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REASSESSING THE FIRST AMENDMENT AND THE PUBLIC'S RIGHT TO KNOW IN CONSTITUTIONAL ADJUDICATION

DAVID M. O'BRIEN †

Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.

Justice Oliver W. Holmes, dissenting in Northern Securities Co. v. United States

I. INTRODUCTION

JUSTICE HOLMES ELOQUENTLY REMINDS US that “great cases” do not emerge from ordinary constitutional litigation solely by virtue of judicial craftsmanship or creativity, or a search for “neutral principles” of law. Instead, great cases arise from shared judicial and public perception of the political salience of the issues posed, as, for example, in Youngstown Sheet & Tube Co.

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1. 193 U.S. 197, 400-01 (1904).


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v. Sawyer and New York Times Co. v. United States (Pentagon Papers). Justice Holmes' observation also points out that public passions may infuse the Supreme Court with a special sense of urgency that may prompt a sacrifice of the time needed for reflection and judicial craftsmanship. Justice Holmes thus suggests that the Court's public is as important for judicial decision-making as the public's Court is for the maintenance of the constitutional system.

Alexis de Tocqueville also noted this when he wrote that "[the Court's] power is enormous, but it is the power of public opinion." To recall Benjamin Cardozo's eloquent observation: "The great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by." In addition to litigating claims to new rights in response to changing social circumstances, the public exerts pressure on the Court through the judicial process by means of amicus curiae briefs and public interest litigation, and outside the judicial process by writing letters, or otherwise petitioning, individual justices; by publicized threats of impeachment, as with the campaign to "Impeach Earl Warren"; or by threatening reorganization of the Court, as with President Roosevelt's "Court Packing Plan." See, e.g., L. Baker, Back to Back: The Duel Between FDR and the Supreme Court (1967); R. Horn, Groups and the Constitution (1956); R. Jackson, The Struggle for Judicial Supremacy (1941); C. Vose, Caucasians Only (1959); Barker, Third Parties in Litigation: A Systematic View of the Judicial Function, 29 J. Pol. 41 (1967); Krislov, The Amicus Curiae Brief: From Friendship to Advocacy, 72 Yale L.J. 694, 702-04 (1963).
Neither Justice Holmes nor de Tocqueville, however, envisioned the "rights revolution"7 of the last three decades as the result of the proclivity of members of the public to vindicate their special interests by claiming new "rights." The rights revolution underscores the importance of the Court's public by indicating the profound significance for constitutional interpretation of the broader practice of rights within the polity.8 This, in turn, compels greater attention to constitutional language and the symbolic appeal of demands that the Supreme Court articulate unenumerated rights.9

During the last two decades, members of the public, and especially the press, have increasingly asserted the constitutional legitimacy of a "right to know." The controversy over The Progressive magazine article, The H-Bomb Secret: How We Got It, Why We're Telling It, epitomizes the wide symbolic appeal and broad political consequences of claims to the public's right to know.10 In United States v. The Progressive, Inc.,11 District Judge Warren granted a preliminary injunction against the publication of

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9. The Supreme Court has recognized several unenumerated rights. For example, the Court has interjected the first amendment to safeguard the right to receive information, Martin v. City of Struthers, 319 U.S. 141, 143 (1943) (ordinance prohibiting door-to-door solicitation violated the first amendment rights of those desiring to distribute literature and those desiring to receive it), and the right of associational privacy, NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 462 (1958) (state's attempt to compel disclosure of NAACP's membership list violated the right to associate freely with others). Cf. Roe v. Wade, 410 U.S. 113, 152-54 (1973) (recognizing a woman's qualified right to terminate her pregnancy within her fourteenth amendment right of privacy); Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (recognizing a right of marital privacy under the fourteenth amendment which was infringed by a state statute forbidding use of contraceptives).


the article.\textsuperscript{12} Acknowledging that the injunction "will infringe upon [the public's] right to know and to be informed,"\textsuperscript{13} Judge Warren concluded that "this Court can find no plausible reason why the public needs to know the technical details about hydrogen bomb construction to carry on an informed debate on this issue."\textsuperscript{14} The Department of Justice subsequently withdrew its request for an injunction against publication of the article, following the printing of a similar article by another Madison, Wisconsin periodical.\textsuperscript{15} The \textit{Progressive} case nevertheless bore the attributes of a great case in that it focused public attention on a basic dilemma in constitutional interpretation, namely, that of reconciling first amendment freedoms with governmental interests in national security.\textsuperscript{16} Although the case is now moot, its political and legal importance persists because there remain the vexatious problems of determining the legitimacy and limits of the public's right to know.

Claims to the constitutional legitimacy of a right to know may not be dismissed as extravagant demands of embittered journalists.\textsuperscript{17}

\textsuperscript{12.} \textit{Id.} at 1000.
\textsuperscript{13.} \textit{Id.} at 996.
\textsuperscript{14.} \textit{Id.} at 994.


\textsuperscript{17.} Several members of the Court have taken seriously first amendment claims to a constitutionally protected right to know. \textit{See notes} 40-48 \textit{and accompanying text infra}. The press has also made claims that their particular interest in news reporting should be entitled to constitutional protection under the first amendment and assailed the Burger Court's treatment of those claims as establishing "a dangerous pattern" that "for all practical purposes \textit{consti-}
Rather, such claims must be taken seriously both because of their symbolic appeal and because the Court's articulation of unenumerated rights may have profound consequences for constitutional law and public policy. Further, several members of the Supreme Court and a number of prominent first amendment scholars defend the constitutional legitimacy of the right to know. Thomas Emerson, for example, argues that "[t]he Supreme Court has recognized in a number of cases that the first amendment embodies a constitutional guarantee of the right to know." The right to know, according to Emerson, "focuses on the affirmative aspects of the first amendment and the system of freedom of expression." In other words, the right to know attains constitutional status as a kind of composite right that unifies previously recognized penumbral first amendment rights to receive or gather information and to acquire access to governmental institutions and materials, as well as buttresses the policy against prior restraints.
Three basic justifications have been offered for the elevation of the right to know to constitutional status: first, an historical finding that the right to know expresses an underlying tenet of constitutionally limited government evident and endorsed during the founding period in debates over the ratification of the Constitution and the adoption of the first amendment; second, a policy decision that, regardless of constitutional history, the right attains legitimacy solely upon policy considerations of the desirability of governmental openness; and third, a decision based on "constitutional common law" that the right to know may be judicially created upon showing that prior dicta and holdings on the first amendment have recognized, albeit in a more limited or derivative fashion, the interest of the public in knowing about governmental operations.

The strongest justification for a judicially-created constitutional right to know would entail showing that all three arguments are meritorious; that is, a right to know has some historical basis, would likely prove auspicious, and has support in previous constitutional rulings. Weaker justifications might be accepted by more activist jurists, admiring of the power of "robed legislators," who might demand only two of the three justifications. Of course, a purely result-oriented jurist might maintain that the anticipated benefit of governmental openness per se provides an adequate basis for establishing a directly enforceable constitutional right to know against the government.

