Diederich College of Communication, Marquette University. Sincere thanks to Christina Mazzeo for outstanding research assistance and to Dr. Tony Fargo for his comments and guidance.

¹ Bill O’Boyle, *Troubled water: Area recalls an epidemic*, TIMES LEADER (June 17, 2015), <https://www.timesleader.com/archive/213551/stories-troubled-water3a-area-recalls-an-epidemic94998>.

² *Id.* Although there were only 437 individuals who contracted it, there were more than 250,000 individuals that were indeed affected by the illness. *Id.*

³ *PENNSYLVANIANS’ ILLNESS MAY BE CAUSED BY BEAVERS*, N.Y. TIMES (Jan. 3, 1984), <http://www.nytimes.com/1984/01/03/us/pennsylvanians-illness-may-be-caused-by->

the outbreak, however, was the seepage of sewage leaking into a nearby reservoir, in addition to the utility company's failure to safeguard against such contaminations.⁴ As a result of this incident, the Pennsylvania legislature enacted the 1984 Pennsylvania Safe Drinking Water Act.⁵

Comparable to the water crisis in Flint, Michigan, a public records request was required in order to uncover the depths of the misconduct.⁶ In the midst of the crisis, the local newspaper—Wilkes-Barre Times Leader—filed a records request with the Department of Environmental Resources, which is the state agency responsible for water regulation.⁷ The request returned a number of records, but the Department of Environmental Resources denied the newspaper a significant portion, which led to an appeal from the Times Leader.⁸ The newspaper contended that the agency's withholding of records violated their First Amendment right of access and the Equal Protection Clause of the Fourteenth Amendment.⁹ The court ruled in favor of the Department of Environmental Resources on the First Amendment access to government information claim, citing a lack of precedent in providing like records, and vacated and remanded the Equal Protection claim in favor of Wilkes-Barre Times Leader.¹⁰

Hearing the case en banc, the Third Circuit Court of Appeals provided a detailed opinion that included discourse on the First Amendment and the public's right to know.¹¹ The majority opinion began

beavers.html. More specifically, it was the beavers' wastes that the company believed had such a severe impact on the spread of the illness. *Id.*

⁴ See O'Boyle, *supra* note 1.

⁵ See Pennsylvania Safe Drinking Water Act, 35 PA. CONS. STAT. §§ 721.1–721.17 (1989). The purpose of this Act was to: (1) establish a State program to assure the public was drinking safe water through establishing drinking water standards; (2) establish a State program to implement and enforce such standards; (3) to develop a process for implementing plans for safe drinking water in emergency situations; and (4) to provide public notice of potentially hazardous conditions that may come into existence. *Id.* § 721.2.

⁶ See *Capital Cities Media Inc. v. Chester*, 797 F.2d 1164, 1166 (3d Cir. 1986); Paul Egan, *Snyder releases thousands of Flint water crisis e-mails*, DETROIT FREE PRESS (Feb. 26, 2016, 7:28 PM), <http://www.freep.com/story/news/local/michigan/flint-water-crisis/2016/02/26/gov-snyder-release-flint-e-mails/80976870/>; Anna Clark, *How the Flint water crisis and a statehouse scandal gave a boost to FOIA reform in Michigan*, COLUM. JOURNALISM REV. (June 21, 2016), http://www.cjr.org/united_states_project/michigan_foia_flint_water_statehouse_scandal.php.

⁷ *Capital Cities Media Inc.*, 797 F.2d at 1166.

⁸ *Id.* at 1165.

⁹ *Id.* Appellant Times Leader also argued that the withholding access to records also constituted a violation of their state law “right to know.” *Id.*

¹⁰ See *Capital Cities Media Inc.*, 797 F.2d at 1176–77. The Appellate Court dismissed the state law claims. *Id.*

¹¹ See generally *Capital Cities Media Inc. v. Chester*, 797 F.2d 1164 (3d Cir. 1986).

by acknowledging that there is no constitutional right to access government information, and historically, access to records in the United States has been erratic in practice and adjudication.¹² In a dissent joined by three other Circuit Judges, Judge John Gibbons expressed a fundamental disagreement with the majority opinion.¹³ Relying on Alexander Meiklejohn's theory of self-governance¹⁴ and Vincent Blasi's theory of checking value,¹⁵ Gibbons' dissent turned on positive and negative rights within the freedom of expression clause of the First Amendment, and found the majority's vain effort to find such exacting "profoundly anti-democratic."¹⁶ Such thinking only perpetuates the status quo and fails to address or update wrongs. Gibbons concluded his access argument by suggesting the majority's interpretation of access to government information—and rejection of self-governance and the checking value—results in:

. . . a model of government in which elected executive or legislative branch officials are deemed to have been delegated the power to decide for us what we need to know. That "big brother" approach to democratic government carries with it the seeds of destruction of participatory democracy, for it places in the hands of those chosen for positions of authority the power to withhold from those to whom they should be accountable the very information upon which informed voting should be based. One cannot vote to throw the rascal out until informed of rascality. Thus the majority's approach to the structural purposes of the first amendment is profoundly anti-democratic.¹⁷

Among First Amendment theorists, there is likely no individual more convinced of the government's potential for rascality than Blasi. Blasi

¹² *Id.* at 1173. Indeed, the Third Circuit stated, "The public's interest in knowing about its government is protected by the guarantee of a Free Press, but the protection is indirect. The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act." *Id.*

¹³ *See id.* at 1178–92 (Gibbons, Higginbotham, Sloviter, Mansmann, JJ., dissenting).

¹⁴ *Capital Cities Media, Inc.*, 797 F.2d at 1183. Judge Gibbons stated that Meiklejohn "identified the first amendment as a corollary to the fundamental constitutional principle of self-government. Because the electorate exercises the power of self-government, though indirectly . . . the electorate must know and be totally free to discuss all matters concerning its government." *Id.*

¹⁵ *See id.* at 1184 (Gibbons, Higginbotham, Sloviter, Mansmann, JJ., dissenting).

¹⁶ *See id.* at 1186. Gibbons continued:

The line of reasoning that because the first amendment only limits governmental action it therefore does not create individual rights or impose governmental duties is as illogical as the proposition that because the fourth amendment does not address invasions of privacy it should not be construed to require governmental acknowledgement of privacy rights.

Id. at 1184–85.

¹⁷ *Id.* at 1186.

placed government oversight in the purview of First Amendment considerations, persuasively arguing for skepticism and transparency in government activity.¹⁸ Yet, there is no formal link between a public right to access government information and the established right of expression, especially considering how many judges have explicitly denied such a correlation.¹⁹

This article will discuss Meiklejohn's discourse-oriented value,²⁰ Blasi's insistence upon government oversight,²¹ and whether the First Amendment doctrine embraces or rejects a citizen's constitutional right to access government information. Part II examines the federal Freedom of Information Act (FOIA).²² Part III examines the foundational thinking that resulted in a statutory right of access.²³ Part IV of this article explores judicial interpretation of a corollary First Amendment right of access. The Supreme Court has decided more than a dozen cases confronting this query, leaving a rich lineage of opinions demonstrating the Court's evolution on the subject.²⁴ Part V will look outside of United States borders to consider international constitutions and multinational agreements' approach to rights of expression and access to information.

¹⁸ See Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 540–41 (1997) (“The exercise of power by public officials needs to be more intensively scrutinized and publicized than the activities of those who hold even vast accumulations of private power.”).

¹⁹ See, e.g., *Capital Cities Media Inc.*, 797 F.2d at 1171 (majority opinion). The Court first recognized that “[a] majority of the seven judge Court . . . held that there is no First Amendment right of press access to government-held information and, in the process, rejected the idea of a First Amendment right of public access.” *Id.* at 1171. In following precedent, the Court stated that they “reject . . . the conclusory assertion that the public and the media have a First Amendment right to government information . . .” *Id.* at 1172.

²⁰ See Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 255 (1961) (“Self-government can exist only insofar as the voters acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare that, in theory, casting a ballot is assumed to express.”).

²¹ See Blasi, *supra* note 18, at 541 (“The exercise of power by public officials needs to be more intensively scrutinized and publicized than the activities of those who hold even vast accumulations of private power.”).

²² See Freedom of Information Act (“FOIA”), 5 U.S.C. § 552 (2018).

²³ See *FOIA*, DEP’T. OF JUST., <https://www.justice.gov/archives/open/foia> (last visited Feb. 4, 2020). The purpose of FOIA is to “ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.” *Id.*; see also *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1979) (holding that the First Amendment guarantees the right to attend criminal trials because without such right, important aspects of freedom of speech and of the press could be eviscerated).

²⁴ See *infra* Part IV.

As of September 2013, there were at least ninety-five nations that recognized a public right to access government information.²⁵

The FOIA's roots, Supreme Court opinions, and a myriad of constitutions have all echoed the words of Judge Gibbons—a right of access performs a structural role in a democracy.²⁶ A right of expression is undoubtedly incomplete without an ability to inform the expression. It logically follows that such a right should be recognized as a national priority, and the legal manifestation of such a priority is constitutional recognition. This article will examine the history, reasoning, and the execution of the right of access.

II. THE FREEDOM OF INFORMATION ACT

Signed into law in 1966 by President Lyndon Johnson, the FOIA granted the American public the right to gather information on the activities and agents of the federal government.²⁷ This statute is the legal recognition of the public's right to request access to records from any federal agency, and is often described as the “law that keeps citizens in the know about their government.”²⁸ Harold Cross, a leading newspaper lawyer and counsel to the New York Herald Tribune, prepared a report—“The People's Right to Know”—on federal, state, and local government information rights after there was much concern regarding the denial of information to the public.²⁹ His report not only confirmed the fears there was a systematic denial of government information, but also closely aligned the nascent FOIA movement's motives and purpose with the values of the First Amendment.³⁰ At the behest of the American Society

²⁵ *Access to Information Laws: Overview and Statutory Goals*, RIGHT2INFO.ORG, https://www.right2info.org/access-to-information-laws/access-to-information-laws#_ftnref7 (last modified Jan. 20, 2012, 1:30 PM).

²⁶ See *Capital Cities Media Inc. v. Chester*, 797 F.2d 1164, 1184 (3d Cir. 1986) (Gibbons, Higginbotham, Sloviter, Mansmann, JJ., dissenting).

²⁷ *Freedom of Information Act*, HISTORY, <https://www.history.com/topics/1960s/freedom-of-information-act> (last updated Aug. 21, 2018).

²⁸ See *What is the FOIA?*, FOIA.GOV, <https://www.foia.gov/faq.html> (last visited Oct. 16, 2019).

²⁹ See MICHAEL R. LEMOV, *PEOPLE'S WARRIOR: JOHN MOSS AND THE FIGHT FOR FREEDOM OF INFORMATION AND CONSUMER RIGHTS* 48–49 (Farleigh Dickenson University Press, 2011).

³⁰ See *id.* at 49; see also PAUL ALFRED PRATTE, *GODS WITHIN THE MACHINE: A HISTORY OF THE AMERICAN SOCIETY OF NEWSPAPER EDITORS, 1923–1993* 90–91 (Praeger Publishers, 1995). It is important to note that “this book in turn, and Cross’ testimony before legislative groups contributed to the passage of the Freedom of Information Act in 1966.” *Id.* at 90.

of Newspaper Editors, Cross published *The People's Right to Know* in 1953—once referred to as the “FOI Bible”—which has helped evolve and fuel the transparency movement.³¹ The book would prove to be “the most influential legal authority in the campaign for government transparency,”³² and a catalog of all then-existing state and federal access to information laws as of 1953.³³ More than a field guide to extent law though, Cross’s book righteously argued that an informed public was necessary for the U.S. government to fulfill its democratic ideals, a notion that would ultimately propel the principle of a right to know into a path-breaking federal law.³⁴ Quite obviously, the public could not ably participate in government without adequate information. Cross’ book begins:

Public business is the public’s business. The people have the right to know. Freedom of information is their just heritage. Without that the citizens of a democracy have but changed their kings. The people are citizens, taxpayers, inhabitants, electors, newsmen, authors, research workers, teachers, students, all persons, each of us.³⁵

Furthermore, Cross was adamant on the right to examine and investigate the conduct of government.³⁶ According to Cross, knowledge regarding government conduct is the “raw material” of social discourse and self-governance.³⁷ Without it, there can therefore be no public debate, no educated vote, and no responsible democratic citizen.³⁸ Constituent access to information on public officials and actions is the foundational element of the democratic enterprise.³⁹ The free press cannot operate as

³¹ See David Cuillier, *The People's Right to Know: Comparing Harold L. Cross' Pre-FOIA World to Post-FOIA Today*, 21 COMM. LAW & POL'Y 433, 433–34, 438 (2016).

³² See Mark Fenster, *FOIA as an Administrative Law*, in TROUBLING TRANSPARENCY: THE HISTORY AND FUTURE OF FREEDOM OF INFORMATION 54 (David E. Pozen & Michael Schudson eds., 2018).

³³ *Id.*

³⁴ *See id.* at 57.

³⁵ HAROLD L. CROSS, *PEOPLE'S RIGHT TO KNOW: LEGAL ACCESS TO PUBLIC RECORDS AND PROCEEDINGS XIII* (1953).

³⁶ *Id.* (“Citizens of a self-governing society must have the *legal* right to examine and investigate the conduct of its affairs, subject only to those limitations imposed by the most urgent public necessity. To that end they must have the right to simple, speedy enforcement procedure geared to cope with the dynamic expansion of government activity.”).

³⁷ *See id.* at 4.

³⁸ *See id.* at xiii (“Without [freedom of information] the citizens of a democracy have but changed their kings.”).

³⁹ CROSS, *supra* note 35, at xiii–xiv. Cross writes, “Freedom of information is the very foundation for all those freedoms that the First Amendment of our Constitution was intended to guarantee.” *Id.*

intended, nor can citizens exercise free speech in meaningful ways when the operations of the social ordering structure remain secret.⁴⁰ These arguments map closely to one of Cross's contemporaries, Alexander Meiklejohn. The arc of this thinking is apparent, and Meiklejohn was the keystone. Cross, along with many others, was enthralled with Meiklejohn's First Amendment ideologies,⁴¹ and Blasi would extensively cite Meiklejohn as well in explicating his checking value of the expressive rights.⁴²

A primary concern behind the FOIA movement was newfound government secrecy practices burgeoned in the build-up to the Cold War.⁴³ The war produced a federal propaganda agency—President Eisenhower's United States Information Agency—aimed at inhibiting the flow of information to the public and controlling public discourse.⁴⁴ These efforts included Defense Department policies that sought to censor the press, which outraged publishers, editors, and producers around the country, and whose anger would ultimately crystalize the FOIA movement.⁴⁵ *The People's Right to Know* captured these fears by enumerating the wide and varying range of laws and the inconsistency in their implementation.⁴⁶ Of the existing laws, nearly all were common law vestiges of a bygone era where servility and autocracy reigned.⁴⁷ The book made clear that citizens could not expect a reliable and enforceable right to access government information and thus had little ability to

⁴⁰ See *id.* at 4 (“No activity of which so much good is justly expected as that of the newspaper press encounters so much legal complications at the raw material level: access to public records and proceedings: the newspaper's most vital raw material source.”).

⁴¹ See Cuillier, *supra* note 31, at 433–34, 434 n.6.

⁴² See *Capital Cities Media Inc. v. Chester*, 797 F.2d 1164, 1184 (3d Cir. 1986) (Gibbons, Higginbotham, Sloviter, Mansmann, JJ., dissenting).

⁴³ See *Freedom of Information Act*, *supra* note 27.

⁴⁴ See *United States Information Agency*, WIKIPEDIA, https://en.wikipedia.org/wiki/United_States_Information_Agency (last visited Nov. 6, 2019) (discussing that the USIA aimed to preserve a positive image of the United States regardless of negative depictions from propaganda).

⁴⁵ See LEMOV, *supra* note 29, at 49–50.

⁴⁶ See CROSS, *supra* note 35, at 7–8.

⁴⁷ See *id.* at 6. Cross writes:

[The laws are] in a condition of cultural lag—the captive of common law rules adopted when the courts, as part of the regalia of government, were concerned with the prerogatives of the king, his ministers and minions, rather than with the small affairs of his subjects; when there were few contacts between government and subject and still fewer which required or were susceptible of written records; when ritualistic adherence to legalisms was an end in itself.

Id.

knowledgably participate in democratic governance.⁴⁸ The premise of Cross's demand rests squarely in the First Amendment.⁴⁹ His work is filled with citations to First Amendment thinkers and their quotes.⁵⁰ Among the many notable citations is a famous passage on knowledge governing the ignorant from President James Madison⁵¹—thought by many to be the drafter of much of the Bill of Rights.⁵² Although Madison wrote about the value of public schools, Madison's famous quote is commonly understood today to support the idea of freedom of information.⁵³ Cross includes a lesser known Madison quote—"the right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right"⁵⁴—that emphasizes the First Amendment's accountability function, akin to Blasi's free expression value. A lengthy quote from John Milton's novel, "*Areopagitica*,"⁵⁵ headlines a chapter, making clear access to information

⁴⁸ See Cuillier, *supra* note 31, at 463. Since 1953, the people's right to know is, overall, stronger today. *Id.*

⁴⁹ See *id.* at 433–34.