These three justifications for denominating a constitutional right to know, however, are not equally meritorious and compelling. That a right to know has legitimacy in historical perspective appears


27. Of course, all three rationales for a right to know would still not prove persuasive for a jurist subscribing to a theory of strict construction or a literalist interpretation of the first amendment, such as Justice Black. Justice Black's criticisms of the Court's denomination of a "right of privacy" in Griswold v. Connecticut, 381 U.S. 479 (1965), are equally applicable to judicial creation of a right to know. "One of the most effective ways of diluting or expanding a constitutionally guaranteed right is to substitute for the crucial word or words of a constitutional guarantee another word or words, more or less flexible and more or less restricted in meaning." Id. at 509 (Black, J., dissenting). See also H. Black, A CONSTITUTIONAL FAITH (1969).


particularly ill-founded, indeed pretentious, in view of the debates over the adoption of the Constitution and the first amendment and the prevailing interpretations of the first amendment provided by the Court and its commentators during the nineteenth and early twentieth centuries.  

I will not recount my arguments made elsewhere against claims of historical support for a right to know, but simply indicate that, while freedom of information was deemed essential to free government during the founding period, there was no acceptance of claims that, under the first amendment, the public has a directly enforceable right to demand access to otherwise inaccessible government information, or even an unqualified liberty to publish with impunity. The most that may be asserted is that the founders, as well as later commentators on the first amendment, comprehended that freedom of information was essential for an informed public.

Nor will I rehearse my criticisms of the second claim that denomination of a directly enforceable right to know entails especially auspicious consequences for the polity. The political ideals of freedom of information and an informed public are reflected in the enumerated guarantees for freedom of speech and press, but they do not require a constitutional right to know directly enforceable against the government. Indeed, the following examination of claims to a right to know underscores the fact that judicial articulation of such a right might prove particularly pernicious in two ways. First, the right to know inevitably leads to judicial determinations of what the public does and does not have a right to know, and thus invites restrictions on freedom of speech and press in the form of prior restraints. Moreover, judicial creation and construction of the contours of a directly enforceable right to know usurp congressional power to determine the wisdom, need, and propriety of public and press access to government information and facilities.


32. See id. at 613-14.

33. See notes 142-287 and accompanying text infra.
The third claim, advanced by Emerson and others, that the Supreme Court has previously acknowledged the legitimacy of a constitutional right to know remains to be considered. Although a right to know appears neither meritorious in historical perspective, nor likely to prove wholly beneficial in practice, the constitutional common law argument for the right requires serious attention from both lawyers defending first amendment claims and students of the Supreme Court. If, as Emerson maintains, "[t]he Supreme Court has recognized in a number of cases that the first amendment embodies a constitutional guarantee for a right to know," 34 then the Court has adopted an expansive interpretation of the first amendment. Reconsideration of the Court's treatment of claims to a right to know therefore becomes important in assessing the validity and accuracy of Emerson's proclamations on the status of "an emerging constitutional right," 35 and in clarifying the present Court's understanding of the scope of the first amendment.

A reassessment of the public's right to know and the Supreme Court's first amendment analysis shows that arguments for a constitutional right to know, as well as criticisms of the Burger Court, fundamentally confuse the political ideal of freedom of information and an informed public with a directly enforceable right to know under the first amendment. While rejecting claims to a first amendment right to know, the Supreme Court maintains that the express guarantees of the first amendment in significant ways embody and ensure the political ideal of freedom of information and an informed public. The re-examination establishes that contemporary constitutional developments do not support the existence of a first amendment right to know. More importantly, it becomes clear that the constitutional common law argument ultimately reduces to considerations of public policy, namely, whether the articulation of a constitutional right to know would have beneficial consequences and whether the Supreme Court is the proper institution to undertake such policy-making. This article concludes by examining the Burger Court's recent treatment of claims to a first amendment right to know, suggesting the problems confronting courts fashioning such a right, and proposing alternative and more appropriate forums and strategies for members of the public and press to vindicate their interests in freedom of information and governmental openness.

34. Emerson, supra note 21, at 755 (footnotes omitted).
35. Emerson, supra note 20, at 23.
II. THE ORIGINS AND DEVELOPMENT OF A CONSTITUTIONAL RIGHT TO KNOW

The origins of a right to know have less to do with the Supreme Court's construction of the first amendment than with the public's, and, especially, the media's. The contemporary understanding of the first amendment, and, more generally, the Bill of Rights, departs from the nineteenth and early twentieth century view of those guarantees as only imposing limitations on the coercive powers of government. By contrast, in the twentieth century, an increasing number of scholars and members of the public have come to understand those basic guarantees as both providing limits on the power of, and simultaneously imposing affirmative duties upon, the government. Accordingly, scholars such as Emerson, tend to presume the constitutionality of a right to know when arguing that the Supreme Court should shape the contours of the right by elaborating on first amendment rights to disseminate and to receive, gather, or obtain access to information, and on the policy against prior restraints. Thus, before examining the Supreme Court's treatment of claims to a right to know in these different areas of first amendment litigation, the presumption of the constitutional legitimacy of a right to know bears further comment.

Emerson maintains that "the right to know focuses on the affirmative aspects of the first amendment and the system of freedom of expression, as well as simply looking at the negative right to be free of governmental interferences." Mindful of the manifest difficulties in reconciling the right to know and the first amendment, Emerson argues:

Reduced to its simplest terms the [right to know] includes two closely related features: first, the right to read, to listen, to see, and to otherwise receive communications; and second, the right to obtain information as a basis for transmitting ideas or facts to others. Together these constitute the reverse side of the coin from the right to communicate. But the coin is one piece, namely the system of freedom of expression.

36. See notes 7-9 and accompanying text supra.
37. See notes 20-25 and authorities cited therein.
38. Emerson, supra note 20, at 2 (emphasis added).
Emerson further argues for the recognition of a right to know by observing that the right to know serves much the same function in our society as the right to communicate. It is essential to personal self-fulfillment. It is a significant method for seeking the truth, or at least for seeking the better answer. It is necessary for collective decision-making in a democratic society.40

Emerson's contention that "[t]he Supreme Court has recognized in a number of cases that the first amendment embodies a constitutional guarantee of the right to know"41 confuses the political ideal of freedom of information safeguarded by the first amendment with a directly enforceable right to know, and proves rebuttable upon a careful reexamination of the Supreme Court's construction of the first amendment and claims to a right to know.

As a matter of constitutional history, the first amendment has been construed primarily to safeguard against restraints on the freedom of individuals and the press to communicate.42 Consequently, the scope of the amendment has traditionally fallen short of requiring affirmative action on the part of the government either to inform citizens about, or to grant them access to, policymaking institutions and processes. In other words, the first amendment has been construed to guarantee individuals only the freedom from restraints on their communications, but not the freedom to demand and obtain information from governmental and nongovernmental sources.43

40. Id.
41. Emerson, supra note 21, at 755.
43. Justice Stevens, during his address on September 8, 1979, at the University of Arizona College of Law Dedication, characterized this distinction as a "general rule" of the first amendment. After reiterating Justice Blackmun's observation in Gannett Co. v. DePasquale, 443 U.S. 368, 411 (1979) (Blackmun, J., dissenting), that "this Court heretofore has not found, and does not today find, any First Amendment right of access to judicial or other government proceedings," he proposed that "[t]hat statement fairly identifies what one
Although pluralities of the Court have affirmed the import of freedom of information and an informed public as an abstract principle when construing first amendment guarantees, a majority of the Court nevertheless has not legitimated a directly enforceable right to know under the first amendment. Indeed, a majority has specifically rejected first amendment claims for news reporters' special privileges to maintain the confidentiality of their sources, and obtain access to prisons so that they may inform the public about conditions there. Furthermore, a majority of the Burger Court recently rejected claims that the first amendment gives the press an affirmative right of access to pre-trial proceedings. The proposition that the public or the press is entitled to an affirmative and enforceable right to know has been endorsed only by individual
justices in dissenting or concurring opinions. A full assessment of the status of the right to know as an emerging constitutional right, however, requires a re-examination of the Supreme Court's specific treatment of claims to a right to know with regard to first amendment protections for disseminating and receiving information and with respect to the policy against prior restraints.

A. Popular Information and the Right to Know

The symbolic appeal of the first amendment for both the Court and the public and its central place in our constitutional democracy has commended the general principle that "freedom of expression is the rule and constraint the exception." Precisely because the Court has understood that "[the amendment's] guarantees are not for the benefit of the press so much as for the benefit of all of us," the scope of the amendment protects a wide range of means of communication. Accordingly, although acknowledging that "[t]he Constitution specifically selected the press . . . to play an important role in the discussion of public affairs," the Court historically has been reluctant to provide the institutional press with special privileges. Thus, the guarantees for freedom of speech and press might be seen to be, in a constitutional sense, redundant: the first amendment fundamentally guarantees two equal and interdependent means for the expression of ideas and the dissemination of information.


49. Emerson, supra note 25, at 655.


51. See note 42 supra and authorities cited therein.


1. Press Privileges—Freedom from Governmental Inquiries

First amendment rulings indicate the Court's view that, from a constitutional perspective, the public's interests in obtaining popular information and debating vital issues are too precious either to permit unjustified restraints on public distribution of information and ideas or to depend solely on the institutional press to accomplish that distribution. Accordingly, Justice White, writing for the majority in *Branzburg v. Hayes*, rejected the claim that the first amendment grants a constitutional testimonial privilege for newspaper reporters refusing to disclose their sources of information about criminal activities before grand juries.

By contrast, in the course of his strong dissent, Justice Douglas wrote that: "[T]he press has a preferred position in our constitutional scheme, not to enable it to make money, not to set newsmen apart as a favored class, but to bring fulfillment to the public's right to know." By construing it to embody a constitutional right to know, Justice Douglas' opinion advanced the most expansive interpretation of the first amendment. The Justice departed from both the majority and his fellow dissenters in rejecting the prevailing view of the first amendment as a guarantee only against inhibitions.


55. 408 U.S. at 708-09. *Branzburg* decided four cases. In three of them, reporters had refused to reveal their sources, or information obtained through them, to an investigating grand jury. In the remaining case, a reporter refused to appear before the grand jury at all. *Id.* at 667-79. The reporters argued that to gather news it is often necessary to agree either not to identify the source of information published or to publish only part of the facts revealed, or both; that if the reporter is nevertheless forced to reveal these confidences to a grand jury, the source so identified and other confidential sources of other reporters will be measurably deterred from furnishing publishable information, all to the detriment of the free flow of information protected by the First Amendment. *Id.* at 679-80. Rejecting this argument, the Court noted that "[i]t has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally." *Id.* at 684, citing *Zemel v. Rusk*, 381 U.S. 1, 16-17 (1965).

56. 408 U.S. at 721 (Douglas, J., dissenting) (emphasis added). Justice Douglas reiterated his quarrel with the majority's interpretation of the first amendment and claims to the right to know in *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 165 (1973) (Douglas, J., concurring), wherein he insisted that "[t]he right of the people to know has been greatly undermined by our decisions..."
on the free distribution of information. \(^{57}\) His opinion registered his belief in the constitutional legitimacy of a first amendment affirmative right to know such as would justify special privileges for the press because of its important role in informing the public. \(^{58}\)

On the other hand, Justice Stewart’s dissenting opinion, in which Justices Brennan and Marshall joined, argued only that “[t]he reporter’s constitutional right to a confidential relationship with his sources stems from the broad societal interest in a full and free flow of information to the public,” \(^{59}\) without maintaining that the first amendment confers upon the public a directly enforceable constitutional right to know extending unqualified protection to reporters gathering information. Indeed, although Justice Stewart adopted a broad view of the first amendment in \(\text{Branzburg}\), \(^{60}\) he subsequently appeared to accept the position of the majority when he wrote:

\[
\text{[I]f freedom of press means simply freedom of speech for reporters, this question of a reporter’s asserted right to withhold information would have answered itself. None of us—as individuals—has a “free speech” right to refuse to tell a grand jury the identity of someone who has given us information relevant to the grand jury's legitimate inquiry.} \]

\(^{61}\)

The majority in \(\text{Branzburg}\) correctly discerned that “[t]he heart of the claim [for a first amendment newsman’s privilege] is that the burden on news gathering resulting from compelling reporters to disclose confidential information outweighs any public interest [reflected in a grand jury’s investigation] in obtaining the information.” \(^{62}\) The majority rejected that claim, pointing out that the amendment does not isolate the press with a privilege of confi-

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\(^{57}\) 408 U.S. at 721 (Douglas, J., dissenting).
\(^{58}\) Id. at 712, 721-22 (Douglas, J., dissenting).
\(^{59}\) Id. at 725-26 & n.2 (Stewart, J., dissenting).
\(^{60}\) Id. at 725 (Stewart, J., dissenting). Justice Stewart focused on the right to gather news, which he found to imply a right to confidentiality of sources. Id. at 727-28 (Stewart, J., dissenting). Balancing society’s interest in the effective use of grand juries against the reporters’ right to confidentiality of sources, he concluded that the government’s ability to compel disclosure was limited to carefully circumscribed situations. Id. at 736, 743 (Stewart, J., dissenting).
\(^{62}\) 408 U.S. at 681.
The disagreement between the majority and Justice Douglas in *Branzburg*, and, more generally, over the constitutional legitimacy of special privileges for the press, does not turn on the import of first amendment protection for freedom of information. The justices agree that the public has legitimate interests in knowing about current events and vital issues pertaining to their self-governance. Their disagreement centers on the nature and scope of the first amendment with respect to claims to a right to know. In other words, whereas Justice Douglas suggested that the amendment implies a directly enforceable right to know, the majority of the Court apparently believed that the specific rights guaranteed by the first amendment are sufficient to adequately ensure the political ideal of freedom of information and an informed public. Nevertheless, the issues raised in *Branzburg* did not require a determination of whether the first amendment embodies a directly enforceable right to know or simply an important abstract principle registering the public's legitimate interests in popular information. The question in that case was simply whether the first amendment invests the press with special testimonial privileges because “[i]n seeking out the news the press ... acts as an agent of the public at large.” Resolution of that question did not entail determining the nature and scope of a right to know. Indeed, Justice Douglas' reliance on claims to a right to know obscures the issue of whether the Constitution mandates any special privileges for the press by assuming that the press alone serves as a conduit for popular information and an informed public.