⁵⁰ See, e.g., CROSS, *supra* note 35, at 19 (quoting John Milton's *Areopagitica*); see *id.* at 48 (quoting Thomas Jefferson).

⁵¹ James Madison, in 9 THE WRITINGS OF JAMES MADISON, COMPRISING HIS PUBLIC PAPERS AND HIS PRIVATE CORRESPONDENCE, INCLUDING NUMEROUS LETTERS AND DOCUMENTS NOW FOR THE FIRST TIME PRINTED 1819–1836, 103 (Gaillard Hunt ed., 1910) ("A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.").

⁵² See, e.g., Wallace Mendelson, *On the Meaning of the First Amendment: Absolutes in the Balance*, 50 CALIF. L. REV. 821, 826–27 (1962) (recognizing that Madison was the "father of the Constitution and he "introduced and fought for the Bill of Rights); Edmond Cahn, *The Firstness of the First Amendment*, 65 YALE L.J. 464, 467–68 (1956) (painting Madison as a pioneer of the Bill of Rights); *Everson v. Board of Education*, 330 U.S. 1, 13 (1947) (discussing that Madison and Jefferson played leading roles in the drafting and adopting of the First Amendment).

⁵³ See Paul H. Gates, Jr. & Bill F. Chamberlin, *Madison Misinterpreted: Historical Presentism Skews Scholarship*, 1 AMERICAN JOURNALISM 38 (2013). Madison's famous quote is: "A popular Government, without popular information, or the means of acquiring it, its but a Prologue to a Farce or a Tragedy; or perhaps both." *Id.*

⁵⁴ See James Madison, Resolutions of 1798 (Dec. 21, 1798), in 6 THE WRITINGS OF JAMES MADISON, COMPRISING HIS PUBLIC PAPERS AND HIS PRIVATE CORRESPONDENCE, INCLUDING HIS NUMEROUS LETTERS AND DOCUMENTS NOW FOR THE FIRST TIME PRINTED, 1790–1802, 328–29 (Gaillard Hunt ed., 1900).

⁵⁵ JOHN MILTON, AREOPAGITICA AND OTHER POLITICAL WRITINGS OF JOHN MILTON 46 (Liberty Fund, Inc., 1999) ("For who knows that Truth is not strong, next to the Almighty; she needs no policies nor stratagems, nor licensings to make her victorious, those are the shifts and the defences that error uses against her power: give her but room, & do not bind her when she sleeps[.]").

aligned with Thomas Emerson's attainment of truth value.⁵⁶ Fenster has suggested that Zechariah Chafee heavily influenced Cross.⁵⁷ Indeed, Cross explored the challenges of access to government information.⁵⁸ Moreover, Chafee concluded that government transparency grows more difficult as the size of the government expands and becomes more complex.⁵⁹ The threat of abuse of power grows in kind, and Chafee warned that access to information must be equivalent to expanding government powers.⁶⁰

There can be little doubt what wells of knowledge Cross drew upon when developing an argument for the people's right to know. Cross's demand for access seemed to be grounded in the First Amendment values that remain current in contemporary free expression adjudication and debate. Federal codification of access to government information would ensure citizens remained capable constituents, able to effectively participate in a democracy, and poised to check government misconduct. These formative ideals were carried directly into the halls of Congress by Representative John Moss, who with the broad and enduring support of the press, began meeting with Cross in 1955.⁶¹ From that moment, Moss began his decade-plus legislative struggle to put a bill on the President's desk.⁶²

⁵⁶ See *id.*; see also Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L.J. 877, 881–82 (1962–63) (“[F]reedom of expression is not only an individual but a social good. It is, to begin with, the best process for advancing knowledge and discovering truth.”).

⁵⁷ See Fenster, *supra* note 32, at 67 n.6.

⁵⁸ See 1 ZECHARIAH CHAFEE, JR., 1 GOVERNMENT AND MASS COMMUNICATIONS 12–13 (University of Chicago Press, 1947). Freedom of expression may be described as:

In many subjects the complexity of the pertinent facts increases. Equal access to the facts becomes more and more difficult. The power of governments over the sources of information tends to grow. Hence the misuse of this power by governments becomes a more and more serious danger. . . . [B]ureaucrats have often invoked public safety as a protection from criticism. What is significant is the enormous recent expansion of the subjects which officials are seeking to hide from publication until they give the signal.

Id.

⁵⁹ *Id.* at 13.

⁶⁰ See *id.* at 13–14 (“A modern government is an ever greater participant in social and economic affairs. This has created a necessity for more extensive and better intercommunication between it and the public in the interests of both.”).

⁶¹ See LEMOV, *supra* note 29, at 50.

⁶² See *id.* Moss became a new member of the Government Operations Committee, which gave him the power and idea to suggest that the Committee authorize a “study” to determine the extent and severity of the information that the Executive Branch was withholding. *Id.*

In 1966, Moss triumphed when Congress passed FOIA.⁶³ There exists considerable uncertainty, however, about the efficacy of the access statute.⁶⁴ In further attempting to establish the legitimacy of citizens' right to access government information, there has been extensive literature attempting to connect the First Amendment to the public's right to access government information.⁶⁵ Much of this research explores the possibility of a constitutionally recognized right to an informed public, and this article is primarily concerned with exploring this First Amendment doctrine, as well as its role in conceptions of freedom of information. The Supreme Court's recognition of a listener sided First Amendment interpretation and theories of government secrecy, its origins, and limitations will also be considered.

III. FIRST AMENDMENT ORIGINS AND INFLUENCES

A. *Early First Amendment Influences*

Many of the earliest theories of the First Amendment exist today as intrinsic to the public understanding of the five rights guaranteed in the amendment,⁶⁶ but much of the pre-Revolution and Founders' rhetoric

⁶³ *Freedom of Information Act*, *supra* note 27.

⁶⁴ *See, e.g.*, H.R. REP. NO. 114-391, at 9 (2016). The report expressed concern regarding the overuse of the nine exemptions by agencies to protect records that should be released under the law. *Id.* Indeed, the agencies invoked exemptions more than 550,000 times. *Id.*; *see Ensuring Gov't Transparency Through FOIA Reform: Hearing Before the Subcomm. on Gov't Operations of the Comm. on Oversight and Government Reform House of Representatives*, 114th Cong. 6-8 (2015) (discussing FOIA's exemptions and why they are problematic); Josh Gerstein, *Judge says Hillary Clinton's private emails violated policy*, POLITICO (Aug. 20, 2015, 11:39 PM), <http://www.politico.com/story/2015/08/judge-says-hillary-clintons-private-emails-violated-policy-121568> (discussing whether a FOIA lawsuit can be used to seek records that are not in a federal agency's system but on a personal email account or server); Steven Aftergood, *Reducing Government Secrecy: Finding What Works*, 27 YALE L. & POL'Y REV. 399, 409 n.46 (2009) ("Courts have been reluctant to challenge executive branch secrecy judgments 'for separation of power reasons, for fear of becoming enmeshed in political questions, and out of concern that the judiciary lacks the expertise to reach appropriate decisions in these areas.'"); REPORT OF THE COMM. ON PROTECTING AND REDUCING GOV'T SECRECY, S. DOC. NO. 105-2, XXV (1997); David E. Pozen, *The Mosaic Theory, National Security, and the Freedom of Information Act*, 115 YALE L.J. 628, 631 (2005) (noting that FOIA's openness-forcing capacity was narrowed after 9/11).

⁶⁵ *See, e.g.*, LEMOV, *supra* note 29, at 49 ("[T]he First Amendment points the way, the function of the press is to carry the torch."); CROSS, *supra* note 35, at xii-xiv ("Freedom of information is the very foundation for all those freedoms that the First Amendment of our Constitution was intended to guarantee").

⁶⁶ *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of

closely ties to the rationale and purposes of FOIA. In what is often considered First Amendment orthodoxy, Milton's "*Areopagitica*" established the importance of free expression in discovering truth.⁶⁷ Scholars view Milton's famous plea for free speech—and in defense of divorce—as the ur-text in developing the popular marketplace of ideas rationale and they believe it to have had a considerable influence on Justice Oliver Wendell Holmes' dissent in *Abrams v. United States*,⁶⁸ where Holmes introduced the prominent concept into United States jurisprudence.⁶⁹ John Locke's *Two Treatises of Government*⁷⁰ carried forward thoughts on a citizen's role in society and provided a blueprint for modern governance, staking an early claim for the government being subordinate to its citizenry.⁷¹ Colonial American literature widely cites Locke as an important touchstone in the writing of the Declaration of Independence and in the establishment of free expression.⁷² Perhaps the most influential literature in regard to the Founders and the original intent of the First Amendment is a series of essays known as "Cato's Letters," published pseudonymously by Britons John Trenchard and Thomas Gordon between 1720 and 1723.⁷³ Most notable is a letter titled "Of Freedom of Speech" where they discuss freedom of speech as a necessary

the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”).

⁶⁷ See MILTON, *supra* note 55, at 46.

⁶⁸ *Abrams et al. v. United States*, 250 U.S. 616 (1919).

⁶⁹ See *id.* at 630 (Holmes, J., dissenting) (“[T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . that at any rate is the theory of our Constitution.”).

⁷⁰ See JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* (1689).

⁷¹ *The Declaration of Independence and Natural Rights*, CONST. RTS. FOUND., <https://www.crf-usa.org/foundations-of-our-constitution/natural-rights.html> (last visited Oct. 22, 2019). Locke wrote:

The purpose of government . . . is to secure and protect the God-given inalienable natural rights of the people. . . . [I]f a government persecutes its people with ‘a long train of abuses’ over an extended period, the people have the right to resist that government, alter or abolish it, and create a new political system.

Id.

⁷² See CLINTON LAWRENCE ROSSITER, *SEEDTIME OF THE REPUBLIC: THE ORIGIN OF THE AMERICAN TRADITION OF POLITICAL LIBERTY* 141 (Harcourt, Brace, & Co., 1953). (“[N]o one can spend any time in the newspapers, library inventories, and pamphlets of colonial America without realizing that *Cato's Letters* rather than Locke's *Civil Government* was the most popular, quotable, esteemed source of political ideas in the colonial period.”).

⁷³ See JOHN TRENCHARD & THOMAS GORDON, *CATO'S LETTERS* (Ronald Hamowy ed., Indianapolis: Liberty Classics, 1995) <https://oll.libertyfund.org/titles/trenchard-catos-letters-vol-1-november-5-1720-to-june-17-1721-lf-ed> (last visited Oct. 22, 2019).

precursor to intellectual autonomy.⁷⁴ Cato's Letters were widely circulated in pre-Revolutionary America and held considerable influence in the rhetoric of the time.⁷⁵

The New York Weekly Journal quoted "Cato's Letters," which, under the management of prominent lawyer James Alexander, had developed a reputation as a leading voice for freedom of speech, press rights, and a persistent critic of government.⁷⁶ The printer for the Weekly Journal was John Peter Zenger,⁷⁷ and after an especially vehement succession of anonymous articles rebuking the British Crown's dominion in colonial New York,⁷⁸ the Crown charged Zenger with seditious libel.⁷⁹ After ten minutes following the jury instructions, the jury returned with a verdict of not guilty.⁸⁰ More importantly, this trial today famously stands as an invaluable springboard in establishing the concept of freedom of the press in the United States.⁸¹ Since the Zenger trial, commentators have acknowledged its importance, while considering it to be a calculated effort in developing law that allowed for broad speech and press rights, to which Eben Moglen observed the following:

The defense offered by Smith and Alexander was no defense at all, simply a political provocation designed to make use of Zenger's case to dig a pit for the Chief Justice and Governor. No one had supposed for a moment that [the defense] would succeed, and it in no wise improved Zenger's legal position.⁸²

⁷⁴ John Trenchard & Thomas Gordon, *Of Freedom of Speech: That the same is inseparable from publick Liberty* (Feb. 4, 1721), in *CATO'S LETTERS* 58 (Ronald Hamowy ed., 1995) ("Without freedom of thought, there can be no such thing as wisdom; and no such thing as publick liberty, without freedom of speech . . .").

⁷⁵ See, e.g., *Module 3: Thomas Paine's Common Sense and Thomas Jefferson and the Declaration of Independence*, CATO INST., <https://www.cato.org/cato-university/home-study-course/module3> (last visited Feb. 6, 2020).

⁷⁶ See *New-York weekly journal*. [Vol. 932, no. 19 (March 11, 1734)], THE GILDER LEHRMAN INST. OF AM. HIST., <https://www.gilderlehrman.org/collection/glc08724> (last visited Oct. 22, 2019); see also Myron Magnet, *How American Press Freedom Began on Wall Street*, CITY J., <https://www.city-journal.org/html/how-american-press-freedom-began-wall-street-13336.html> (last visited Feb. 6, 2020).

⁷⁷ See generally *The Trial of John Peter Zenger*, U.S.HISTORY.ORG, <http://www.ushistory.org/us/7c.asp> (last visited Oct. 22, 2019).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ See *The Trial of John Peter Zenger*, *supra* note 77 (noting that Zenger and Hamilton, Zenger's defense attorney, were hailed as heroes).

⁸² See Eben Moglen, *Considering Zenger: Partisan Politics and the Legal Profession in Provincial New York*, MOGLEN.LAW.COLUMBIA.EDU, <http://moglen.law.columbia.edu/publications/zenger.html> (last visited Oct. 22, 2019).

As the American Revolution commenced and the colonies convened the First Continental Congress, freedom of speech and press remained a priority. Madison was especially concerned with installing these rights into the constitutional fabric of the country.⁸³ Madison grounded his focus in securing speech and press rights in a belief that expressive freedom could check federal abuse of power, stating that restrictions on expression amount to “a protection of those who administer the government, if they should at any time deserve the contempt or hatred of the people against being exposed to it”⁸⁴ According to Madison, expressive freedom was imperative because “chequered as it is with abuses, the world is indebted for all the triumphs which have been gained by reason and humanity, over error and oppression[.]”⁸⁵ Both Madison and Thomas Jefferson remained intensely interested in ensuring the public’s right to express themselves as a method for popular participation in governance, contributing some of the most influential thoughts on the subject.⁸⁶ As a fledgling country largely comprised of the marginalized and displaced, it appeared that establishing strong expressive rights was given primacy and seen as protection against autocratic governance. The American First Amendment tradition grounds its rhetorical lineage in Milton, Madison, and Jefferson, among many others, consistently positioning the five rights as the method for ensuring power remains in the hands of the demos.⁸⁷

⁸³ SELECTED WRITINGS OF JAMES MADISON 167 (Ralph Ketcham ed., Hackett Publishing Co. 2006). Madison introduced the essence of the First Amendment to the House of Representatives in 1789, proposing “The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable.” *Id.*

⁸⁴ *Id.* at 262.

⁸⁵ *Id.* at 256.

⁸⁶ See Hunt, *supra* note 51. On August 4, 1822, James Madison wrote to W.T. Barry: “A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.” *Id.*; see also Letter from Thomas Jefferson, to Edward Carrington (Jan. 16, 1787), FOUNDERS ONLINE, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/01-11-02-0047>. Jefferson wrote:

The way to prevent these irregular interpositions of the people is to give them full information of their affairs thro’ the channel of the public papers, and to contrive that those papers should penetrate the whole mass of the people. The basis of our governments being the opinion of the people, the very first object should be to keep that right

Id.

⁸⁷ See, e.g., MILTON, *supra* note 55, at 46; Hunt, *supra* note 51; Jefferson, *supra* note 86.

B. Contemporary First Amendment Doctrine

Contemporary First Amendment doctrine retains its position as a fundamental legal element of the American experience, and as a result it is a highly contested space. The First Amendment has preserved much of its early American essence, but the forty-five word clause has withstood a myriad of challenges and interpretations over time. In a California Law Review article, Robert Post observed, “The simple and absolute words of the First Amendment float atop a tumultuous doctrinal sea. The free speech jurisprudence of the First Amendment is notorious for its flagrantly proliferating and contradictory rules, its profoundly chaotic collection of methods and theories.”⁸⁸ Defense of expression predates the Constitution, yet it did not realize much of its modern function until Justice Holmes delivered his dissenting opinion in *Abrams et al. v. United States*.⁸⁹ Robert Post credited Holmes as having “virtually invented First Amendment theory,”⁹⁰ citing the dissent in *Abrams* as greatly expanding the individual right to speech as a crucial element in public discourse.⁹¹

Justice Holmes’s opinions may have provided the groundwork for the contemporary understanding of free speech, but they did little in diagnosing the specific, underlying rationales beyond a general support of a marketplace of ideas concept. In a classic reading of contemporary First Amendment values and motives, Thomas Emerson identified four categories of values sought by society in protecting the right to freedom of expression: (1) individual self-fulfillment, (2) attainment of truth, (3) participation in decision-making, and (4) balance between stability and change.⁹² In explicating the necessity of wide, popular participation in decision-making, Emerson observed that the evolution of the First Amendment included the logic of free expression as intended to be “a social good.”⁹³ Emerson continued, “In order for the process to operate at its best, every relevant fact must be brought out, every opinion and every insight must be available for consideration. Since facts are discovered and opinions formed only by the individual, the system demands that all

⁸⁸ Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CALIF. L. REV. 2353, 2355 (2000).

⁸⁹ See Alan M. Dershowitz, *Speaking Freely*, N.Y. TIMES (Aug. 22, 2013), <http://nytimes.com/2013/08/25/books/review/thomas-healys-greatdissent.html> (discussing Holmes’ dissenting opinion in *Abrams*); see also *Abrams v. United States*, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

⁹⁰ Post, *supra* note 88, at 2356.

⁹¹ *Id.* at 2359 n.18.

⁹² See Emerson, *supra* note 56, at 878–79.

⁹³ See *id.* at 881.

persons participate.”⁹⁴ He further noted that “[the First Amendment] embraced the right to participate in the building of the whole culture,”⁹⁵ before noting the especially acute necessity of participation in decision-making when applied to political actions:

It is through the political process that most of the immediate decisions on the survival, welfare and progress of a society are made. It is here that the state has a special incentive to repress opposition and often wields a more effective power of suppression. Freedom of expression in the political realm is usually a necessary condition for securing freedom elsewhere.⁹⁶

Emerson returned to the refrain that only in ensuring expressive freedom can a public guard against overbearing governance.⁹⁷ Aside from the individual self-fulfillment rationale, it could be said that all roads lead back to a view of expressive rights as a method for keeping the power in the hands of the citizens.

Emerson’s “participation in decision-making” is closely related, and heavily indebted, to the work of Meiklejohn. Throughout his scholarly career, Meiklejohn wrestled with the notion of the First Amendment’s role in contemporary society.⁹⁸ Credited with developing the self-governance theory of the First Amendment, his legacy is fundamental to contemporary free speech scholarship and jurisprudence.⁹⁹ Meiklejohn viewed the First Amendment through a generalist’s lens, considering its sole responsibility to protect the democratic process: “The final aim . . . is the voting of wise decisions.”¹⁰⁰ He popularized the “town hall meeting” as a metaphor for his interpretation of the First Amendment’s purpose, proposing that a town hall meeting is “self-government in its simplest,

⁹⁴ *Id.* at 882.

⁹⁵ *Id.* at 883.

⁹⁶ Emerson, *supra* note 56, at 883.

⁹⁷ *See id.* (“As the general theory makes clear, freedom of discussion in public affairs serves an important function regardless of whether the political structure of a nation is democratic or not.”).

⁹⁸ *See* ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 24–25 (Harper Brothers Publishers, 1948).

⁹⁹ *See* Meiklejohn, *supra* note 20, at 255 (“Self-government can exist only insofar as the voters acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare[.] In describing his theory of self-governance, Meiklejohn expresses that we, the people who govern, possess three kinds of responsibilities, including “understand[ing] the issues . . . which face the nation . . . pass[ing] judgment upon the decisions which our agents make upon those issues . . . [and] shar[ing] in devising methods by which those decisions can be made wise and effective. . . .”).

¹⁰⁰ *See* MEIKLEJOHN, *supra* note 98, at 25.

most obvious form.”¹⁰¹ He posited the metaphor as an idealized miniature of social decision-making.¹⁰² The significance of the analogy is in Meiklejohn’s description of the role of the chairman or the moderator, whose duties include controlling the meeting and abridging speech when warranted,¹⁰³ which has been criticized as “limiting”¹⁰⁴ and “managerial.”¹⁰⁵ As a result, government intervention in individual expression should only occur in situations where controlling public discourse requires “distinguishing between relevant and irrelevant speech, abusive and nonabusive speech, [and] ‘high’ and ‘low’ value speech”¹⁰⁶ Meiklejohn explained these parameters by identifying the communal objectives of expressive rights and the necessity in favoring the listener in an oft-referenced quote: “What is essential is not that everyone shall speak, but that everything worth saying shall be said.”¹⁰⁷ In a later paper, he more clearly defined his interpretation of the purpose for freedom of expression:

The First Amendment does not protect a ‘freedom to speak.’ It protects the freedom of those activities of thought and communication by which we ‘govern.’ It is concerned, not with a private right, but with a public power, a governmental responsibility. . . . The freedom implies and requires what we call “the dignity of the individual.”¹⁰⁸

Ultimately, Meiklejohn’s self-governance value is a two-part gambit. He seeks a wide range of public discourse so as to allow for an informed public, one he seeks to ensure by favoring expression that concerns governing activities.¹⁰⁹ Although it was his primary tenet, Meiklejohn’s interests exceeded that of political discourse; he sought a definition for

¹⁰¹ See ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 24 (Greenwood Press, 1980).

¹⁰² See *id.* (“Every man is free to come. They meet as political equals. Each has a right and a duty to think of his own thoughts, to express them, and to listen to the arguments of others.”).

¹⁰³ See *id.*

¹⁰⁴ See Thomas I. Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U. L. Q. 1, 12–13 (1976).

¹⁰⁵ See Robert Post, *Meiklejohn’s Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109, 1113 (1993).

¹⁰⁶ See LEE C. BOLLINGER & GEOFFREY R. STONE, *ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA* 167 (University of Chicago Press, 2002).

¹⁰⁷ MEIKLEJOHN, *supra* note 98, at 25.

¹⁰⁸ Meiklejohn, *supra* note 20, at 255.

¹⁰⁹ *Id.* (“Self-government can exist only insofar as the voters acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare that, in theory, casting a ballot is assumed to express.”).

“the paradoxical relation between free men and their legislative agents.”¹¹⁰ He wished to find the self-perpetuating conditions for “the American experiment in self-government.”¹¹¹ Meiklejohn knew well that the five guaranteed rights of the First Amendment alone could not cast the die of shared governance.¹¹² He mused on requisite subsidiary rights, arriving at education as a necessity.¹¹³ He concluded that education “in all its phases” was a prerequisite that allowed for “the wisdom, the independence, and, therefore, the dignity of a governing citizen.”¹¹⁴ Akin to Madison’s famous quote, Meiklejohn, an educational reformer, wrote about knowledge acquisition in the form of public schooling and civics instruction.¹¹⁵ There is no better lens for viewing the paradoxical relationship between constituents and their officials than the very products of their activity. Meiklejohn saw franchise as the conclusive act of the First Amendment. Unbounded political discourse would lead to informed voting. That was the end game, but it is difficult to imagine a satisfactory end if the means are incomplete or compromised. And though he never explicitly argues for a public right to know, Meiklejohn’s First Amendment is untenable without it.

Vincent Blasi’s subsequent study of First Amendment doctrine builds on the Meiklejohnian concept of self-governance, putting a finer and more critical point on Meiklejohn’s more discourse-based theory.¹¹⁶

From an access to government information vantage, Blasi’s notion of “checking value” is arguably the most apt interpretation of expressive rights and their purpose in a democracy. Blasi identified the “checking value” as the essential guiding principle of expressive rights.¹¹⁷ His intervention is in suggesting that the First Amendment protections of speech, press, and assembly are guided by values quite similar to those proposed by Emerson—individual autonomy, diversity of thought, and self-governance—but in service to their ability to constrain “abuse of

¹¹⁰ Alexander Meiklejohn, *What does the First Amendment Mean*, 20 U. Chi. L. Rev. 461, 463 (1953).

¹¹¹ *Id.*

¹¹² *See id.*

¹¹³ *See* Meiklejohn, *supra* note 20, at 256–57.

¹¹⁴ *Id.* at 257.

¹¹⁵ *See Alexander Meiklejohn, CIVIL LIBERTIES IN THE UNITED STATES* (Feb. 6, 2020), <https://uscivil liberties.org/biography/4134-meiklejohn-alexander-18721964.html>.

¹¹⁶ *See* Blasi, *supra* note 18, at 562.

¹¹⁷ *Id.* at 527 (“Indeed, if one had to identify the single value that was uppermost in the minds of the persons who drafted and ratified the First Amendment, this checking value would be the most likely candidate.”).

power by official, government employees.”¹¹⁸ He catalogs his reasons for this preference: 1) the ability of government to “employ legitimized violence,”¹¹⁹ 2) “an essentially pessimistic view of human nature and human institutions[,]”¹²⁰ 3) the “inevitable size and complexity of modern government” necessitates “professional critics”¹²¹ and 4) “the general populace must be the ultimate judge of the behavior of public officials.”¹²² Blasi’s interpretation of the First Amendment closely aligns with the traditional self-governance reading of Meiklejohn; Blasi and Meiklejohn diminish the value of self-expression as a tertiary, almost negligible, result of maintaining robust political expression.¹²³ Both extol the communal purposes of the First Amendment over individual interests.¹²⁴ The authors’ values diverge, however, over considerations of the breadth of protected political communication.¹²⁵ Self-governance itself is primarily

¹¹⁸ *Id.* at 621. Blasi purports that “[t]he central premise of the checking value is that the abuse of official power is an especially serious evil—more serious than the abuse of private power, even by institutions such as large corporations which can affect the lives of millions of people.” *Id.* at 538.

¹¹⁹ Blasi, *supra* note 18, at 538. (“No private party—not Lockheed, not United Fruit, not the Mafia—could ever have done what our government did to the Vietnamese people and the Vietnamese land.”).

¹²⁰ *Id.* at 541. Expanding on the pessimistic view of human nature and institutions, Blasi wrote:

While a proponent of the checking value may regard free expression as important partly because of its contributions to progress, wisdom, community, and the realization of the individual potential, he is likely to value free expression primarily for its modest capacity to mitigate the human suffering that other humans cause. Much of that suffering is caused by persons who hold public office.

Id.

¹²¹ *Id.* at 541. Here, Blasi is primarily concerned with the sheer magnitude and all-encompassing nature of governance. Were an ability to counter government action to be mitigated to any further degree, the system would likely combust. He suggests grassroots efforts “to have little impact,” and that individuals dedicated to criticism of authority to be an imperative. *See* Blasi, *supra* note 18, at 542.

¹²² *Id.* Blasi explicitly denies the idealism of Meiklejohn, instead preferring the democratic theories of Locke and Schumpeter. “[T]he role of the ordinary citizen is not so much to contribute on a continuing basis to the formations of public policy as to retain a veto power to be employed when the decisions of officials pass certain bounds.” *Id.*

¹²³ *See id.* at 557–58 (“The checking value has much in common with Professor Meiklejohn’s self-governance value. . . . [B]oth the checking value and the self-government value stem from democratic concepts of sovereignty.”); *see also* Meiklejohn, *supra* note 20, at 255 ([The First Amendment] is concerned, not with a private right, but with a public power, a governmental responsibility.”).

¹²⁴ *See* Blasi, *supra* note 18, at 557–58; *see also* Meiklejohn, *supra* note 20, at 255.

¹²⁵ *See* Blasi, *supra* note 18, at 558. Although there are many points of agreement between both First Amendment theorists, “[t]he difference most immediately apparent is that the self-government value is concerned with, and thus supports special protection for, a much

concerned with the collectivist notion that the public is responsible for participating in the functions of governance (*i.e.* helping shape the democracy through decision-making).¹²⁶ On the other hand, Blasi's vision of self-governance finds itself specifically focused on scrutiny of government conduct, especially transgressive activity.¹²⁷ Blasi deems necessary this narrower version of the First Amendment because, in his opinion, official misconduct "is so antithetical to the entire political arrangement, is so harmful to individual people, and also so likely to occur, that its prevention and containment is a goal that takes precedence over all other goals of the political system."¹²⁸ Furthermore, Blasi sees the evil of human misconduct as such an urgent and ubiquitous threat that its prevention warrants the highest level of constitutional protection, even at the cost of other expressive rights.¹²⁹

Accordingly, the checking value is less classically liberal in affording protection of all political speech. It is not interested in the theories that animate or underlie the self-governance value. The common reading of self-governance holds that the marketplace of ideas concept¹³⁰ encourages public discourse, which in turn is the only acceptable means of determining democratic ends.¹³¹ Blasi derives the parameters of expressive rights from a "consequentialist ethics."¹³² There are to be no mandated or absolute standards, but instead the imposition of *ad hoc* jurisprudence in weighing the positives and negatives of disputed speech on a case-by-case basis.¹³³ The cynicism and regrettable attenuation of

broader range of communications. The checking value focuses on the particular problem of misconduct by government officials." *Id.*

¹²⁶ See Barry P. McDonald, *The First Amendment and the Free Flow of Information: Towards a Realistic Right to Gather Information in the Information Age*, 65 OHIO ST. L.J. 249, 272 (2004) (recognizing that the First Amendment's concern is with ensuring a "free and full flow of information" to facilitate *informed* self-governance in addition to its truth-seeking purpose).

¹²⁷ Blasi, *supra* note 18, at 558. A proponent of the checking value permits a wide range of speaking activities, but "maintains that the particular evil of official misconduct is of a special order." *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ See W. Wat Hopkins, *The Supreme Court Defines the Marketplace of Ideas*, 73 J&MCQ 40, 46 (1996). The marketplace of ideas metaphor is the idea that the ultimate good is better reached by free trade in ideas and that the best test of truth is the power of the thought to get itself accepted in the competition of the market. *Id.* at 41.

¹³¹ See *id.* ("The free flow of ideas is important . . . not because it will lead to the discovery of any objective truth, but because it is essential to a system of self-government.").

¹³² Blasi, *supra* note 18, at 559.

¹³³ *Id.* Blasi argues that the judicial protection of speech under his theory is warranted "only if the good consequences of the speech outweigh the bad." *Id.*

speech rights stem from Meiklejohn's insistence on a "compact" between the public and its representatives, a covenant too often breached in Blasi's eyes.¹³⁴

The checking value is particularly conducive to arguments for access to government information. At its heart, the First Amendment rationale seems to suggest that popular participation is the only true antidote to political corruption. Blasi acknowledged the importance of the checking value by stating, "The central premise of the checking value is that the abuse of official power is an especially serious evil—more serious than the abuse of private power, even by institutions such as large corporations which can affect the lives of millions of people."¹³⁵ Such a focus on government misconduct may seem excessively suspicious and may come at the expense of other First Amendment values. Both Blasi and Meiklejohn, however, see government as the social firmament.¹³⁶ All other liberties are built atop this foundation, and a warped federal government undermines every activity of the public.¹³⁷ Meiklejohn's intervention is to suggest that citizens ensure a stable foundation through participation and decision-making.¹³⁸ Blasi, in a more republican, less idealistic turn, demands the fidelity of the federally elected and appointed.¹³⁹ Trust in government is the *sine qua non* of social function. The federal government is much too capacious and able to do harm on such a scale that it warrants focusing the First Amendment on the public's ability to oversee and counteract government misbehavior.¹⁴⁰

¹³⁴ See *id.* at 554.

¹³⁵ Blasi, *supra* note 18, at 538.

¹³⁶ See Meiklejohn, *supra* note 20, at 263; see also Blasi, *supra* note 18, at 548.

¹³⁷ See *id.* at 538 (noting that government misconduct is different and more severe than misconduct by private parties).

¹³⁸ Meiklejohn, *supra* note 20, at 255. Meiklejohn contends there are three kinds of responsibilities when it comes to self-governance:

We, the people who govern, must try to understand the issues which, incident by incident, face the nation. We must pass judgment upon the decisions which our agents make upon those issues. And, further, we must share in devising methods by which those decisions can be made wise and effective or, if need be, supplanted by others which promise greater wisdom and effectiveness. Now it is these activities, in all their diversity, whose freedom fills up "the scope of the First Amendment." These are the activities to whose freedom [the First Amendment] gives its unqualified protection.

Id.

¹³⁹ See Blasi, *supra* note 18, at 538.

¹⁴⁰ See *id.* at 539 ("The check on government must come from the power of public opinion, which in turn rests on the power of the populace to retire officials at the polls, to withdraw the minimal cooperation required for effective governance, and ultimately to make a revolution.").

Access to government information is a logical cousin of the checking value.¹⁴¹ FOIA exists as the tool for acquiring the consequential (and trivial) records of everyday governance.¹⁴² To practice Blasi's intensive scrutiny and publication of "the activities of those who hold . . . vast accumulations of private power," a full and honest record of government activities to check is required.¹⁴³ While the United States may already employ a system of checks and balances, that system can be susceptible to shortcomings.¹⁴⁴ Without an ability to access records and information accounting for public officials' activities, there would be no verifiable account to redress.¹⁴⁵ Providing access to records helps to place electorate checks on the misconduct of public officials and can even benefit public officials.¹⁴⁶ Thus, as mentioned above, FOIA is essential legislation, which exists as the tool for acquiring both the consequential and trivial records of everyday governance.¹⁴⁷ In considering the depths of access to government information, Lyrisa Barnett Lidsky proposed a First Amendment outlook called the "rational audience" theory, which affirms a belief in self-governance, in an informed public, and the public's ability to discern an appropriate path for the nation.¹⁴⁸ Barnett called for faith in the American experiment and for an expansion in the rights of individuals in determining the commonwealth.¹⁴⁹ She seemingly resists some of the

¹⁴¹ See *id.* at 609 ("A more difficult problem is whether the checking value implied that government officials are sometimes constitutionally obligated to be "sources" against their will.").

¹⁴² *Freedom of Information Act*, *supra* note 27.

¹⁴³ See Blasi, *supra* note 18, at 541.