2. Popular Information and the Problem of Obscenity

The fact that claims to the public's right to know are often simply a pretense for an expansive construction of the first amendment is also evident in other areas of controversy over the scope of the amendment. Although “a central tenet of the First Amendment
[is] that the government must remain neutral in the marketplace of ideas," 66 the government inevitably and justifiably enters this marketplace when safeguarding the conditions for each individual's exercise of first amendment freedoms—for example, when securing and maintaining a public forum 67 for the exercise of those freedoms.


67. The concept of a "public forum" was well articulated by Justice Roberts in Hague v. C.I.O., 307 U.S. 496 (1939) (ordinance forbidding distribution of printed material and holding of public meetings held unconstitutional):

Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks or communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.

Id. at 515-16.

The Court's fashioning of first amendment protection for a public forum underscores the importance of the availability of information and the opportunity to discuss wide-ranging opinions, and hence, the legitimacy of the public's right to know as a broad political principle, if not a directly enforceable right. See, e.g., Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 319-20 (1968) (freely accessible shopping center serving as the community business block held to be a public forum where the activity was related to the shopping center's operations); Niemotkou v. Maryland, 340 U.S. 268, 271 (1951) (denial of permits for use of a public park must be based on "narrowly drawn, reasonable and definite standards"). In other cases, the Court has rejected claims to first amendment protection as public forums. See, e.g., Lehman v. City of Shaker Heights, 418 U.S. 298, 303-04 (1974) (holding that buses containing advertising placards are not public forums); Lloyd Corp. v. Tanner, 407 U.S. 551, 568-70 (1972) (shopping center not a public forum for handbilling on matters unrelated to the operation of the center); Adderly v. Florida, 385 U.S. 39, 41-42 (1966) (driveway of county jail is not open for public use and demonstrations).

In Lehman, Justice Blackmun stated that:

No First Amendment forum is here to be found. The city consciously has limited access to its transit system advertising space in order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience. These are reasonable legislative objectives advanced by the city in a proprietary capacity. In these circumstances, there is no First or Fourteenth Amendment violation.

418 U.S. at 304. In his dissent, however, Justice Brennan countered that "[o]nce a public forum for communication has been established, both free speech and equal protection principles prohibit discrimination based solely upon subject matter or content." Id. at 315 (Brennan, J., dissenting) (emphasis
by imposing reasonable time, place and manner restrictions on the dissemination of ideas and information. Furthermore, as in English common law governing freedom of speech and press, the Supreme Court maintains that a first amendment right "is not an absolute one, and the State in the exercise of its police power may punish the abuse of this freedom." The majority of the Court continues to hold that some speech receives no first amendment protection upon the rationale articulated in Chaplinsky v. New Hampshire:

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

While there has never been general agreement among the justices in interpreting the first amendment, the Court has established some general areas where the protection of the amendment is limited. supplied by Justice Brennan) (footnote omitted). Indeed, Justice Blackmun's opinion in that case is difficult to square with his later opinion for the majority in Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975), where the Court invalidated as a prior restraint a municipal board's refusal to permit the musical stage production of "Hair" in the city-leased theater it managed. Id. at 552.

68. The Supreme Court has upheld reasonable time, place, and manner regulations applied in an evenhanded fashion. See, e.g., Grayned v. City of Rockford, 408 U.S. 104, 121 (1972) (upholding a conviction under ordinance forbidding disturbing noisemaking near school buildings while class is in session); Cox v. Louisiana, 379 U.S. 536, 554-55 (1965) (upholding a statute forbidding the obstruction of public passages, while reversing a conviction thereunder because of the unlimited discretion permitted in the statute's enforcement); Cox v. New Hampshire, 312 U.S. 569, 576 (1941) (upholding reasonable license fees for use of public streets for parades).

69. See O'Brien, supra note 31, at 590-603.

70. Stromberg v. California, 283 U.S. 359, 369 (1931) (invalidating those segments of a state statute which prohibited display of a flag or symbol in opposition to the government, while upholding other segments prohibiting utterances inciting violence, crime or overthrow of the government).

71. 315 U.S. 568, 574 (1942) (upholding state law prohibiting offensive words against another lawfully in a public place).

72. Id. at 571-72 (footnotes omitted).
For example, libel,73 "fighting words," 74 and obscenity 75 all fall outside absolute first amendment protection.

Within the areas of speech determined to be "no essential part of any exposition of ideas" 76—indeed, "utterly without redeeming social importance" 77—the Supreme Court has held that the Constitution permits government to regulate the conditions for disseminating such information and to define its content.78 Thus, it can hardly be said that the Court has recognized in the public an unqualified right to know about expressions of libel, personal abuse and obscenity.

Justice Douglas argued, however, that the public has a constitutionally protected interest in knowing about expressions of obscenity and the like. In Miller v. California79 and Hamling v. United States80 Justice Douglas, dissenting from the Court's reaffirmation that obscene materials are excluded from first amendment protection, repeated Emerson's arguments that "the right to know is the corollary of the right to speak or publish." 81 As Justice Douglas expressed it: "[I]mbedded in the First Amendment is the philosophy that the people have the right to know. Sex is more important to some than to others but it is of some importance to all."82


74. See Chaplinsky v. New Hampshire, 315 U.S. at 572. For a discussion of Chaplinsky, see notes 71-72 and accompanying text supra. Although the Court continues to acknowledge that speech constituting "fighting words" may be prohibited, the cases nevertheless indicate that statutes proscribing such speech must be narrowly drawn. See, e.g., Lewis v. City of New Orleans, 415 U.S. 130, 132 (1974) (striking down a statute punishing the use of "opprobrious" language against a policeman on duty).

75. See, e.g., Miller v. California, 413 U.S. 15, 23-24 (1973) (reaffirming that obscene material is not protected by the first amendment and setting forth standards of obscenity); Roth v. United States, 354 U.S. 476, 481-85 (1957) (obscenity held not to be constitutionally protected speech).


Such reliance on a right to know to support individuals' first amendment claims to freely distribute whatever they desire is misplaced. The constitutional issues raised by prosecutions for obscenity do not concern the public's interests in receiving information about sex education, but rather the permissibility of the legal enforcement of public morality. Moreover, resolution of controversies over the scope of the first amendment regarding libelous or obscene materials does not require a determination of whether the public has a constitutionally protected right to know. Justice Black, an ardent opponent of libel and obscenity prosecutions, argued simply that individuals have "an absolute, unconditional constitutional right to publish" under the first amendment. The invocations of a right to know improperly inject considerations of the rights of the audience, persons generally not before the court in such cases. The Court does, however, remain sensitive to the ideal of public information and an informed public when construing the contours of the first amendment. Over the last decade, a majority of the Court has, for example, extended first amendment protection to commercial speech and reaffirmed the rights of the press to publish information obtained from public records.