¹⁴⁴ *Id.* at 539 ("Each branch of government may impose specific sanctions against members of the other branches, and also typically has at its disposal substantial investigative resources. But this system breaks down in certain political contexts, particularly at the local level where even the theoretical inter-branch checks may not amount to much.").

¹⁴⁵ See *id.* at 538. One of the most important values attributed to the First Amendment was that of checking the "inherent tendency of government officials to abuse the power entrusted to them." *Id.* It logically follows that, without a right of access to government information, the checking power is rendered moot, thus allowing any abuse of power to continue without an appropriate forum to vindicate the harm suffered.

¹⁴⁶ See *id.* (noting that the system of checks and balances usually functions only when an aroused populace demands that one segment of the government check another).

¹⁴⁷ See *Freedom of Information Act*, *supra* note 27.

¹⁴⁸ See Lyrisa Barnett Lidsky, *Nobody's Fool: The Rational Audience as First Amendment Ideal*, 2010 U. ILL. L. REV. 799, 799, 814 (2009). Lidsky identifies two assumptions that she classifies as "core speech," which include, first, that audiences are capable of rationally assessing the truth, quality, and credibility of core speech, and, secondly, more speech generally is preferable to less. *Id.* Together, those two assumptions constitute the "rational audience model." *Id.*

¹⁴⁹ See *id.* at 840 ("[A]uthoritative selection of the information to be included in public discourse violates citizen autonomy.").

limitations of Meiklejohn and Blasi, calling for trust in the public's ability to digest complex or controversial information.¹⁵⁰ Resorting to paternalistic restrictions of discourse raises a host of questions, ultimately casting doubt on the citizenry's capability. While the rational audience theory is imperfect, belief in the demos seems to provide the foundation for self-governance. I would venture to say that to abandon that belief would be to abandon the defining tenet of the system put in place by the Founders. Lidsky concluded, "If we the people are incapable of rationally choosing our collective fates, then democracy is doomed to failure."¹⁵¹ She also quoted novelist John Updike in emphasizing the imperative nature of trusting the public:

[A]t bottom, a matter of trusting the citizens to know their own minds and best interests And though the implementation will inevitably be approximate and debatable, and though totalitarianism or technocratic government can obtain some swift successes, in the end, only a democracy can enlist a people's energies on a sustained and renewable basis.¹⁵²

Just as a government must allow its citizens to speak openly and freely, it follows logically that the public must know what the government is doing on its behalf. The experiment can only work with reciprocal confidence: the government needs to believe in its people and the people need to believe in their government. In order to do so, the public needs access to and knowledge of government activities occurring on its behalf, and the government must withstand any resulting criticism. Failure to achieve this would tend to suggest that the experiment may need a new direction. Furthermore, this trust should extend to inconvenient truths or internal embarrassments that are often withheld by the government out of distrust in the public's ability to responsibly manage such information. According to Lidsky, "If a majority of citizens make policy choices based on lies, half-truths, or propaganda, sovereignty lies not with the people but with the purveyors of disinformation."¹⁵³ The rational audience theory asserts that the fullest possible record must be made available to the people.¹⁵⁴

¹⁵⁰ See Lidsky, *supra* note 148, at 850.

¹⁵¹ *Id.*

¹⁵² *Id.*; see also John Updike, *Testing the Limits of What I Know and Feel*, NPR (Apr. 18, 2005, 12:00 AM), <http://www.npr.org/templates/story/story.php?storyId=4600600>.

¹⁵³ Lidsky, *supra* note 148, at 839.

¹⁵⁴ See *id.* at 838–39.

For his part, Meiklejohn identified with concerns of paternalism over a half century ago. He frequently turned to Justice Holmes' dissent in *Abrams*, where the justice called the American democracy a great "experiment."¹⁵⁵ Meiklejohn emphasized this ever-evolving nature in imploring post-war America to allow for more reign in public discourse and criticism, asking "Do We, the People of the United States, wish to be thus mentally 'protected'?" To say that would seem to be an admission that we are intellectually and morally unfit to play our part . . . Have we, on that ground, abandoned or qualified the great experiment?"¹⁵⁶

IV. JUDICIAL INTERPRETATION

The First Amendment contains five clauses protecting various elements of expressive behavior.¹⁵⁷ Over time, courts have recognized a range of related activities or modes of conduct as necessary or correlative to a fully realized First Amendment. First, there is the right not to speak.¹⁵⁸ Second, the Court has recognized the right to gain access to public property for expressive purposes.¹⁵⁹ Third, courts have recognized a freedom to associate.¹⁶⁰ Additionally, the Court has given great attention to whether a fully realized First Amendment requires access to government information.¹⁶¹ Phillip Cooper identified that, "The Supreme Court has made an important shift in the constitutional theory which undergirds free expression. It has moved away from a rights-based theory

¹⁵⁵ See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("It is an experiment, as all life is an experiment.").

¹⁵⁶ MEIKLEJOHN, *supra* note 101, at 6–7.

¹⁵⁷ See U.S. CONST. amend. I.

¹⁵⁸ See, e.g., *Turner Broadcasting Systems, Inc. v. Fed. Comm. Comm'n.*, 512 U.S. 622, 641 (1994). The Court considered the ability of government to force a speaker to make statements counter to the speaker's desire, ultimately prohibited such government coercion, and recognized a right of a speaker not to engage in expression against one's will. *Id.* The Court noted, "[a]t the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Id.* Furthermore, "the First Amendment . . . does not countenance governmental control over the content of messages expressed by private individuals." *Id.*

¹⁵⁹ See, e.g., *Arkansas Educ. Television Comm'n. v. Forbes*, 523 U.S. 666, 676–78 (1998) (outlining a general public forum position.).

¹⁶⁰ See, e.g., *NAACP v. Alabama*, 357 U.S. 449, 460–61 (1958). Commenting on the relationship between a right to association and First Amendment guarantees of speech and assembly, the Court stated, "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *Id.* at 460.

¹⁶¹ See, e.g., *Houchins v. KQED, Inc.*, 438 U.S. 1, 9 (1978) ("Th[e] Court has never intimated a First Amendment guarantee of a right of access to all sources of information within government control. Nor does the rationale . . . lead to the implication of such a right.").

concerned with the communicator to a free-flow theory which focuses on the message and the process of the communication.”¹⁶²

This section will explore the adjudication of access to government information as another extension of the First Amendment. This judicial consideration is rooted in foundational First Amendment cases where federal courts were in the early stages of processing contemporary rights of speech and press arguments, incidentally addressing a right to access government information. Slowly, the judiciary began directly confronting the query, making two major turns, first considering the right of access to prisons and then the right of access to criminal court rooms. These decisions also cut across a secondary plane, whether a right of access differed for the press and the public.

Two cases that challenged the government’s ability to dictate a central truth were *Abrams v. United States* and *Whitney v. California*.¹⁶³ In each case, the United States charged communists for expressing beliefs deemed contrary to United States interests.¹⁶⁴ The dissent in *Abrams* indirectly seems to address right of access as a tertiary necessity to holding unorthodox opinions and challenging majority positions.¹⁶⁵ Furthermore, in the landmark prior restraint case *Near v. Minnesota*, Chief Justice Charles Evans Hughes expressed an early concern that the growing complexity and authority of the government encouraged the need for a vigilant press, in order to hold those in power accountable.¹⁶⁶ Additionally, *New York Times v. Sullivan* determined that despite possible errors, the press was to be emboldened in pursuing the truth.¹⁶⁷ The Court feared chilling public dissent and proposed potential secondary rights of access in fulfilling the citizen’s and press’s role in government critique.¹⁶⁸ In a concurring opinion, Justice Black suggested First Amendment rights encompassed oversight and critique of government.¹⁶⁹ In considering the

¹⁶² Phillip J. Cooper, *The Supreme Court, the First Amendment, and Freedom of Information*, 46 PUB. ADMIN. REV. 622, 622 (1986).

¹⁶³ See *Abrams v. United States*, 250 U.S. 616 (1919); *Whitney v. California*, 274 U.S. 357 (1927).

¹⁶⁴ *Whitney*, 274 U.S. at 363; *Abrams*, 250 U.S. at 617–18.

¹⁶⁵ *Abrams*, 250 U.S. at 624–31 (Holmes, J., dissenting).

¹⁶⁶ See *Near v. Minnesota*, 283 U.S. 697, 719–20 (1931).

¹⁶⁷ See *New York Times Co. v. Sullivan*, 376 U.S. 254, 270–71 (1964). The Court quoted Madison: “Some degree of abuse is inseparable from the proper use of everything; and in no instance is this more true than in that of the press.” *Id.* at 271.

¹⁶⁸ *Id.* at 282 (Championing the “citizen-critic of government. It is as much his duty to criticize as it is the official’s duty to administer.”).

¹⁶⁹ *Id.* at 293 (Black, J., concurring). Black wrote, “I vote to reverse exclusively on the ground that the Times and the individual defendants had an absolute, unconditional

limits to expressive rights, he deemed them “unconditional” when discussing public affairs, observing the nuisance of frequent libel suits preferable to a country “where its people can be made to suffer physically or financially for criticizing their government, its actions, or its officials.”¹⁷⁰

Following *New York Times v. Sullivan*, the United States Supreme Court explicitly considered a public right to acquire facts before World War II in *Grosjean v. American Press*.¹⁷¹ The Court ruled a newspaper tax unconstitutional.¹⁷² The majority opinion compared the Louisiana effort to British taxes on the colonies, which were conceived as taxes on knowledge.¹⁷³ Justice George Sutherland, presaging Blasi, concluded “informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern.”¹⁷⁴

In 1943, the Court in *Martin v. City of Struthers* handed down a decision that would introduce an influential rationale to the access of information trajectory.¹⁷⁵ The *Struthers* ruling decided that a city ordinance restricting door-to-door distribution of handbills was unconstitutional because it interfered with the freedom of speech and press.¹⁷⁶ Some central concepts in the decision were the free flow of information and the belief that unconstrained movement of ideas and information would lead to more democratic and egalitarian outcomes.¹⁷⁷ The Court further noted that door-to-door distribution is widely used by many members of the public, such as the federal government and religious organizations, while also conceding that this type of distribution is “the most effective way of bringing . . . notice [to] individuals is their distribution at the homes of the people.”¹⁷⁸ In the majority opinion, Justice Black emphasized that the rights of freedom of speech and press are

constitutional right to publish in the Times advertisement their criticisms of the Montgomery agencies and officials.” *Sullivan*, 376 U.S. at 293 (Black, J., concurring).

¹⁷⁰ *Id.* at 297.

¹⁷¹ *See Grosjean v. American Press Co.*, 297 U.S. 233 (1936).

¹⁷² *See id.* at 249–50.

¹⁷³ *See id.* at 247 (“[T]he dominant and controlling aim was to prevent, or curtail the opportunity for, the acquisition of knowledge by the people in respect of their governmental affairs.”).

¹⁷⁴ *Id.* at 250.

¹⁷⁵ *See Martin v. City of Struthers*, 319 U.S. 141 (1943).

¹⁷⁶ *Id.* at 149.

¹⁷⁷ *See id.* at 146–47 (“Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society, that . . . it must be preserved.”).

¹⁷⁸ *See id.* at 145–46.

broadly defined, and further interpreted the ability to distribute and receive information essential to realizing these rights.¹⁷⁹ Barry McDonald suggested this to be a shift whereby federal courts became less concerned with protecting individual interests and instead looked to secure social objectives.¹⁸⁰

Most assertions—and as a result, court cases—regarding a right to gather information seem to have involved organized news media. In *Zemel v. Rusk*, a pivotal early decision on the subject, the case was brought by a stifled tourist.¹⁸¹ It was this case where the Supreme Court began considering access to information in earnest.¹⁸² Louis Zemel was a passport-holding U.S. citizen with a desire to travel to Cuba.¹⁸³ When Zemel wanted to travel to Cuba, the State department denied his application to travel,¹⁸⁴ which Zemel couched as an infringement on his right to go abroad and learn first-hand about United States government policies and a violation on a First Amendment free flow of information.¹⁸⁵ The Court denied any First Amendment implications, stating that “[t]he right to speak and publish does not carry with it the unrestrained right to gather information.”¹⁸⁶ The Court explained that such a recognition would open a veritable floodgate of intrusive and problematic activities, such as unencumbered access to the entirety of the White House.¹⁸⁷ Justice William Douglas’s dissent called a right to gather information a peripheral right of the First Amendment by writing: “The right to know, to converse

¹⁷⁹ *Martin*, 319 U.S. at 143.

¹⁸⁰ McDonald stated:

And having established a right to communicate, and a correlative right to receive communications, later assertions by the Court that one of the chief purposes of the First Amendment is to protect the ‘free flow’ of information and ideas to the public seemed to be a natural extension of these principles. On this conception of freedom of expression, however, the Court’s focus was not so much on protecting *individual* interests in expressing oneself or receiving another’s expression, but rather on the *societal* interest in maintaining a sufficient flow of information to the public about matters of social concern in order to foster our system of informed self-governance.

McDonald, *supra* note 126, at 250–51 (emphasis in original).

¹⁸¹ See *Zemel v. Rusk*, 381 U.S. 1, 3 (1965).

¹⁸² *Id.* at 7, 16 (discussing appellant’s assertion that the refusal to validate his passport for travel denies rights guaranteed by the First Amendment).

¹⁸³ See *id.* at 3.

¹⁸⁴ *Id.* at 3–4.

¹⁸⁵ *Zemel*, 381 U.S. at 4, 16.

¹⁸⁶ *Id.* at 17.

¹⁸⁷ See *id.* (“[T]he prohibition of unauthorized entry into the White House diminishes the citizen’s opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right.”).

with others, to consult with them, to observe social, physical, political and other phenomena abroad as well as at home gives meaning and substance to freedom of expression and freedom of the press. Without those contacts First Amendment rights suffer.”¹⁸⁸

A year after *Sullivan*, the Supreme Court connected First Amendment theory to the delivery of mail: “Just as the licensing and taxing authorities in [other] cases sought to control the flow of ideas to the public, so here federal agencies regulate the flow of mail.”¹⁸⁹ Additionally, a most explicit statement in support of free flow of information, the Supreme Court in *Stanley v. Georgia* stated that the “right to receive information and ideas, regardless of their social worth . . . is fundamental to our free society.”¹⁹⁰ The landmark case *Red Lion Broadcasting v. FCC* was also significant in establishing the right to free flow of information.¹⁹¹ In debating the Fairness Doctrine and broadcasters’ expressive rights, the Supreme Court emphasized the public’s right to know.¹⁹² Justice White wrote, “It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.”¹⁹³ The Court then emphasized its primary interest in maintaining “the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences”¹⁹⁴

Additionally, *Branzburg v. Hayes* is a pivotal Supreme Court consideration of corollary First Amendment rights—a decision in which many view as a landmark reporter’s privilege decision.¹⁹⁵ In that case, the Court weighed the import of free flow of information on the free press clause.¹⁹⁶ Journalists argued that a subpoena for reporting notes and information constituted a detriment to “the free flow of information protected by the First Amendment.”¹⁹⁷ In a five-to-four decision, the Court ruled against recognizing reporters’ privilege, rejecting a special

¹⁸⁸ *Id.* at 24 (Douglas, J., dissenting).

¹⁸⁹ *Lamont v. Postmaster General*, 381 U.S. 301, 306 (1965).

¹⁹⁰ *Stanley v. Georgia*, 394 U.S. 557, 564 (1969).

¹⁹¹ *See Red Lion Broadcasting Co., Inc., v. FCC*, 395 U.S. 367 (1969).

¹⁹² *Id.* at 390.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *See Branzburg v. Hayes*, 408 U.S. 665 (1972).

¹⁹⁶ *See id.* at 720–21 (“Today’s decision will impede the wide-open and robust dissemination of ideas and counterthought which a free press both fosters and protects and which is essential to the success of intelligent self-government.”).

¹⁹⁷ *See id.* at 679–80.

class of rights for journalists,¹⁹⁸ but clarified that news-gathering was afforded some First Amendment protections.¹⁹⁹ The majority opinion asserted that “news gathering is not without its First Amendment protections, and grand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment.”²⁰⁰ Justice Potter Stewart, a frequent and voluble voice in the right to know discussion, wrote a dissent that strongly supported the press’s right to acquire information.²⁰¹ He observed that without a right to acquire information, the free press guarantee would be “impermissibly compromised.”²⁰²

Notably, three years after *Branzburg*, Justice Stewart published a law article in the midst of issuing other Supreme Court opinions circumscribing a right to access government information.²⁰³ In his article, Justice Stewart explicitly rejected a right of the press to access government information.²⁰⁴ He wrote in support of the press’s democratic role, but declared the government owed it no favors: “The press was free to do battle against secrecy and deception in government. But the press cannot expect from the Constitution any guarantee that it will succeed. There is no constitutional right to have access to particular government information, or to require openness from the bureaucracy.”²⁰⁵ Justice Stewart observed the right of the press to work in opposition to the government, which is protected by the Free Press clause, but the First

¹⁹⁸ *Id.* at 688–90.

¹⁹⁹ *Branzburg*, 498 U.S. at 681. The Court explicitly stated there were to be some First Amendment protection for information gathering: “[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated.” *Id.*

²⁰⁰ *Id.* at 707.

²⁰¹ *See id.* at 725–28 (Stewart, J., dissenting) (“The Court’s crabbed view of the First Amendment reflects a disturbing insensitivity to the critical role of an independent press in our society.”).

²⁰² *Branzburg*, 498 U.S. at 728. Stewart further argued:

A corollary of the right to publish must be the right to gather news. The full flow of information to the public protected by the free-press guarantee would be severely curtailed if no protection whatever were afforded to the process by which news is assembled and disseminated . . . News must not be unnecessarily cut off at its source, for without freedom to acquire information the right to publish would be impermissibly compromised. Accordingly, a right to gather news, of some dimensions, must exist.

Id. at 727–28. (Stewart, J., dissenting).

²⁰³ *See* Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631 (1975).

²⁰⁴ *Id.* at 636 (“There is no constitutional right to have access to particular government information, or to require openness from the bureaucracy.”).

²⁰⁵ *Id.* at 636.

Amendment went no further.²⁰⁶ In fact, he specified that the Constitution had nothing to say regarding FOIA, but that it merely “establishes the contest, not its resolution” in which we must rely on the “tug and pull of the political forces” in the United States for the rest.²⁰⁷ The law would have to stand on its own.

A. Access to Prisons

It is likely that Justice Stewart wrote the law review article discussed above because the subject was of increasing salience. As discussed above, the Court had directly and indirectly considered the right of access on several occasions. Between 1974 and 1980, however, the Supreme Court decided a series of cases that seemed to develop the prevailing position on a public right to access government information.²⁰⁸ The article will not address all decisions of the Court on the subject—though they deserve mention—but will instead explore five cases that stand out in the evolution of a corollary First Amendment right to access government information.

This series begins with the companion cases—*Pell v. Procunier* and *Saxbe v. Washington Post Co.*—in which the Court considered restrictions on access to government-controlled information, namely access to federal prisons.²⁰⁹ In *Pell*, Justice Stewart wrote for the five-to-four majority,

²⁰⁶ See *id.* at 636–37. “Newspapers, television networks, and magazines have sometimes been outrageously abusive, untruthful, arrogant, and hypocritical. But it hardly follows that elimination of a strong and independent press is the way to eliminate abusiveness, untruth, arrogance, and hypocrisy from government itself.” Stewart, *supra* note 203, at 636.

²⁰⁷ *Id.* at 636 (“The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act.”).

²⁰⁸ See *Kleindienst v. Mandel*, 408 U.S. 753, 762, 775 (1972) (recognizing that the Court has referred to a First Amendment right to “receive information and ideas” in a variety of contexts); *Procunier v. Martinez*, 416 U.S. 396, 406, 408 (1974) (considering what the appropriate standard of review should be for prison regulations restricting freedom of speech, ultimately siding with a prisoner’s right to receive mail: “Communication by letter is not accomplished by the act of writing words on paper. Rather, it is effected only when the letter is read by the addressee.”); *First National Bank v. Bellotti*, 435 U.S. 765, 783–84 (1978) (“[T]he First Amendment goes beyond protection of the press and self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw.”); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Couns.*, 425 U.S. 748, 770–71 (1976) (“[P]eople will perceive their own best interest if only they are well enough informed, and . . . the best means to that end is to open the channels of communication rather than to close them.”).

²⁰⁹ See *Pell v. Procunier*, 417 U.S. 817, 819 (1974) (considering the constitutionality of California’s Department of Corrections Manual, which provided that “[p]ress and other media interviews with specific individual inmates will not be permitted”); see also *Saxbe v. Washington Post Co.*, 417 U.S. 843, 844 (1974) (considering the constitutionality of a

outright rejecting the notion that the First Amendment afforded the press any right to information.²¹⁰ The opinion explained that the general public had no right of access to prisons, and the press would be no different.²¹¹ *Branzburg* may have provided confidentiality for journalistic sources, and *New York Times Co. v. United States* might have quashed prior restraint,²¹² but “it is quite another thing to suggest that the Constitution imposed upon government the affirmative duty to make available to journalists sources of information not available to members of the public generally.”²¹³

Similar in *Pell*, Justice Stewart once again authored the *Saxbe* five-to-four opinion, which restricted access to federal prisons.²¹⁴ Justice Lewis Powell’s dissent, however, advocated for a right to access, first acknowledging that the press had no additional constitutional rights or powers superior to those enjoyed by ordinary citizens, and then clearly endorsed a press-clause supported right to access government information when general public access was not possible.²¹⁵ Justice Powell suggested the press held a watchdog role, and as the information gathering agents of the public, the press was not only allowed, but also responsible for acquiring information when conditions made general public access untenable.²¹⁶ The dissent underscored the role of the press in granting a right of access: “What is at stake here is the societal function of the First Amendment in preserving free public discussion of governmental affairs

regulation that prohibited any personal interviews between newsmen and individually designated federal prison inmates).

²¹⁰ See *Pell*, 417 U.S. at 833–34 (“Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded . . . [N]ewsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public.”).

²¹¹ *Id.* at 834.

²¹² See *id.* (considering the impact of prior precedent—*New York Times Co. v. United States* and *Branzburg v. Hayes*—on the issue of whether access barred from the public is available to the press).

²¹³ *Id.* at 834.

²¹⁴ *Saxbe*, 417 U.S. at 850.

²¹⁵ *Id.* at 857 (Powell, J., dissenting).

²¹⁶ See *id.* at 860–61. Powell asserts that the regulation’s consequence is to “preclude accurate and effective reporting on prison conditions and inmate grievances.” *Id.* at 861. Reports generated by the press on these two subjects are “not privileged or confidential” and the government “has no legitimate interest in preventing newsmen from obtaining the information that they may learn through personal interviews or from reporting their findings to the public.” *Saxbe*, 417 U.S. at 861 (Powell, J., dissenting). Furthermore, Powell argues that it is indeed the press’ duty to report on the administration of these institutions, effectiveness of rehabilitative programs, conditions of confinement, and inmate experiences because they include “matters of legitimate societal interest and concern.” *Id.*

. . . . And public debate must not only be unfettered; it must also be informed.”²¹⁷

While the *Pell* and *Saxbe* decisions constrained access to government-controlled information, the Court seemed to acknowledge the opportunity to gain information about prisons as a right. That right, however, was not unlimited—designated prisoner interviews exceeded the Court’s standard.²¹⁸ The twin cases seemingly presented the possibility of a Court open to expansive rights to access government information when the unfettered public access was not possible. A later case, however, would make clear the Court’s circumscribed stance on access to prisons.²¹⁹

After a prisoner suicide at KQED, an Alameda County jail, a Bay Area broadcaster reported a statement made by a psychiatrist that the conditions at the facility were responsible for the illness of his patient-prisoners.²²⁰ Additionally, the report contained a statement from the petitioner—Houchins, Sheriff of Alameda County—which denied that the prison conditions were responsible for the illnesses.²²¹ When KQED requested permission to inspect the jail, Sheriff Houchins refused access to the facilities.²²² KQED and local NAACP chapters filed suit against the sheriff, claiming their First Amendment rights had been violated.²²³ The complaint alleged that petitioner Houchins violated their First Amendment rights by refusing to permit media access and by failing to provide any effective means by which the public could be informed of conditions prevailing in the facility, or to learn of the prisoners’ grievances.²²⁴ Following suit, Alameda County announced monthly tours of the facilities for all interested parties, but the tours only provided access to portions of the jail, and inmates were removed from the touring areas.²²⁵

²¹⁷ *Id.* at 862–63 (Powell, J., dissenting).

²¹⁸ *Saxbe*, 417 U.S. at 850 (upholding the Policy Statement because it does not deny the press access to sources of information available to members of the general public and therefore it does not abridge the freedom that the First Amendment guarantees).

²¹⁹ See *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978).

²²⁰ *Id.* at 3.

²²¹ *Id.*

²²² *Id.*

²²³ *Houchins*, 438 U.S. at 3–4.

²²⁴ *Id.* at 4. Furthermore, they asserted that “public access to information was essential” for there to be public debate on the jail conditions in the county. *Id.*

²²⁵ See *id.* at 4–5. Such tours did not include disciplinary cells, or the portions of the jail known as “Little Greystone,” the scene of alleged rapes, beatings, and adverse physical conditions. *Houchins*, 438 U.S. at 5. In addition, although tourists were prohibited from using cell phones and taking their own photographs, the jail made available some photographs of certain portions of the site. *Id.*

Photography, videography, and audio recording were prohibited, as were interviews with inmates.²²⁶ The press did maintain a right, however, like every other citizen, to visit prisoners they knew to interview inmates so long as the press had the consent of the inmate, his or her attorney, the district attorney, and the court.²²⁷ Additionally, inmates were free to make unmonitored collect phone calls without limitations in designated areas of the jail.²²⁸

Although there was no majority decision, Chief Justice Warren Burger wrote for a plurality of three justices and strongly rejected a First Amendment right of access, disavowing the notion that the press had an important social role.²²⁹ He wrote, “[t]his Court has never intimated a First Amendment guarantee of a right of access to all sources of information within government control.”²³⁰ He seemed to suggest that there was a freedom to gather news and information, but only within the confines of the existing law; the First Amendment stopped there and did not compel the production or disclosure of any information outside of what was legally defined.²³¹ In determining the parameters, Chief Justice Burger claimed it was Congress’s responsibility.²³² The Chief Justice seemed to be theorizing that elected representatives were best positioned to define government access instead of courts obliged by lawsuits from the press.²³³ He went further in castigating the press, suggesting KQED’s argument contained an implicit assertion that media access to jail is essential for informed public debate on prison conditions and that there is “the assumption that media personnel are the best qualified persons for the task of discovering malfeasance in public institutions. But that assumption finds no support in the decisions of this Court or the First Amendment.”²³⁴

²²⁶ *Id.* at 5.

²²⁷ *Id.* at 6.

²²⁸ *Houchins*, 438 U.S. at 6.

²²⁹ *See id.* at 9 (“The public importance of conditions in penal facilities and the media’s role of providing information afford no basis for reading into the Constitution a right of the public or the media to enter these institutions, with camera equipment, and take moving and still pictures of inmates for broadcast purposes.”).

²³⁰ *Id.*

²³¹ *See id.* at 14–15. For example, media and news sources may receive information and letters from inmates criticizing jail officials and reporting on the jail conditions; the First Amendment protects such activity. *Id.* at 15.

²³² *Houchins*, 438 U.S. at 14–15 (“Congress may provide a resolution, at least in some instances, through carefully drawn legislation.”).

²³³ *Id.* at 15 (“[W]e must rely . . . on the tug and pull of the political forces in American society.”).

²³⁴ *Id.* at 13–14.

Justice Stewart issued a concurring opinion with a similarly dismal view of a constitutional right of access.²³⁵ Stewart first stated that the First Amendment had no guarantee of a public right of access to information generated or controlled by the government, nor did it guarantee the press any basic right of access superior to that of the public generally.²³⁶ He was adamant the press deserved no special treatment and that the press was on the same playing field as the general public.²³⁷ Once access was granted, however, the press did have elevated rights in its constitutional role as information-gathering agent for the public.²³⁸

Justice John Paul Stevens's dissented, making him an important catalyst in favor of access.²³⁹ He argued that Sheriff Houchins restricted access to the jail in an attempt to cover up the conditions, and that the tours suggested an effort to control the flow of information.²⁴⁰ Justice Stevens countered the majority ruling, declaring that "[t]he preservation of a full and free flow of information to the general public has long been recognized as a core objective of the First Amendment to the Constitution."²⁴¹ This objective ensured not only the dissemination of information, but also receipt, as Justice Stevens would go as far as citing the full James Madison quote in arguing that merely leaving the channels of communication free of government interference was not sufficient.²⁴² He concluded that "[w]ithout some protection for the acquisition of information about the operation of public institutions such as prisons by the public at large, the process of self-governance contemplated by the Framers would be stripped of its substance."²⁴³

B. Access to Courts

Houchins effectively brought Supreme Court consideration of a right of access to prisons to a close. The First Amendment did provide some

²³⁵ See *id.* at 16–19 (Stewart, J., concurring).

²³⁶ *Houchins*, 438 U.S. at 16.

²³⁷ See *id.* at 16–18.

²³⁸ See *id.* at 16–17 (Stewart, J., concurring) (“[T]he First Amendment speaks separately of freedom of speech and freedom of the press is no constitutional accident, but an acknowledgment of the critical role played by the press in American society. The Constitution requires sensitivity to that role, and to the special needs of the press in performing it effectively.”).

²³⁹ See *id.* at 19–40.

²⁴⁰ *Houchins*, 438 U.S. at 28 (Stevens, J., dissenting).

²⁴¹ *Id.* at 30.

²⁴² *Id.* at 31–32.

²⁴³ *Id.* at 32.

rights of access, but those rights did not penetrate a prison's walls.²⁴⁴ The year after the Court decided *Houchins*, it would hear *Gannett Co., Inc. v. DePasquale*, considering whether members of the public have an independent constitutional right to insist upon access to pretrial judicial proceedings, even though all parties to the litigation have agreed to close such proceedings in order to assure a fair trial.²⁴⁵ Two suspects sought the exclusion of the press for pretrial hearings regarding evidence.²⁴⁶ They argued the attendant publicity would jeopardize their Sixth Amendment right to a fair trial.²⁴⁷ The Court balanced the constitutional rights of the press and the public against the defendants' right to a fair trial, concluding: "the representatives of the press did have a right of access of constitutional dimension, but . . . under the circumstances of this case . . . this right was outweighed by the defendants' right to a fair trial."²⁴⁸ Furthermore, the Court observed that First Amendment rights had not been violated because the transcription of the pretrial hearings were only temporarily withheld, and the press could inform the public of the details of the pretrial hearing accurately and completely.²⁴⁹ Justice William Rehnquist emphatically refused the notion that "the First Amendment is some sort of "sunshine law that requires notice, an opportunity to be heard, and substantial reasons before a government proceeding may be closed to the public and press."²⁵⁰ He declared that neither the First nor the Fourteenth Amendments granted the press or public a right of access to any government proceeding.²⁵¹ In his concurrence, Justice Powell reinforced his belief that the First Amendment does contain a right of access.²⁵²

Justice Harry Blackmun's lengthy opinion—joined by three other justices concurring in part and dissenting in part—declared that public scrutiny was necessary, and that the purpose of access to the trial was to expose courts to this oversight.²⁵³ Publicity held all parties, from judges,

²⁴⁴ See *Houchins*, 438 U.S. at 15–16 (majority opinion).

²⁴⁵ See *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 370 (1979).

²⁴⁶ *Id.* at 375.

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 392–93.

²⁴⁹ *Gannett Co., Inc.*, 443 U.S. at 393.

²⁵⁰ *Id.* at 405 (Rehnquist, J., concurring).

²⁵¹ *Id.*

²⁵² *Id.* at 397–98. Powell posited, "[b]ecause of the importance of the public's having accurate information concerning the operation of its criminal justice system, I would hold explicitly that petitioner's reporter had an interest protected by the First and Fourteenth Amendments in being present at the pretrial suppression hearing." *Gannett Co., Inc.*, 443 U.S. at 398 (Powell, J., concurring). He continued by observing that the press held no special status but derived their right to attend as agents of the public at large. *Id.* at 397–98.

²⁵³ *Id.* at 412 (Blackmun, J., concurring in part, dissenting in part).

to prosecutors, and juries in the justice system accountable.²⁵⁴ Justice Blackmun made clear the objective was protecting against abuse by public officials.²⁵⁵ Although he grounded his argument primarily in the Sixth Amendment and the benefits of open trials, he emphasized the imperative for access was providing public scrutiny and government accountability.²⁵⁶

The outcome of *Gannett Co., Inc. v DePasquale* continued the series of decisions finding in favor of a strong government right to control access, but the foundation was laid for a transformative decision. Though a general right of access to prisons was never recognized, *Pell*, *Saxbe*, and *Houchins* managed to establish a First Amendment right of access with considerable restrictions. Justice Blackmun's opinion in *Gannett Co., Inc.* seemed to build on the previous decisions, putting a finer point on the First Amendment right of access. The objective was not access for discourse's sake alone, but access to provide a check on the government by ensuring that information was not concealed from citizens.²⁵⁷ Anthony Lewis, an editorial columnist for *The New York Times*, was convinced the *Gannett Co., Inc.* decision, in particular, laid the groundwork for "Supreme Court acceptance of a doctrine of public access" under the First Amendment.²⁵⁸ The *Gannett Co., Inc.* decision—with special derision from Justice Rehnquist's closure of court rooms "for any reason"²⁵⁹—touched off outrage in the press.²⁶⁰ Uncharacteristically, justices responded to the public criticism.²⁶¹ On four separate occasions, justices made extracurricular comments on the case over the ensuing summer.²⁶² Lewis,

²⁵⁴ *See id.*

²⁵⁵ *Gannett Co., Inc.*, 443 U.S. at 448 (Blackmun, J., concurring in part, dissenting in part) ("[P]ublicity 'is the soul of justice . . . open judicial processes . . . protect against judicial, prosecutorial, and police abuse; provide a means for citizens to obtain information about the criminal justice system and the performance of public officials; and safeguard the integrity of the courts.'").