3. Popular Information and Commercial Speech

The Burger Court's treatment of claims to first amendment protection for commercial speech is particularly instructive regarding the Court's analysis of the extent of the amendment's protection of popular information and an informed public. Until Bigelow v. Virginia, commercial speech appeared to constitute a category of unprotected speech under the first amendment. Bigelow, an edi-

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88. See, e.g., Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 391 (1973) (commission order prohibiting sex-based clas-
or of a weekly newspaper, was convicted, under a Virginia statute prohibiting anyone from, "by publication, lecture, advertisement, or by sale or circulation of any publication . . . encouraging or prompt[ing] the procuring of abortion or miscarriage." Bigelow had published an advertisement for an abortion clinic located in the state of New York. With Justices Rehnquist and White dissenting, the Court held that the statute infringed upon Bigelow's first amendment rights. In so deciding the case, the Court limited the commercial speech doctrine, first enunciated in Valentine v. Chrestensen, to the extent of holding that "commercial aspects" of and "publisher's motives of financial gain" from advertisements do not "negate all First Amendment guarantees." Justice Blackmun wrote for the majority:

"The advertisement conveyed information of potential interest and value to a diverse audience—not only to readers possibly in need of the services offered, but also to those with a general curiosity about, or genuine interest in, the subject matter or the law of another State and its development, and to readers seeking reform in Virginia."

The following term, with only Justice Rehnquist dissenting, the Court extended its finding that public interests in commercial speech justify first amendment protection. In Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., the Court struck down limitations upon the advertising of prescription drug sales on the ground that the first amendment is "primarily an instrument to enlighten public decisionmaking in a democracy." Justice Blackmun, again writing the majority opinion, stated:

"So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic de-


89. 421 U.S. at 811-14.
90. Id. at 812.
91. 421 U.S. at 829 (Rehnquist, J., dissenting). Justice White joined Justice Rehnquist's dissent. Id.
93. 421 U.S. at 818.
94. Id. at 822.
96. Id. at 765.
cisions. It is a matter of public interest that those decisions in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. 97

Justice Rehnquist, in dissent, maintained his opposition to the Court's extension of the scope of the first amendment protection. He rejected Justice Blackmun's public interest rationale with the quip: "I cannot distinguish between the public's right to know the price of drugs and its right to know the price of title searches or physical examinations or other professional services for which standardized fees are charged." 98 He further condemned what he understood to be the majority's implicit acceptance of a right to know: "It is undoubtedly arguable that many people in the country regard the choice of shampoo as just as important as who may be elected to local, state, or national political office, but that does not automatically bring information about competing shampoos within the protection of the First Amendment." 99

Justice Rehnquist's misgivings about his colleagues' treatment of claims to protected commercial speech were misplaced, however, in as much as he equated the majority's concern with broadly construing first amendment safeguards for popular information with the construction of a constitutional right to know. The Virginia State Board Court did not recognize a right to know, but merely construed the first amendment to protect the right of sellers to advertise prices and thereby guarantee the public's interests in vital information. 100 While it is true that the Court permitted a consumer group to bring the action, 101 it did so on the basis of a right to receive information 102—a right previously recognized by the Court and analytically distinguishable from an independently enforceable right to know. 103 The right to receive presumes a willing speaker prevented by government interference from reaching the intended listener, while a right to know requires a listener seeking

97. Id.
98. Id. at 785 (Rehnquist, J., dissenting).
99. Id. at 787 (Rehnquist, J., dissenting).
100. See id. at 760-61, 773.
101. See id. at 756-57.
102. See id. The Court stated that "[i]f there is a right to advertise, there is a reciprocal right to receive the advertising, and it may be asserted by these appellees [the consumer group]." Id. at 757 (footnote omitted) (emphasis added).
103. See notes 107-70 and accompanying text infra.
to obtain information in spite of an unwilling speaker. The regulation involved in *Virginia State Board* did not prohibit buyers from learning drug prices, but restrained pharmacists from advertising them.\(^{104}\) In addition, the relief sought and granted did not include affirmatively requiring pharmacists to advertise, but merely limited the state’s power to prohibit advertising. Thus pharmacists still need not advertise if they choose not to.\(^{105}\) The Court further recognized the continuing power of government to impose reasonable time, place, and manner regulation and restrictions on “false, deceptive, and misleading commercial speech” in order to protect the public.\(^{106}\) Thus, the Court has not recognized a right to know in the commercial speech area, but has merely acknowledged the general public interest in a free flow of information by protecting the right of the seller to advertise.

**B. First Amendment Affirmative Action: the Right to Know and Rights to Receive and Obtain Access to Information**

Since the first amendment “protects the structure of communications necessary for the existence of our democracy,”\(^{107}\) the aura of the political ideal of freedom of information and an informed public also encourages arguments for a constitutional right to know in order to support claims to receive and obtain access to information that arguably has redeeming social importance but to which the government, nevertheless, withholds or restricts public access. Such claims pose vexatious problems in determining what the first amendment requires and permits, and Emerson’s argument that the right to know expresses a corollary of first amendment unenumerated rights commands greater attention.\(^{108}\) As Justice Marshall has observed:

> [I]n a variety of contexts this Court has held that the First Amendment protects the right to receive information and ideas, the freedom to hear as well as the freedom to speak. The reason for this is that the First Amendment

\(^{104}\) See 425 U.S. at 749-50.

\(^{105}\) See id. at 749-50, 773.

\(^{106}\) See id. at 771-72. See also Friedman v. Rogers, 440 U.S. 1, 9-10 (1979) (state statute prohibiting optometric advertisements under a trade name held not violative of first amendment).


\(^{108}\) See Emerson, *supra* note 20, at 2.
protects a process . . . and the right to speak and hear—including the right to inform others and to be informed about public issues—are inextricably part of that process. The freedom to speak and the freedom to hear are inseparable; they are two sides of the same coin. But the coin itself is the process of thought and discussion. 109

Thus, Justice Marshall, like Emerson, analyzed these first amendment freedoms with the metaphor of a coin; the first amendment is seen to guarantee freedom from restraints on the distribution of information and ideas and, on the other side, to guarantee a freedom to receive or acquire access to information and ideas. 110

The simplicity of the metaphor, however, proves beguiling. Justice Marshall, for instance, concludes that “[t]he First Amendment means that Government has no power to thwart the process of free discussion, to ‘abridge’ the freedoms necessary to make that process work.” 111 So too the Court’s commentators readily argue: “It is obvious that the freedom of the press implies the right to gather news and the right of those who possess information to impart news.” 112 However, it does not follow from the Court’s acknowledgement of a right to receive that, as Emerson urges, “the constitutional right to know embraces the right of the public to obtain information from the government.” 113

1. The Right to Receive and Governmental Restraints

Dictum in Martin v. City of Struthers 114 that “freedom [of speech and press] necessarily protects the right to receive” 115 provided the genesis for claims to a constitutional right to receive. Subsequent cases elaborated the right as a corollary of the first amendment applicable to disseminating materials about organized

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110. See Emerson, supra note 20, at 2.
112. Parks, supra note 16, at 10 (emphasis in original).
113. Emerson, supra note 20, at 14.
114. 319 U.S. 141, 149 (1943) (striking down a city ordinance prohibiting door-to-door canvassing and distribution of leaflets as an abridgment of first amendment rights).
115. Id. at 143.
labor, religious, educational, political matters, commercial speech and personal correspondence. In these cases the Court clearly understood any right to receive to exist only as a corollary of the enumerated rights in the first amendment. For example,

116. See Thomas v. Collins, 323 U.S. 516, 534 (1945) (recognizing labor organizer's right to speak and the rights of workers "to hear what he had to say," and therefore striking down as an abridgment of these rights a state statute requiring labor organizers to obtain a card before soliciting workers).