²⁵⁶ *See id.* at 438, 448 ("Publicity is essential to the preservation of public confidence in the rule of law and in the operation of courts.").

²⁵⁷ *See id.* at 412 ("The public-trial guarantee . . . ensures that not only judges but all participants in the criminal justice system are subjected to public scrutiny as they conduct the public's business of prosecuting crime.").

²⁵⁸ Anthony Lewis, *A Public Right to Know about Public Institutions: The First Amendment as Sword*, 1980 SUP. CT. REV. 1, 14 (1980).

²⁵⁹ *Gannett Co., Inc.*, 443 U.S. at 404 (Rehnquist, J., concurring) ("But, as the Court today holds, the Sixth Amendment does not require a criminal trial or hearing to be opened to the public if the participations to the litigation agree for any reason, no matter how jurisprudentially appealing or unappealing, that it should be closed.").

²⁶⁰ *See Lewis, supra* note 258, at 14.

²⁶¹ *Id.*

²⁶² *Id.*

a long-time Supreme Court reporter, claimed the unusual clarifications suggested the Court was not done with the subject, and potentially would be willing to undo some of what they had done.²⁶³

The following year, the Court decided *Richmond Newspapers, Inc. v. Virginia*,²⁶⁴ the final case of the pivotal access series that provided a lasting precedent on the corollary First Amendment right of access. After three mistrials in a murder case, the judge sitting for the fourth murder trial closed the courtroom pursuant to his discretion under state law.²⁶⁵ On the same day, Richmond Newspapers sought a hearing on their motion to vacate the closure order, which the trial judge denied.²⁶⁶ The Virginia Supreme Court denied the petition for appeal, finding no reversible error.²⁶⁷ The Supreme Court then handed down a seven-to-one majority decision, written by Chief Justice Burger.²⁶⁸ The other justices, except Justice Powell, wrote their own individual opinions. Justice Stevens, Justice White, and Justice Stewart concurred.²⁶⁹ Justice Thurgood Marshall joined Justice Brennan's concurrence in the judgment,²⁷⁰ and Justice Rehnquist dissented.²⁷¹

Chief Justice Berger's majority opinion observed there was a strong rationale for a First Amendment right to attend a trial.²⁷² He wrote, "[t]hese expressly guaranteed freedoms [of the First Amendment] share a common core purpose of assuring freedom of communication on matters relating to the functioning of government."²⁷³ The First Amendment freedoms of speech and press meant closing courtrooms was prohibited, and if the Court were to hold otherwise, it would pervade the century old history of open trials and opinions of courts.²⁷⁴ He made clear the case was about a right to gather information generally rather than access to courts, and made special note of the role and rights of the press: "for we

²⁶³ *Id.*

²⁶⁴ *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

²⁶⁵ *Id.* at 560.

²⁶⁶ *Id.* at 560–61.

²⁶⁷ *Id.* at 562.

²⁶⁸ *See Richmond Newspapers*, 448 U.S. at 558.

²⁶⁹ *See id.* at 581–84, 598–01, 601–04.

²⁷⁰ *See id.* at 584–98.

²⁷¹ *Id.* at 604–06.

²⁷² *See Richmond Newspapers*, 448 U.S. at 575 ("[I]t would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted[.]").

²⁷³ *Id.*

²⁷⁴ *Id.* at 575–76 ("What this means in the context of trials is that the First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors . . .").

have recognized that ‘without some protection for seeking out the news, freedom of the press could be eviscerated.’”²⁷⁵

Several justices pivoted in the *Richmond Newspapers, Inc.* decision. Notably, Justice Stewart, after writing the court opinions in *Pell*, *Saxbe*, and *Gannett* (in addition to his law review article), softened his position on corollary First Amendment rights in his *Richmond Newspapers, Inc.* concurrence.²⁷⁶ Furthermore, Justice Blackmun conceded in his concurrence “that the First Amendment must provide some measure of protection for public access to the trial.”²⁷⁷

Of the case’s six opinions, Justice Stevens’ was the most emphatic. He was clear in what was at stake. The Court was tacking in a new direction with the decision: “This is a watershed case. Until today the Court has accorded virtually absolute protection to the dissemination of information or ideas, but never before has it squarely held that the acquisition of newsworthy matter is entitled to any constitutional protection whatsoever.”²⁷⁸ He cited the restrictions of *Saxbe* and *Houchins*²⁷⁹ before making likely the surest recognition of a First Amendment right of access to date: “Today, however, for the first time, the Court unequivocally holds that an arbitrary interference with access to important information is an abridgement of the freedoms of speech and of the press protected by the First Amendment.”²⁸⁰ As Justice Stevens’ concurring opinion made clear, *Richmond Newspapers* marked a new day in recognizing a corollary First Amendment right of access.²⁸¹ Even those staunchly opposed in early cases, namely Justice Stewart, softened their positions in recognizing a right of access to government information, even if only partially.

²⁷⁵ *Id.* at 576 (quoting *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972)).

²⁷⁶ *Richmond Newspapers, Inc.*, 448 U.S. at 599 (Stewart, J., concurring) (“Whatever the ultimate answer to that question may be with respect to pretrial suppression hearings in criminal cases, the First and Fourteenth Amendments clearly give the press and the public a right of access to trials . . . civil as well as criminal.”).

²⁷⁷ *Id.* at 604 (Blackmun, J., concurring).

²⁷⁸ *See id.* at 582 (Stevens, J., concurring).

²⁷⁹ *Id.* at 582 (“Twice before, the Court has implied that any governmental restriction on access to information, no matter how severe and no matter how unjustified, would be constitutionally acceptable so long as it did not single out the press for special disabilities not applicable to the public at large.”).

²⁸⁰ *Richmond Newspapers, Inc.*, 448 U.S. at 583. (Stevens, J., concurring).

²⁸¹ *Id.* at 584 (Stevens, J., concurring) (“I agree that the First Amendment protects the public and the press from abridgment of their rights of access to information about the operation of their government, including the Judicial Branch, given the total absence of any record justification for the closure order entered in this case, the order violated the First Amendment.”).

Since *Richmond Newspapers, Inc.*, there has been little substantial movement by the Court in considering a corollary First Amendment Right of access to government information. Much of this can likely be attributed to the advent of FOIA, in addition to federal courts turning their attention from whether the public had a First Amendment right of access to refining the details of the access legislation. The *Houchins* decision signaled this transition when it cited Justice Stewart's law review article.²⁸² Before citing Stewart's article, Chief Justice Burger overtly rejected a First Amendment right to government information: "The Constitution . . . establishes the contest, not its resolution. Congress may provide a resolution, at least in some instances, through carefully drawn legislation."²⁸³

Nonetheless, the Court was clearly moving in the direction of increased access to government information, and the language of government accountability and scrutiny suffuses later opinions, most notably *Richmond Newspapers, Inc.* At this point, opinions seem to adopt a tone aligned with that of Meiklejohn and Blasi. Justice Brennan's opinion marks a clear victory for access to government information advocates and turns to refining the limits of access.²⁸⁴ Lewis suggested *Richmond News, Inc.* demonstrated wherever the limits to such a right of access reached, they certainly extended well beyond court rooms.²⁸⁵

That decision marked an important turn in jurisprudence. After all, there are no Supreme Court cases where a First Amendment right of access is being directly deliberated, certainly not with the intensity of the access to prison and court rooms intensity. Instead, the Court recognized the corollary right of access and proceeded outlining the parameters of that right in the FOIA legislation. The transition is not linear, but after the 1974 FOIA amendments²⁸⁶—which sought to give teeth to the original

²⁸² See *Houchins v. KQED, Inc.*, 438 U.S. 1, 14–15 (1978) (quoting Stewart, *supra* note 203, at 636).

²⁸³ *Id.*

²⁸⁴ See *Richmond Newspapers, Inc.*, 448 U.S. at 586 (Brennan, J., concurring in judgment) ("[A]ny privilege of access to government information is subject to a degree of restraint dictated by the nature of the information and countervailing interests in security or confidentiality . . .").

²⁸⁵ See Lewis, *supra* note 258, at 22 (quoting *Richmond Newspapers, Inc.*, 448 U.S. at 580) ("When one finds a right of access 'implicit in the guarantees of the First Amendment,' as the Chief Justice does, it defies language and logic to say that the right implied is for trials alone.").

²⁸⁶ See Privacy Act, Pub. L. 93–502, 88 Stat. 1561–64, §§ 1–3 (1974).

legislation's lax enforcement mechanisms²⁸⁷—the Court set out to refine the details of a robust access to government information system.

The relationship is most notable in the shared language of the structural role of accountability, process of informed citizens, and scrutiny of government. The *Richmond News* decision is saturated with this language:

[T]he First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes, it has a *structural* role to play in securing and fostering our republican system of self-government. . . . The structural model links the First Amendment to that process of communication necessary for a democracy to survive, and thus entails solicitude not only for communication itself, but also for the indispensable conditions of meaningful communication.²⁸⁸

Decades later, the 2004 FOIA case—*National Archives and Records Administration v. Favish*—emphasized the legitimacy of FOIA with unmistakably similar language.²⁸⁹ FOIA was “not [to] be dismissed as a convenient formalism. It defines a structural necessity in a real democracy.”²⁹⁰ In a similar FOIA case, the Court struck the same chord of democracy and scrutiny, declaring that “[t]he basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.”²⁹¹ In other cases decided during the access to prison and courts series, the language frequently overlapped. The Court seemed to be in the process of adopting the right of access as a structural role for expression allowing for the informed scrutiny of government. In the 1973 case *EPA v. Mink*, the Court was deliberating the strength of a right of access, outlining the purpose of FOIA as a legal lever for prying information from recalcitrant government hands in the name of scrutiny.²⁹² The dissenting opinion in *Mink* emphasized the structural role

²⁸⁷ See, e.g., Ralph Nader, *New Opportunities for Open Government: The 1974 Amendments to the Freedom of Information Act and the Federal Advisory Committee Act*, 25 AM. U. L. REV. 1, 1 (1975) (“The new amendments . . . provide a second attempt to ensure that these power overrides do not succeed.”).

²⁸⁸ *Richmond Newspapers, Inc.*, 448 U.S. at 587–88 (emphasis in the original).

²⁸⁹ See *Nat'l Archives and Records Admin. v. Favish*, 541 U.S. 157 (2004).

²⁹⁰ *Id.* at 172.

²⁹¹ *National Labor Rel. Bd. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

²⁹² See *Environmental Protection Agency v. Mink*, 410 U.S. 73, 80 (1973) (“[FOIA] seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands.”).

of access, stating that, “[t]he generation that made the nation . . . committed itself to the principle that democracy cannot function unless the people are permitted to know what their government is up to.”²⁹³ And in a 1976 FOIA case, Justice Brennan, writing for the Court, observed, “the basic purpose of the Freedom of Information Act [is] ‘to open agency action to the light of public scrutiny.’”²⁹⁴

The FOIA case that most clearly marks the lineage connecting the First Amendment and FOIA, though one often considered a defeat by press and transparency advocates, was *Department of Justice v. Reporters Committee*.²⁹⁵ Press members sought the FBI rap sheet of a suspected member of organized crime who had received a number of government contracts.²⁹⁶ The Court, however, limited FOIA’s reach and held that the rap sheet was nondiscoverable.²⁹⁷ Justice Stevens’ majority opinion emphasized the purpose of FOIA and access to government information by stating these rights were intended to provide the public with a record of “what the government is up to.”²⁹⁸ Justice Stevens’ language is strikingly similar to his dissent in *Richmond Newspapers, Inc.* He wrote, “[T]he FOIA’s central purpose is to ensure that the *Government’s* activities be opened to the sharp eye of public scrutiny, not that information about *private citizens* that happens to be in the warehouse of the Government be so disclosed.”²⁹⁹ The case was a setback for a right of access, but in placing private information outside the purview of the FOIA, it appeared that the justices saw the law as mechanism of government scrutiny, a strong statutory realization of Blasi’s checking value. The opinions in *Reporters Committee* were primarily concerned with adjudicating the privacy and law enforcement exemptions, and there is little mention of a general right of access to government information.³⁰⁰ Thus, the opinions can be credibly read as signaling the Court’s acceptance of the FOIA as the materialization of a people’s right to know. The rationale for a corollary First Amendment right of access was ported

²⁹³ *Id.* at 105 (Douglas, J., dissenting) (quoting Henry Steele Commager, *The Defeat of America*, N.Y. REV. OF BOOKS (Oct. 5, 1972), <https://www.nybooks.com/articles/1972/10/05/the-defeat-of-america/>).

²⁹⁴ *Dep’t. of Air Force v. Rose*, 425 U.S. 352, 372 (1976).

²⁹⁵ *See United States Dep’t. of Just. v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989).

²⁹⁶ *Id.* at 757.

²⁹⁷ *See id.* at 780.

²⁹⁸ *Id.*

²⁹⁹ *Reporters Committee*, 489 U.S. at 774 (emphasis in original).

³⁰⁰ *See id.* at 755–56, 762–63.

onto the FOIA. The Court was done debating a right of access and settled into interpreting the details of the law.

V. INTERNATIONAL RIGHTS

While historians and scholars have produced a convincing connection between the concepts animating the FOIA and the First Amendment, United States courts have produced only a partial recognition of a public right to know doctrine. Outside the United States, both multinational agreements and state constitutions commonly recognize a right to information.³⁰¹ The intergovernmental rights community has made a right to know a prominent and consistent provision of human rights charters.³⁰² Cheryl Ann Bishop suggested that the international community has recognized the right to know under four different premises: a right to truth, a right to information privacy, a right to a healthy environment, and most prominently a freedom of expression conceptualization.³⁰³ A citizen's ability "to seek, receive and impart information" is expressly and unequivocally addressed in a number of these international agreements.³⁰⁴ The Convention for the Protection of Human rights and Fundamental Freedoms, which also established the European Court of Human Rights, has recognized a right to seek and receive information.³⁰⁵ This Convention, along with the Inter-American Court on Human rights and the UN special rapporteur on freedom of expression, connected this fundamental right specifically with an ability to access government

³⁰¹ See CHERYL ANN BISHOP, ACCESS TO INFORMATION AS A HUMAN RIGHT 3-4 (Melvin I. Urofsky ed., 2012) ("Currently, over [ninety] countries have adopted access laws, over half of which were adopted within the last fifteen years, and at least fifty countries have access laws pending adoption. Today rights to official government information are also guaranteed in at least fifty national constitutions[.]").

³⁰² *Id.* ("[W]ithin the past ten years, intergovernmental organizations such as the World Trade Organization and the World Bank have changed their policies to allow greater access to their official records.").

³⁰³ See *id.* at 193.

³⁰⁴ *Id.* at 2; see, e.g., G.A. Res 217 (III) A, Universal Declaration of Human Rights, (Dec. 10, 1948); International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 ; American Convention on Human Rights: Pact of San José, Costa Rica", Nov. 22, 1969, 1144 U.N.T.S. 157; African Commission Resolution on the Adoption of the Declaration of Principles on Freedom of Expression in Africa, Oct. 23, 2002, ACHPR/Res. 62(XXXII)02.

³⁰⁵ See Convention for the Protection of Human Rights and Fundamental Freedoms, art. 10, Nov. 4, 1950, 213 U.N.T.S. 222.

information,³⁰⁶ with the Inter-American court recognizing this right in a 2006 decision.³⁰⁷

An early example of this type of intergovernmental rights-focused conclave was a 1927 League of Nations conference whose sole purpose was to wade through the merits of legally recognizing freedom of information.³⁰⁸ Kent Cooper, a long-time Associated Press reporter and executive, who is thought to have originated the phrase “right to know” in his 1945 *New York Times* article—“The Right to Know”³⁰⁹—was a lead member of the U.S. delegation. Although concrete solutions were not achieved, the conference itself represented an important service in uniting concern for freedom of information.

In 1948, the United Nations released its Universal Declaration of Human Rights, with Article 19 addressing free expression: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”³¹⁰ A year later, the U.N. affirmed its commitment to a right to information by establishing a freedom of information committee and holding a conference on the subject in an effort to elaborate on its recently recognized right.³¹¹ The tenor of the conference was divorced from the contemporary access to records conversation. The world was still dealing with the repercussions of devastating global wars, unfathomable casualties, and people collectively reconfiguring the tenets of society. As a result, freedom of information was framed in the context of propaganda

³⁰⁶ See Annual Report of the Special Rapporteur for Freedom of Expression, Inter-Am. Comm’n H.R., at 138 (2003) (Without access to government information “the political benefits that flow from a climate of free expression cannot be fully realized.”).

³⁰⁷ *Claude-Reyes et al. v. Chile*, Inter-Am. Ct. H. R. (ser. C) No. 151, at 41, ¶ 77 (Sept. 19, 2006). The Court held that:

[B]y expressly stipulating the right to ‘seek’ and ‘receive’ ‘information,’ Article 13 of the Convention protects the right of all individuals to request access to State-held information . . . [It] protects the right of the individual to receive such information and the positive obligation of the State to provide it.

Id.

³⁰⁸ Final Report of the Conference of Press Experts, United Nations Educational, Scientific, and Cultural Organisation (Aug. 1927) (“[T]he aims of the Conference [are] [t]o investigate means of ensuring easier and cheaper transmission of news in order to diminish the chances of misunderstanding between peoples.”).

³⁰⁹ Kent Cooper, *The Right to Know*, N.Y. TIMES (Jan. 23, 1945), <https://www.nytimes.com/1945/01/23/archives/the-right-to-know.html>.

³¹⁰ Universal Declaration of Human Rights, *supra* note 304, art. 19.

³¹¹ See John B. Whitton, *The United Nations Conference on Freedom of Information and the Movement Against International Propaganda*, 43 AM. J. INT’L L. 73, 73 (1949).

and censorship.³¹² The fight for information had yet to turn inward, and the primary concern was with governments controlling public discourse.³¹³ Free flow of information did not mean the movement of government information to its constituency specifically, but a right for unvarnished information to pass freely between nations without manipulation by government (*i.e.* for United States information to reach the Soviet Union and Soviet information to reach Japan).³¹⁴ The prevailing thought was by coming to a universal agreement on the movement of information, future conflict could possibly be avoided.³¹⁵

Chauvinism Cold War factions marred the conference, but prominent First Amendment scholar Zechariah Chafee, a U.S. representative, took a longer view in considering the difficulties in enacting such far-reaching, difficult-to-enforce agreements.³¹⁶ He was less concerned with restrictions of private individuals against other private individuals (*e.g.* listing utterances between one private person and another, censoring student publications, and the firing of college professors),³¹⁷ suggesting the outcome of such micromanaging is government regulation of private discussion, concluding that “[t]he proper remedy lies in public opinion and the development of genuine professional spirit among [institutions].”³¹⁸ The conference’s culminating article was circulated before approval with each draft including an assurance of the public’s right to “receive and disseminate information of all kinds.”³¹⁹ The drafts did include restrictive exemptions to these rights.³²⁰ Arguably, the proposed article may cause conflict with such restrictions, especially with the provisions allowing penalties with regard to matters which must

³¹² *Id.* (noting that two resolutions were discussed, which included one on condemning war propaganda and the other against false and distorted information).

³¹³ *Id.* (“The major objective was the improvement in the means of sending information across frontiers in accordance with the view, solemnly affirmed by the Conference, that freedom of information is a ‘fundamental human right and . . . the touchstone of all the freedoms to which the [U.N.] is consecrated.’”).

³¹⁴ *Id.*

³¹⁵ See Whitton, *supra* note 311, at 73 n.2.

³¹⁶ See generally Zechariah Chafee, Jr. *Legal Problems of Freedom of Information in the United Nations*, 14 L. AND CONTEMP. PROBLEMS 545 (1949) (discussing Article 17 of the Covenant on Human Rights).

³¹⁷ See *id.* at 566.

³¹⁸ *Id.*

³¹⁹ *Id.* at 581.

³²⁰ See Chafee *supra* note 316, at 581; see also Rep. of the Working Party on an Int’l Convention of Human Rights, Comm’n on Human Rights, Second Session, E/CN. 4/56 (Dec. 11, 1947).

remain secret in the interests of national safety and publications intended or likely to incite persons to alter by violence the governmental system.³²¹

The outcome of intergovernmental efforts to establish a right to know or freedom of information as a human right are mixed with, as addressed by Chafee, the enforceability of any agreement to be exceedingly problematic.³²² Observation of these meetings provides a sense of the concerns on a broader stage in the years leading up to United States journalism organizations sparking a similar fight domestically. It is a distinctly different tone with the intergovernmental organizations naturally debating global concerns and sovereign responsibilities, occasionally dipping into individual rights. Though these efforts manifest the Universal Declaration of Human Rights, these personal rights are pieces of an overarching aim addressing global anxieties, like propaganda and censorship, and ultimately domineering governments.

The right to know is prevalent in multinational agreements,³²³ but individual nation-states recognize a right to know frequently as well. Of the 194 active state constitutions, ninety-two include a provision explicitly establishing a right to government-held information.³²⁴ In 2012, Right2Info, an international consortium of FOI experts and organizations supported by the Open Societies Foundation, found nearly seventy-five percent of countries had a constitutional guarantee of a right to information or documents.³²⁵ Countries that recognize the right are geographically heterogeneous, with all six inhabited continents represented.³²⁶ They span a broad range of political orientations and religious concentrations as well.³²⁷ This right cleaves along a First Amendment-oriented right to know what the government is up to and a right to know what information the government has on you.

³²¹ Chafee, *supra* note 316, at 581.

³²² See generally Chafee, *supra* note 316.

³²³ See, e.g., David E. Pozen & Michael Schudson, *Introduction*, in *TROUBLING TRANSPARENCY: THE HISTORY AND FUTURE OF FREEDOM OF INFORMATION 1* (David E. Pozen & Michael Schudson eds., 2018) (“Freedom of information laws have proliferated, claims of a constitutional or supra-constitutional ‘right to know’ have become commonplace.”).

³²⁴ See THE CONSTITUTE PROJECT, <https://www.constituteproject.org/> (last visited Oct. 24, 2019).

³²⁵ *Constitutional Protections of the Right to Information*, RIGHT2INFO (Jan. 9, 2012), <https://www.right2info.org/constitutional-protections>.

³²⁶ *Id.*

³²⁷ *Id.*

The latter iteration has been termed “habeas data,” and is a provision in thirty-two constitutions.³²⁸ Habeas data is a data privacy principle that has evolved as a method in combatting government surveillance.³²⁹ Influenced by a German resistance to technological surveillance, “a writ of habeas data allows an individual to obtain data from corporations or government agencies for the purpose of verifying it, modifying it, or perhaps even deleting it.”³³⁰ It was first codified as a response to authoritarian regimes in the Philippines and Latin American countries.³³¹ Essentially, habeas data is a right to information, but its roots reside in the Fourth and Fifth amendments, and its objective is privacy via a check on government surveillance. On its surface, it lacks much of the direct First Amendment motives of the historical arguments for a free flow of information and a right to know, yet habeas data is itself accountability oriented. Cyrus Farivar has called for revealing “the government’s vast stores of data to the public eye so that it can be scrutinized.”³³² Although the transparency is aimed specifically at containing government surveillance, the common constitutional right to information is more generally focused on oversight of broad government functions. Many are contained in provisions that are explicitly tied to rights of expression.³³³ It could be argued that others provide a narrower approach in seeking to root out corruption or bad actors, in line with Blasi’s checking value, but for most existing constitutions, the right to information is likely grounded in Meiklejohn’s conception of shared governance and informed citizens.

The right of access is often concise and simple.³³⁴ For instance, “[a] Bhutanese citizen shall have the right to information.”³³⁵ In Kosovo,

³²⁸ CYRUS FARIVAR, *HABEAS DATA: PRIVACY VS. THE RISE OF SURVEILLANCE TECHNOLOGY* xvii (2018).

³²⁹ *Id.*

³³⁰ *Id.*

³³¹ *Id.*

³³² See FARIVAR, *supra* note 328, at xvii.

³³³ See, e.g., Bundesverfassung der Schweizerischen Eidgenossenschaft [Constitution] Apr. 18, 1999, tit. 2, ch. 1, art. 16 (Switz.) (“Freedom of expression and of information is guaranteed Every person has the right freely to receive information to gather it from generally accessible sources and to disseminate it.”); Hiến pháp [Constitution] (1992) ch. II, art. 25 (Vnm.) (“The citizen shall enjoy the right to freedom of opinion and speech, freedom of the press, to access to information, to assemble, form associations and hold demonstrations.”).

³³⁴ See ኅይ ኤርትራ [Constitution] ch. III, art. 19, cl. 3 (Eri.) (“Every citizen shall have the right of access to information.”); Guinea Décret [Constitution] tit. II, art. 7 (Guinea) (“The right of access to public information is guaranteed to the citizen.”); Ústava Slovenskej Republiky [Constitution] ch. 2, pt. 3, art. 26 (Slovk.) (“The freedom of expression and the right to information are guaranteed.”).

³³⁵ རྟེན་ལེན་པའི་ དོན་འཕམས་ཟིག་པ་ འང་མེས་ རྟེན་ལེན་པའི་ འབྲུག་རྒྱལ་ཁབ་ [Constitution] art. 7, cl. 3 (Bhutan).

“[e]very person enjoys the right of access to public documents.”³³⁶ Many offer no elaboration, while others acknowledge that the mechanics will be laid out in legislation.³³⁷ Other nations, like Mexico and Sweden, articulate ambitious rights with thorough explanations. Sweden, the first nation to promise its citizens access to information in 1766,³³⁸ dedicated a sizeable portion of their Constitution to freedom of the press, including clear expectations regarding access to government information.³³⁹ The purpose of the right is to ensure “free exchange of opinion,” and the objective is to provide “comprehensive information” for every Swedish citizen.³⁴⁰ There are seven listed restrictions, ranging from “security of the Realm” to “preservation of animal or plant species.”³⁴¹ The Swedish Constitution spells out accessibility of official documents, specifically that such information will be disseminated free of charge and even requirements for obtaining redacted documents.³⁴² The Constitution effectively contains an entire freedom of information law. Mexico’s right to information is the most elaborate of the constitutional provisions.³⁴³ Access to information is integrated with the right of expression and exists as a parallel freedom.³⁴⁴ The Mexican Constitution provides an extensive list of bodies subject to the right of access and casts a wide net for “any authority, entity or organ . . . entitled with public funds or that can exercise authority.”³⁴⁵ Furthermore, Mexico requires all subject bodies “to record every activity that derives from their authority, competence or

³³⁶ Kushtetuta e Republikës së Kosovës [Constitution] ch. II, art. 41, cl. 1 (Kos.).

³³⁷ See, e.g., Constitution De La République Algérienne Démocratique Et Populaire [Constitution] tit. I, ch. IV, art. 51 (Alg.) (“The law shall establish the modalities of exercising this right.”); Royaume du Maroc [Constitution] tit. II, art. 27 (Morocco) (Details to be “determined with specificity by the law.”); Constitución de la República del Paraguay [Constitution] pt. I, tit. II, ch. II, art. 28 (Para.) (“The law will regulate the corresponding modalities, time periods and sanctions for them, in order to make this right effective.”).

³³⁸ See John M. Ackerman & Irma E. Sandoval-Ballesteros, *The Global Explosion of Freedom of Information Laws*, 58 ADMIN. L. REV. 85, 88 (2006).

³³⁹ See Tryckfrihetsförordningen (TF) “Freedom of Press Act” ch. 2, art. 1 (Swed.).

³⁴⁰ *Id.*

³⁴¹ *Id.* Furthermore, any applied restrictions are to be scrupulously assessed. *Id.*

³⁴² See Tryckfrihetsförordningen (TF) “Freedom of Press Act” ch. 2, art. 12 (Swed.).

³⁴³ See Constitución Política de los Estados Unidos Mexicanos [Constitution] tit. 1, ch. I, art. 6 (1917) (Mex.).

³⁴⁴ See *id.* (“Every person shall be entitled to free access to plural and timely information, as well as to search for, receive, and distribute information and ideas of any kind, through any means of expression.”).

³⁴⁵ *Id.* at tit. 1, ch. 1, art. 6(A)(I) (“All information in custody of any authority, entity or organ of the Executive, Legislative and Judicial Powers, autonomous organisms, political Parties, public funds or any person or group, such as unions, entitled with public funds or that can exercise authority at the federal, state or municipal level is public.”).

function.”³⁴⁶ The Mexican Constitution also meticulously lays out the expectations for habeas data.³⁴⁷ Many constitutions make explicit reference to restrictions to the right to information, such as Mexico, which requires that procedures be established and formalized before specialized and impartial autonomous agencies established by the Constitution.³⁴⁸ The most common exemptions are national security³⁴⁹ and a general need

³⁴⁶ *Id.*

³⁴⁷ Constitución Política de los Estados Unidos Mexicanos [Constitution] at tit. 1, ch. 1, art. 6(A)(II)-(III) (1917) (Mex.) (“Information regarding private life and personal data shall be protected according to law . . . Every person shall have free access to public information, his/her personal data, and in the case of the rectification of his/her personal data, without the necessity to argue interest or justification.”).

³⁴⁸ *Id.* at art. 6(A)(IV).

³⁴⁹ See Constitution De La République Algérienne Démocratique Et Populaire [Constitution] tit. I, ch. IV, art. 51 (Alg.) (“Exercising this right may not prejudice the others’ private life, their rights, legal contractual interests, and national security requirements”); Конституция на Република България [Constitution] ch. II, art. 41 (Bulg.) (“The exercise of this right may not be detrimental to the rights and good names of other citizens, national security, public order, public health or morality.”); Syntagma [Constitution] pt. 2, art. 5A (2008) (Greece) (“Restrictions to this right may be imposed by law only insofar as they are absolutely necessary and justified for reasons of national security, of combatting crime or of protecting rights and interests of third parties.”); Constitución Política de la República de Guatemala [Constitution] tit. II, ch. I, art. 30 (Guat.) (“All of the acts of the administration are public . . . [E]xcept when dealing with military or diplomatic matters relating to national security, or details provided by individuals under the guarantee of confidentiality.”); Constitución de la República de Moldova [Constitution] tit. II, ch. II, art. 34 (Mold.) (“The right of access to information may not prejudice either the measures of citizens’ protection or the national security.”); Constitución Política del Perú [Constitution] tit. I, ch. I, art. 2 (Peru) (“The information affecting personal privacy and those expressly excluded by the law or for reasons of national security are excepted.”); Constitution of Southern Sudan [Constitution] pt. 2, § 32 (S. Sudan) (“Every citizen has the right of access to official information and records . . . except where the release of such information is likely to prejudice public security or the right to privacy of any other person.”); Constitución Española [Constitution] pt. IV, § 105, Dec. 29, 1978 (Spain) (“The law shall make provision for . . . The access of citizens to administrative files and records, except to the extent that they may concern the security and defence of the State, the investigation of crimes and the privacy of persons.”); The Constitution of the Republic of Uganda [Constitution] ch. 4, § 41 (Uganda) (“Every citizen has a right of access to information . . . except where the release of the information is likely to prejudice the security of sovereignty of the State or interfere with the right to the privacy of any other person.”).

for state secrecy.³⁵⁰ Personal privacy is also frequently protected.³⁵¹ For instance, Norway guards access to personal information for privacy and “for other weighty reasons.”³⁵² Additionally, commercial trade, banking, and finance records were often explicitly verboten.³⁵³ Belarus provides an exception to “safeguard the honour, dignity, personal and family life of the citizens and the full implementation of their rights.”³⁵⁴ Madagascar’s

³⁵⁰ See, e.g., Constituição da República de Angola [Constitution] tit. V, ch. I, art. 200 (Angl.) (“Individuals shall be guaranteed the right to access archives and administrative records, without prejudice to the legal provisions for security and defence matters, state secrecy, criminal investigation and personal privacy.”); Constituição Federal [C.F.] [Constitution] tit. II, ch. I, art. 5 (XXXIII) (Braz.) (“[A]ll persons are entitled to receive from public agencies information in their private interest or of collective or general interest . . . except for information whose secrecy is essential to the security of society and of the State.”); A Constituição da República de Cape Verde [Constitution] pt. V, tit. VII, art. 267(2)(a) (Cape Verde) (“The citizen shall also have . . . access to administrative files and records, except those relative to the State security and defence, criminal investigation, the privacy of persons, as well as matters classified as State secret, in accordance with the law.”); Gaanoonu Asaasee Jumhooriyyaa Dhivehi [Constitution] ch. II, 61(c) (Maldives) (“All information concerning government decisions and actions shall be made public, except information that is declared to be State secrets by a law that is declared to be State secrets[.]”).

³⁵¹ See, e.g., Constitution De La République Algérienne Démocratique Et Populaire [Constitution] tit. I, ch. IV, art. 51 (Alg.) (“Acquisition and transfer of information, documents and statistics shall be guaranteed to the citizens . . . Exercising this right may not prejudice the others’ private life, their rights, legal contractual interests, and national security requirements.”); Constitución Política de los Estados Unidos Mexicanos [Constitution] tit. I, ch. 1, art. 6(A)(II) (Mex.) (“Information regarding private life and personal data shall be protected according to law and with the exceptions established therein . . . Every person shall have free access to . . . his/her personal data[.]”); Constituição da República Portuguesa [Constitution] pt. III, tit. IX, art. 268 (Port.) (“Without prejudice to the law governing matters of internal and external security, criminal investigation and personal privacy, citizens shall also possess the right of access to administrative files and records.”); Rwanda Const. [Constitution] ch. IV, § 1, art. 38 (Rwanda) (“Freedom of expression and freedom of access to information shall not prejudice public order, good morals, the protection of the youth and children, the right of every citizen to honour and dignity and protection of personal and family privacy.”).

³⁵² Konstitusjonen av Kongeriket Norge [Constitution] § E, art. 100 (Nor.) (“Everyone has a right of access to documents of the State . . . Limitations to this right may be prescribed by law to protect the privacy of the individual or for other weighty reasons.”).