119. See Lamont v. Postmaster General, 381 U.S. 301, 306-07 (1965) (procedure withholding delivery of communist political propaganda sent through the mails pending addressee's notification of his desire to receive it held unconstitutional); id. at 307-08 (Brennan, J., concurring) (explicitly relying on a right to receive information).

120. See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. at 756-57. For a discussion of Virginia State Board, see notes 95-106 and accompanying text supra. See also Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 400-01 (1969) (affirming the FCC's "fairness doctrine"). The Red Lion Court stated: "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail ...." Id. at 390. The Court further declared: "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. ... It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences ...." Id. (citations omitted).

121. Procunier v. Martinez, 416 U.S. 396, 407-09 (1974) (invalidating prisoner mail censorship regulations). In Martinez, the Court relied heavily on the addressee's right to receive mail in order to avoid determining whether prisoners had the same first amendment rights as free persons. See id. The Court stated:

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. Both parties to the correspondence have an interest in securing that result, and censorship of the communication between them necessarily impinges on the interest of each. Whatever the status of a prisoner's claim to uncensored correspondence with an outsider, it is plain that the latter's interest is grounded in the First Amendment's guarantee of freedom of speech. And this does not depend on whether the nonprisoner correspondent is the author or intended recipient of a particular letter, for the addressee as well as the sender of direct personal correspondence derives from the First and Fourteenth Amendments a protection against unjustified governmental interference with the intended communication. ... We do not deal here with difficult questions of the so-called "right to hear" and third-party standing but with a particular means of communication in which the interests of both parties are inextricably meshed. The wife of a prison inmate who is not permitted to read all that her husband wanted to say to her has suffered an abridgement of her interest in communicating with him as plain as that which results from censorship of her letter to him. In either event, censorship of prisoner mail works a consequential restriction on the First and Fourteenth Amendments [sic] rights of those who are not prisoners.

Id. at 408-09 (footnote & citations omitted) (emphasis added).
Justice Douglas, writing for the Court in *Lamont v. Postmaster General*, explained: "We rest on the narrow ground that the addressee in order to receive his mail must request in writing that it be delivered. This amounts in our judgment to an unconstitutional abridgment of the addressee's First Amendment rights." Justice Douglas thereby construed the right to receive as a reciprocal right with respect to the express guarantees of the first amendment. Justice Brennan, concurring in *Lamont*, was prepared to go even further:

It is true that the First Amendment contains no specific guarantee of access to publications. However, the protection of the Bill of Rights goes beyond the specific guarantees to protect from congressional abridgment those equally fundamental personal rights necessary to make the express guarantees fully meaningful. . . . I think the right to receive publications is such a fundamental right.

The principal advantages and policy considerations of legitimating an independent and enforceable right to receive and right to know, Emerson thinks, are especially compelling in those situations in which

the speaker, who is normally the party most likely to seek vindication of the right to free expression, may not be in a position to assert that right, and the listener or reader may find it necessary to defend the right of expression by invoking the constitutional right to know. From a procedural point of view the right to know may give standing to the recipients or potential recipients of the communication.

The right to receive, however, has not been extended any further than to protect intended recipients of information from governmental interference with voluntarily disseminated information. The right to receive thus exists only as a necessary coordinate of

122. 381 U.S. 301 (1965). See note 119 supra.
123. 381 U.S. at 307.
124. Id. at 308 (Brennan, J., concurring).


the right to speak. That is, the right does not entitle a person to claim a right to receive information unless another has exercised his first amendment right to disseminate that information. In short, the right to receive is not tantamount to a first amendment right to know enforceable against a person holding information but unwilling to disseminate it.

The Burger Court, in its initial opportunity to consider the merits of claims to a right to receive, dealt with precisely this situation, in Kleindienst v. Mandel,127 and found that any infringement of first amendment rights to receive information was not a limit upon the government's bona fide exercise of discretion in the exclusion of aliens.128 The case arose when the Attorney General refused to grant a temporary nonimmigrant visa to a Belgian journalist and Marxist theoretician whom American organizers had invited to participate in academic conferences and discussions.129 In framing the issue for the six-member majority, Justice Blackmun wrote:

The case, therefore, comes down to the narrow issue whether the First Amendment confers upon the appellee professors, because they wish to hear, speak, and debate with Mandel in person, the ability to determine that Mandel should be permitted to enter the country or, in other words, to compel the Attorney General to allow Mandel's admission.130

After acknowledging previous cases citing a first amendment right to receive,131 the Court ruled that when the Attorney General decides for a legitimate reason to refuse to grant a visa to an alien, as authorized by Congress, courts may not weigh his decision against the first amendment interests of those desiring to communicate with the alien.132 By contrast, the dissenters argued that the first amendment "involves not only the right to speak and publish but also the right to hear, to learn, to know." 133 Justice Douglas, therefore, would have permitted discretionary exclusion of aliens only where there are issues of "national security, importation of drugs, and the

127. 408 U.S. 753 (1972).
128. Id. at 770.
129. Id. at 756-59.
130. Id. at 762.
132. 408 U.S. at 770.
133. 408 U.S. at 771 (Douglas, J., dissenting). See also id. at 774 (Marshall, J., dissenting).
like,” and Justice Marshall would have required the showing of a compelling governmental interest outweighing the infringement of first amendment rights to hear and be informed. The majority rejected these interpretations where the governmental control of immigration was involved.

*Kleindienst* complements the Warren Court's decision seven years earlier in *Zemel v. Rusk*, upholding the secretary of state's passport restrictions for travel to Cuba authorized by the Passport Act of 1926 and the Immigration and Nationality Act. In *Zemel*, Chief Justice Warren, writing for the Court, acknowledged that the restriction "renders less than wholly free the flow of information concerning that country," but also pointed to the dangers and absurdities of constructing a broad right to know:

There are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow. For example, the prohibition on 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. The right to speak and publish does not carry with it the unrestricted right to gather information.

The majority in *Zemel*, like that in *Kleindienst*, comprehended that the first amendment does not guarantee unlimited and unconditional liberties, nor does it confer upon the public an unqualified right to receive or right to know. As Justice Stewart succinctly put it: "The Constitution is neither a Freedom of Information Act nor an Official Secrets Act."

**2. Access to Governmental Facilities**

Two years after *Kleindienst*, members of the press raised first amendment challenges to blanket prohibitions of personal interviews between reporters and individually designated inmates in
Writing for bare majorities in *Pell v. Procunier* and *Saxbe v. Washington Post Co.*, Justice Stewart reaffirmed that "the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally." Thus, the Court found it "unnecessary to engage in any delicate balancing of . . . penal considerations against the legitimate demands of the First Amendment."  

Justice Douglas, in a dissent joined by Justices Marshall and Brennan, argued that the first amendment embodies an affirmative right to know and confers special privileges on the press so that it may obtain information and vindicate the public's interests in popular information. He found the prison regulations on press interviews to be "far broader than is necessary to protect any legitimate governmental interests and . . . an unconstitutional infringement on the public's right to know protected by the free press."  