³⁵³ See, e.g., Sakartvelos K’onstitutsia [Constitution] ch. 2, art. 41 (Geor.) (“Every citizen has the right according to the law to know information about himself which exists in state institutions as long as they do not contain state, professional or commercial secrets . . . Information . . . connected with health, finances or other private matters . . . are not available[.]”); Kushtetuta e Republikës së Kosovës [Constitution] ch. II, art. 41 (Kos.) (“Documents of public institutions and organs of state authorities are public, except for information that is limited by law due to privacy, business trade secrets or security classification.”); Constitution of the Independent State of Papua New Guinea [Constitution] pt. III, div. 3, subdiv. C, art. 51(c) (Papua N.G.) (“Every citizen has the right of reasonable access to official documents, subject only to the need for such secrecy as is reasonably justifiable . . . in respect of . . . trade secrets, and privileged or confidential commercial or financial information obtained from a person or body[.]”).

³⁵⁴ Канстыгунцыя Рэспублікі Беларусь [Constitution] § 2, art. 34 (Belr.).

right to government information is sweeping, but limits access on information that infringes upon public morality.³⁵⁵ Croatia offers a balancing test for determining restrictions.³⁵⁶

Enforcement and punishment are addressed by a few of the constitutions. Turkey's Constitution declares a right to information in twelve words, using five to recognize the right to appeal to an ombudsperson.³⁵⁷ Egypt leaves to the legislature the specifics, but declares "penalties for withholding information or deliberately providing wrong information."³⁵⁸ Likewise, Paraguay suggests sanctions in order to make the right effective.³⁵⁹

Most notable is the underlying purpose of most rights of access to government information. They consistently seem to align with the self-governance value, offering the public the right to scrutinize the actors and activities of their government. Naturally, they are nearly all directed at access to government-held information. A few nations grant access to privately held information, typically in service of another guaranteed right.³⁶⁰ In Kazakhstan, mass media are among the entities subject to citizen access to information.³⁶¹ The Egyptian Constitution makes note that government information is public property: "[i]nformation, data, statistics and official documents are the property of the people and the disclosure thereof from their various sources is a right guaranteed by the State for all citizens."³⁶² Somewhat beguilingly, Greece declares: "[a]ll persons have the right to participate in the Information Society."³⁶³ And it

³⁵⁵ Constitution de la République de Madagascar [Constitution] tit. II, sub-tit. I, art. 11 (Madag.) ("Information under all its forms is not submitted to any prior constraint, except that which infringes the public order and the morality").

³⁵⁶ See Ustav Republike Hrvatske [Constitution] § III, pt. 2, art. 38 (Croat.) ("Restrictions on the right to access to information must be proportionate to the nature of the need for such restriction in each individual case and necessary in a free and democratic society, as stipulated by law.").

³⁵⁷ See Türkiye Cumhuriyeti Anayasası [Constitution] pt. 2, ch. 4, § VII, art. 74 (Turk.).

³⁵⁸ Düstur Juinhuriyat Mîsr al-Arabiyah [Constitution] pt. 3, art. 68 (Egypt).

³⁵⁹ Constitución de la República del Paraguay [Constitution] pt. I, tit. II, ch. II, art. 28 (Para.).

³⁶⁰ See, e.g., Dastuurka [Constitution] ch. 2, tit. 2, art. 32 (Som.) ("Every person has the right of access to any information that is held by another person which is required for the exercise or protection of any other just right.").

³⁶¹ Қазақстан Республикасының Конституциясы [Constitution] § II, art. 18 (Kaz.) ("State bodies, public associations, officials, and the mass media must provide every citizen with the possibility to become familiar with the documents, decisions and other sources of information concerning his rights and interests.").

³⁶² Constitution of the Arab Republic of Egypt, 18 Jan. 2014 [Constitution] pt. 3, art. 68 (Egypt).

³⁶³ Syntagma [Syn.] [Constitution] pt. 2, art. 5A (2) (Greece.).

follows that to fulfill such an objective, the state is obligated to facilitate access.³⁶⁴

Many of the rights are directed at entities that exercise authority, are populated by elected officials, or spend government funds. Belarus casts a wide net, including “the activities of state bodies and public associations, on political, economic, cultural and international life.”³⁶⁵ Ecuadorians have the right to “[g]ain access freely to information generated in public institutions or in private institutions that handle State funds or perform public duties.”³⁶⁶ Norway grants a right of access to the records of a range of public bodies including both local and federal courts as well as elected officials.³⁶⁷ Poland carves out a wide berth for entities subject to the right to obtain information, including public bodies themselves, but also those that receive information on government activities “. . . and other persons or organizational units relating to the field in which they perform the duties of public authorities and manage communal assets or property of the State Treasury.”³⁶⁸ The Filipino Constitution provides access to not only the activities of government, but the underlying data: “[a]ccess to official records, and to documents, and papers pertaining to official acts, transactions, or decisions, as well as to government research data used as basis for policy development, shall be afforded the citizen.”³⁶⁹ Zimbabwe explicitly identifies the purpose of their right of access to information stating that it is in “the interests of public accountability.”³⁷⁰

While a constitutional recognition of a right to access is inevitably going to be directed at government bodies, the overwhelming tenor of the collected rights tends toward access as an informer of the public, the public’s expression, and as an explicit method for engineering accountability. The corpus of constitutions makes clear its motivations. People across the world, if they are to be their own masters, must be given a right to witness the activities and actors of governance. It must be noted that eloquent, even well-intentioned, statements of rights and the realization of these rights are very different notions. Mexico is celebrated

³⁶⁴ *Id.*

³⁶⁵ Канстытуцыя Рэспублікі Беларусь [Constitution] § 2, art. 34 (Belr.).

³⁶⁶ La Constitucion de Ecuador [Constitution] tit. II, ch. II, § 3, art. 18(2) (Ecuador).

³⁶⁷ Konstitusjonen av Kongeriket Norge [Constitution] § E, art. 100 (Nor.) (“Everyone has a right of access to documents of the State and municipal administration and a right to follow the proceedings of the courts and democratically elected bodies.”).

³⁶⁸ Tekst Konstytucji Rzeczypospolitej Polskiej w Dz.U. [Constitution] ch. II, art. 61 (Pol.).

³⁶⁹ Konstitusyon ng Republika ng Pilipinas [Constitution] art. III, § 7 (Phil.).

³⁷⁰ Mutemo weZimbabwe [Constitution] ch. 4, pt. 62 (Zim.).

for its rhetorical commitment to access and its popular Access to Information law,³⁷¹ but implementation and execution have yet to deliver on the ambitious outline.³⁷² Even authoritarian regimes in Russia³⁷³ and Pakistan³⁷⁴ operate with constitutions that recognize a right to access government information.

Constitutions are the grandest social ordering principles extant; manifesting the ideals in a foundational document represents an even greater challenge than most nations are capable of. Yet, constitutions, and the rights therein, operate as the North Star of nations. Leaders may deceive and populations may wander, but the Constitution remains the guiding force. The language in these international Constitutions echo the opinions of Justice Stevens in *Richmond Newspapers* and *Reporters Committee*.³⁷⁵ These constitutions make clear that access to government information aimed at holding governments accountable is a priority throughout the world.

VI. CONCLUSION

In tracing FOIA's First Amendment ties, one must first consider whether there is any purpose or power in imbuing the right to know with constitutional force. Some prominent scholars are ambivalent on the subject. Frederick Schauer suggested there is no substantive evidence that

³⁷¹ See *The RTI Rating*, ACCESS INFO EUROPE & CENTRE FOR LAW AND DEMOCRACY, <https://www.rti-rating.org/> (Mexico ranks second in the world for quality of the world's access to information laws).

³⁷² See Daniel Berliner & Aaron Erlich, *Competing for Transparency: Political Competition and Institutional Reform in Mexican States*, 109 AM. POL. SCI. REV. 110, 110–11 (2015) (observing good governance advocates have hailed Mexico's commitment to access to information, but implementation has been fraught with issues); Jonathan A. Fox & Libby Haight, *Mexico's Transparency Reforms: Theory and Practice*, in GOVERNMENT SECRECY 354 (2011) (acknowledging that a second generation of constitutional reforms in 2007 has led to advances but has fallen well short of the objectives); see generally Zachary Bookman & Juan-Pablo Guerrero Amaran, *Two Steps Forward, One Step Back: Assessing the Implementation of Mexico's Freedom of Information Act*, 1 MEXICAN L. REV. 25 (2009) (discussing Mexico's FOI enterprise).

³⁷³ Konstitutsiia Rossiiskoi Federatsii [Constitution] § 1, ch. 2, art. 24(2) (Russ.) ("State government bodies and local self-government bodies and their officials shall be obliged to provide everyone with access to documents and materials directly affecting his (her) rights and freedoms, unless otherwise envisaged by law.").

³⁷⁴ Pakistan Const. [Constitution] pt. II, ch. 1, 19A (Pak.) ("Every citizen shall have the right to have access to information in all matters of public importance subject to regulation and reasonable restrictions imposed by law.").

³⁷⁵ See *Richmond Newspapers*, 448 U.S. 555, 582 (1980) (Stevens, J., concurring); see also *United States Dep't of Justice et al. v. Reporters Comm. for Freedom of the Press et al.*, 489 U.S. 749, 751 (1989).

constitutional recognition would increase or expand the public right to access government information.³⁷⁶ He conceded it is easier to repeal a statute than amend the Constitution, and that statutes were more vulnerable to political winds.³⁷⁷ But, he suggested FOIA—and other landmark legislation such as the 1890 Sherman Antitrust Act and the Civil Rights Act of 1964—hold such sway that they are effectively of constitutional strength.³⁷⁸ Further, constitutional recognition would entail lawmaking by litigation, which generally produces piecemeal policies and ultimately a less systematic result.³⁷⁹ On the other hand, the statutory manifestation gives Congress the ability to determine the details of the law and refine parameters as needed, along with broad powers in weighing the value and costs of access to government information.³⁸⁰ Fenster concurred with Schauer, finding the value of constitutional recognition overstated.³⁸¹ Indeed, he observed that both Emerson and Cross preferred a constitutional solution to access to government information, conceding the duo's preference suggests "that there is something special about constitutional law, and it is clearly true that constitutionalization of information access rights could have expansive doctrinal effects."³⁸²

Lillian BeVier also failed to find a plausible connection.³⁸³ In response to Meiklejohn and Emerson, she returned to republicanism, finding that "[t]he difficulty with the view of 'self-government' which is implicit in the assertions of both Meiklejohn and Emerson is that the democratic processes embodied in the Constitution prescribe a considerably more attenuated role for citizens in the actual decision of public issues."³⁸⁴ BeVier found no constitutional nor normative

³⁷⁶ Frederick Schauer, *Positive Rights, Negative Rights, and the Right to Know*, in *TROUBLING TRANSPARENCY: THE HISTORY AND FUTURE OF FREEDOM OF INFORMATION* 34, 40 (David E. Pozen & Michael Schudson eds. 2018).

³⁷⁷ *Id.* He reasons that repealing a statute requires only a majority of the House and Senate, followed by the President's signature. *Id.* Amending a Constitution, however, requires the votes of two-thirds of both houses followed by the usually impossible ratification of three-quarters of the states. *Id.*

³⁷⁸ SCHAUER, *supra* note 376, at 41 ("None of these laws has constitutional status and all could thus be repealed without constitutional objection, but as a practical political and sociological matter, all of these laws, and others, are as deeply entrenched as any Supreme Court opinion, and arguably more than most.")

³⁷⁹ *See id.* at 42.

³⁸⁰ *See id.* at 41.

³⁸¹ *See generally* FENSTER, *supra* note 32 (discussing differences among constitutional and statutory rights).

³⁸² *Id.* at 60.

³⁸³ *See* Lillian R. BeVier, *An Informed Public, an Informing Press: The Search for a Constitutional Principle*, 68 CAL. L. REV. 482, 484 (1980).

³⁸⁴ *Id.* at 505.

relationship, determining that despite the government's best efforts, constructing and consistently applying a right to know would be highly impractical and legally unjustifiable because it does not meet the "reasoned elaboration of principle."³⁸⁵ BeVier states, "the absence of a constitutionally derived normative standard by which to evaluate particular claims to information renders such questions inherently incapable of yielding principled results, yet susceptibility to principled resolution alone justifies committing them to the courts for resolution."³⁸⁶ This would leave the legislature and executive responsible for a right to know, which BeVier argues to also be untenable because they are subject to political winds, leaving them with a diminished ability to reliably oversee such a right.³⁸⁷ BeVier's findings no doubt trouble the establishment and execution of the FOIA, but to forgo a necessary tool for government oversight out of fear of an untidy application is a riskier proposition than returning to a system lacking any mechanism for access to government information at all. Whether a free flow of information or right to know are grounded in the First Amendment is a worthy debate but abandoning one of the very few substantial checks on a federal government would be disposing of both the baby and the bathwater.

After citing Walter Gellhorn's skepticism,³⁸⁸ Fenster concluded that we mislead ourselves by believing that every FOIA problem can be solved with "the perfect statutory amendment, or the perfect institutional innovation, or if only those judges had some backbone, or if we could only get it constitutionalized."³⁸⁹ Secrecy in the United States is the result of a constitutional system where authority is distributed throughout an expansive administrative state. This, however, undermines large-scale institutional reform. The shared powers design makes enforcing complex policy problematic, especially when the bodies have an ulterior motive.

Despite respected scholars' beliefs that the FOIA has transcended to a kind of normative legal principle, constitutional recognition would not provide much in the way of added heft or judicial consideration. The realization of government transparency and its synecdoche, the FOIA, is deeply flawed. Settling for the unsatisfying status quo, both in legal status

³⁸⁵ *Id.* at 511.

³⁸⁶ *Id.* at 509.

³⁸⁷ BeVier, *supra* note 383, at 509.

³⁸⁸ Walter Gellhorn, *The Right to Know: First Amendment Overbreadth*, 1976 WASH. U. L. Q. 25, 26 (1976) ("We mislead ourselves by presenting every problem that confronts contemporary society as a justiciable issue to be decided by aloof judges under the rubric of a constitutional principle.").

³⁸⁹ FENSTER, *supra* note 32, at 66.

and manifestation, is abandoning the grand experiment. Secrecy may be hard-wired into the government system, but the only failure would be in accepting this as a calcified reality. As mentioned above, constitutional recognition is hardly a silver bullet for enacting the access promised and desired—authoritarian regimes disregard it and federal agencies ignore statutory deadlines—but it could represent a new public demand. It could signal a public fed up with pacifying a legal mechanism that is underfunded, lightly enforced, and only taken seriously if an organization with a team of Ivy league lawyers files a suit. Commercial outfits make the vast majority of requests because they likely have the time and resources to navigate, cajole, and force products from the system. Regular citizens have seemingly abandoned the law, not because it is complicated, but because public bodies acting without consequence obfuscate, delay, and generally act in bad faith. Disclosure of embarrassing or incriminating information of true consequence is a rarity. Everyday requests take years to yield records and countless requests never merit any attention at all. Politicians pay it lip service, but their rhetoric has never altered the reality that access to government information is not a priority.

Constitutional recognition is likely a fruitless endeavor, one that if successful would likely be hollow, but so it has been the case with many protests and long shot demands. Fine-tuning of the FOIA is an important path, but the necessary seismic change can only occur with similarly grand efforts. A new day for access begins when people start expecting it. The public can begin expecting it when the Court recognizes the right to know as a primary constitutional principle.



DATE DOWNLOADED: Sat Jul 25 20:57:23 2020

SOURCE: Content Downloaded from [HeinOnline](#)

Citations:

Bluebook 20th ed.

A. Jay Wagner, A Structural Imperative: Freedom of Information, the First Amendment, and the Accountability Function of Expression, 38 *Quinnipiac L. Rev.* 205 (2020).

ALWD 6th ed.

A. Jay Wagner, A Structural Imperative: Freedom of Information, the First Amendment, and the Accountability Function of Expression, 38 *Quinnipiac L. Rev.* 205 (2020).

APA 7th ed.

Wagner, A. (2020). structural imperative: Freedom of information, the first amendment, and the accountability function of expression. *Quinnipiac Law Review (QLR)*, 38(2), 205-258.

Chicago 7th ed.

A. Jay Wagner, "A Structural Imperative: Freedom of Information, the First Amendment, and the Accountability Function of Expression," *Quinnipiac Law Review (QLR)* 38, no. 2 (2020): 205-258

McGill Guide 9th ed.

A Jay Wagner, "A Structural Imperative: Freedom of Information, the First Amendment, and the Accountability Function of Expression" (2020) 38:2 *Quinnipac L Rev* 205.

MLA 8th ed.

Wagner, A. Jay. "A Structural Imperative: Freedom of Information, the First Amendment, and the Accountability Function of Expression." *Quinnipiac Law Review (QLR)*, vol. 38, no. 2, 2020, p. 205-258. HeinOnline.

OSCOLA 4th ed.

A Jay Wagner, 'A Structural Imperative: Freedom of Information, the First Amendment, and the Accountability Function of Expression' (2020) 38 *Quinnipiac L Rev* 205

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at

<https://heinonline.org/HOL/License>

-- The search text of this PDF is generated from uncorrected OCR text.

-- To obtain permission to use this article beyond the scope of your license, please use:

[Copyright Information](#)