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143. 417 U.S. 817 (1974). In *Pell*, reporters contended:  
[I]Irrespective of what First Amendment liberties may or may not be retained by prison inmates, members of the press have a constitutional right to interview any inmate who is willing to speak with them, in the absence of an individualized determination that the particular interview might create a clear and present danger to prison security or to some other substantial interest served by the corrections system. *Id.* at 829.  
144. 417 U.S. 843 (1974). In *Saxbe*, where the lower courts had held that the federal prison regulation at issue violated the first amendment rights of the media, the court of appeals had held that press interviews could be denied "only where it is the judgment of the administrator directly concerned, based on either the demonstrated behavior of the inmate, or special conditions existing at the institution at the time the interview is requested, or both, that the interview presents a serious risk of administrative or disciplinary problems." *Id.* at 846, *quoting Washington Post Co. v. Kleindienst*, 494 F.2d 994 (D.C. Cir. 1974), *rev'd sub nom. Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974).  

It is one thing to say that a journalist is free to seek out sources of information not available to members of the general public, that he is entitled to some constitutional protection of the confidentiality of such sources, . . . and that government cannot restrain the publication of news emanating from such sources. . . . It is quite another thing to suggest that the Constitution imposes upon government the affirmative duty to make available to journalists sources of information not available to members of the public generally. That proposition finds no support in the words of the Constitution or in any decision of this Court.  

417 U.S. at 834-35 (citations omitted).  
guarantee of the First Amendment." 148 Moreover, Justice Douglas thought that special privileges for the press to receive information and acquire access to facilities not open to the public was defensible:

The prohibition of visits by the public has no practical effect upon their right to know beyond that achieved by the exclusion of the press. The average citizen is most unlikely to inform himself about the operation of the prison system by requesting an interview with a particular inmate with whom he has no prior relationship. He is likely instead, in a society which values a free press, to rely upon the media for information. 149

Justice Powell also dissented in Pell and Saxbe, finding that an absolute prohibition on prisoner-press interviews "significantly impairs the right of the people to a free flow of information and ideas on the conduct of their Government . . . ." 150 He further explained that "the underlying right is the right of the public generally. The press is the necessary representative of the public's interest in this context and the instrumentality which effects the public's right." 151 Justice Powell, however, emphasized that "[g]overnmental regulations should not be policed in the name of a 'right to know' unless they significantly affect the societal function of the First Amendment." 152 He then indicated that he would uphold press interview policies that accommodate both first amendment and governmental interests and cautioned against excessive claims to a right to know: "Common sense and proper respect for the constitutional commitment of the affairs of state to the Legislative and Executive Branches should deter the Judiciary from chasing the right-of-access rainbows that an advocate's eye can spot in virtually all governmental actions." 153

The Pell and Saxbe cases demonstrate the appeal of the political ideal of an informed public and highlight the divisions of the Court over interpreting that ideal and the first amendment. Those divisions emerged again four years later when a plurality again rejected claims by the media for access to prison facilities in Houchins v. KQED. 154 KQED, a California broadcasting station, challenged as

148. Id. at 841 (Douglas, J., dissenting).
149. Id.
151. Id. at 864 (Powell, J., dissenting).
152. Id. at 872 (Powell, J., dissenting).
153. Id.
a denial of first amendment rights the refusal of Alameda County Jail officials to permit access to a portion of the jail where a prisoner's suicide had occurred, reportedly due to the conditions of the prison. Chief Justice Burger, in an opinion joined by Justices White and Rehnquist, examined prior rulings in rejecting any claim that the press is entitled to special privileges because of the importance of an informed public and the role which the press plays in providing such information. He emphasized that "an analysis of those cases reveals that the Court was concerned with the freedom of the media to communicate information once it is obtained; [the cases do not intimate] that the Constitution compels the government to provide the media with information or access to it on demand." He then concluded:

[KQED's] argument is flawed, not only because it lacks precedential support and is contrary to statements in this Court's opinions, but also because it invites the Court to involve itself in what is clearly a legislative task which the Constitution has left to the political processes. Whether the government should open penal institutions in the manner sought by [KQED] is a question of policy which a legislative body might appropriately resolve one way or the other.

The plurality opinion thus accepts at face value the Court's opinions in Pell and Saxbe which denied special rights of access to the press. Their author, Justice Stewart, in a separate opinion concurring in the judgment in Houchins, agreed that "[t]he First and Fourteenth Amendments do not guarantee the public a right of access to information generated or controlled by government, nor do they guarantee the press any basic right of access superior to that of the public generally." After he reviewed the importance of the press to society, however, Justice Stewart concluded that "terms of access that are reasonably imposed on individual members of the public may, if they impede effective reporting without sufficient justification, be unreasonable as applied to journalists who are there to convey to the general public what the visitors

155. Id. at 3-6.
156. Id. at 8-12.
157. Id. at 9 (emphasis in original).
158. Id. at 12.
159. See notes 142-53 and accompanying text supra.
160. 438 U.S. at 16 (Stewart, J., concurring).
In other words, although neither press nor public has a first amendment right of access to prisons, once that access is granted to the public generally, the press may be able to gain access on more favorable terms so as to report adequately upon the conditions in the accessible areas.\textsuperscript{162}

Justice Stevens, however, having assumed Justice Douglas' seat on the high court, maintained his predecessor's position expressed in \textit{Pell} and \textit{Saxbe}.\textsuperscript{163} In \textit{Houchins}, Justice Stevens wrote the dissenting opinion in which Justices Brennan and Powell joined.\textsuperscript{164} In their view, the basic question was "whether [the jail's] policies, which cut off the flow of information at its source, abridged the public's right to be informed about [the jail's] conditions."\textsuperscript{165} Justice Stevens argued that "[w]ithout some protection for the acquisition of information about the operation of public institutions . . . by the public at large, the process of self-governance contemplated by the Framers would be stripped of its substance."\textsuperscript{166}

Thus, the division within the Burger Court between the Chief Justice and Justices Rehnquist, Blackmun, White and Stewart, on the one hand, and Justices Stevens, Powell, Brennan, and Marshall on the other, arises because of the latter Justices' willingness to allow special privileges for the press in order that the press may inform the public of vital issues and current events. The latter, unlike the former, are further willing to fashion a limited but enforceable right to know by extending dicta on first amendment protection for the right to receive\textsuperscript{167} and the import of free and unrestricted dissemination of information within the body politic.\textsuperscript{168} They also are willing to assume the task of line-drawing in determining the reasonableness of policies restricting public access to governmental facilities or materials and deciding what the public has or has not a right to know.\textsuperscript{169} In other words, the justices remain fundamentally divided over the political ideal of an informed public and what the first amendment requires and permits. Whereas Justice Stevens' group finds a limited but enforceable right to know

\begin{itemize}
\item \textsuperscript{161} \textit{Id.} at 17 (Stewart, J., concurring).
\item \textsuperscript{162} \textit{See id.} at 17-18 (Stewart, J., concurring).
\item \textsuperscript{163} \textit{See notes} 147-49 and accompanying text supra.
\item \textsuperscript{164} 438 U.S. at 19 (Stevens, J., dissenting).
\item \textsuperscript{165} \textit{Id.} at 84 (Stevens, J., dissenting).
\item \textsuperscript{166} \textit{Id.} at 32 (Stevens, J., dissenting).
\item \textsuperscript{167} \textit{See notes} 114-23 and accompanying text supra.
\item \textsuperscript{168} \textit{See notes} 49-53 and accompanying text supra.
\item \textsuperscript{169} \textit{Compare Houchins v. KQED}, 438 U.S. at 3-16 \textit{with} text accompanying note 33 supra.
\end{itemize}
constitutionally defensible, the Chief Justice and his colleagues find such an affirmative right illegitimate, both in terms of historical perspective and recent rulings on the first amendment; as well as pernicious in expanding the Court's supervisory role and entangling it in policy issues.\footnote{170. See O'Brien, supra note 31, at 608-17.}

The Court has never recognized any right of access to governmental facilities, whether in the public generally or the press. A majority has denied such rights exist, although one member of that majority appeared willing to grant the press special terms of access to those facilities, and those justices arguing for an enforceable right of access in the public and the press remain a minority.

3. \textit{Popular Information and Public Trials}

Controversy over a first amendment right of access to trials is particularly salient because of the symbolic appeal of a public's right to know. Justice Stewart himself, the author of \textit{Pell} and \textit{Saxbe}, earlier wrote in his dissent in \textit{Estes v. Texas}\footnote{171. 381 U.S. 532 (1965).} that "[t]he suggestion that there are limits upon the public's right to know what goes on in courts causes me deep concern."\footnote{172. Id. at 615 (Stewart, J., dissenting).} In fact, even the opinion for the Court in \textit{Estes}, holding that television broadcasting of criminal trials may amount to a violation of due process,\footnote{173. Id. at 534-35; id. at 552 (Warren, C.J., concurring); id. at 587 (Harlan, J., concurring). \textit{Cf.} id. at 617 (Brennan, J., dissenting) (stating that the case only determined the issue with regard to trials of great notoriety, since the opinion of Justice Harlan, who constituted the fifth vote of the bare majority, was so qualified). The opinions of the Justices constituting the majority turned almost exclusively on the danger of prejudice to the defendant inherent in televising such trials. \textit{See} id. at 544-50. Chief Justice Burger, writing for the Court, recently held that photographic or broadcast coverage of criminal trials is not inherently a denial of due process. \textit{Chandler v. Florida}, 49 U.S.L.W. 4141, 4145 (Jan. 26, 1981).} declared that "the public has a right to be informed as to what occurs in its courts."\footnote{174. Id. at 541.} The following year, in \textit{Sheppard v. Maxwell},\footnote{175. 384 U.S. 333 (1966) (holding that the "massive, pervasive, and prejudicial" publicity attending a murder trial constituted a denial of the convicted person's right to a fair trial warranting the grant of a writ of habeas corpus).} the Court further observed: "The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism."\footnote{176. Id. at 350.}
The Burger Court continues to recognize these important and interdependent interests. Indeed, the Burger Court has repeatedly demonstrated sensitivity to the public's understanding of and the necessity for open trials. In *Nebraska Press Association v. Stuart*, for example, the Chief Justice, in his opinion for the Court, reaffirmed that "prior restraints on speech and publications are the most serious and least tolerable infringement on First Amendment rights." Here, Chief Justice Burger endorsed previous holdings that public and press access to trials serves the important and interdependent interests of an informed public and defendants' right to a fair trial.

The "fair trial/free press controversy" arising with sensational trials necessitates balancing the interests of the defendant with the public's interests in obtaining information. The dilemma of reconciling the sixth amendment and the first amendment may be at least partially circumvented, as Chief Justice Burger urged in *Nebraska Press Association*, by judges employing alternatives to prior restraints on publication in those circumstances where pretrial publicity would deny defendants a fair trial. Moreover, as Justice Harlan argued in his concurring opinion in *Estes*, "the right of a 'public trial' is not one belonging to the public, but one belonging to the accused, and inhering in the institutional process by which justice is administered." This view was eloquently expressed by Justice Felix Frankfurter, who explained:

177. 427 U.S. 539 (1976) (holding that an order restraining a newspaper from publishing accounts of confessions or admissions discussed in open court during arraignment, or other facts "strongly implicating" of the accused, violated the first amendment).
178. Id. at 559.
179. See id. at 559-60.
181. See Nebraska Press Ass'n v. Stuart, 427 U.S. at 562. In the opinion of the Court, Chief Justice Burger employed Judge Learned Hand's test: Whether "the gravity of the evil, discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." Id., quoting United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950), aff'd, 341 U.S. 494 (1951).
182. See 427 U.S. at 563-65. See also Sheppard v. Maxwell, 384 U.S. at 357-62. The measures mentioned included: 1) change of venue to a place exposed to less publicity; 2) postponement of trial; 3) "searching questioning" of prospective jurors; and 4) "emphatic and clear instructions" on the duty of the jurors to decide the case in accord with the evidence presented in court. Nebraska Press Ass'n v. Stuart, 427 U.S. at 563-64.
183. 381 U.S. at 588 (Harlan, J., concurring).
A trial is not a "free trade in ideas," nor is the best test of truth in a courtroom "the power of the thought to get itself accepted in the competition of the market." . . . A court is a forum with strictly defined limits for discussion. It is circumscribed in the range of its inquiry and in its methods by the Constitution, by laws, and by age-old traditions. . . .

. . .

Of course freedom of speech and press are essential to the enlightenment of a free people and in restraining those who wield power. Particularly should this freedom be employed in comment upon the work of courts, who are without many influences ordinarily making for humor and humility, twin antidotes to the corrosion of power. But the Bill of Rights is not self-destructive. Freedom of expression can hardly carry implications that nullify the guarantee of impartial trials.184

The antagonism over translating first amendment guarantees into affirmative rights for the public and the press against the government intensified with the ruling in Gannett Co. v. DePasquale.185 In Gannett, a newspaper asked the Court to recognize an independent and affirmative right of access for reporters to pretrial proceedings under the first, sixth, and fourteenth amendments.186 At a pretrial hearing on the suppression of allegedly involuntary confessions and certain physical evidence, the defendants had requested that the public and the press be excluded on the grounds that adverse pretrial publicity would jeopardize their ability to receive a fair trial.187 The district attorney did not oppose the motion for closure; nor did a reporter, who was employed by Gannett Publishing Company and present at the hearing, offer any objection.188 The trial judge granted the motion.189 The following day, the reporter requested a copy of the pretrial transcript and asserted a right to cover the proceeding, which the trial judge denied.190 Gannett Publishing Company then sought a writ of

184. Bridges v. California, 314 U.S. 252, 283 (1941) (Frankfurter, J., dissenting) (dissenting from the Court's holding that contempt convictions of persons who published comment on a trial before all matters had been finally determined violated the first amendment).
186. Id. at 374-78.
187. Id. at 375.
188. Id.
189. Id.
190. Id. at 375-76.
mandamus arguing that the sixth amendment conferred a right of access on the public and the press to attend pretrial hearings as well as trials, and, on appeal, urging the Supreme Court to narrow its holdings in *Pell*, *Saxbe*, and *Houchins* to the extent of recognizing, under the first and fourteenth amendments, an independent and affirmative right of the public and the press to attend pretrial hearings.

The Supreme Court was divided over the issues in *Gannett* and the majority opinion was so broadly framed that it not only invited criticisms from the Court's commentators, but also prompted no fewer than five of the Justices to clarify, explain and defend extrajudicially the holding and import of the case. As in *Pell* and *Saxbe*, Justice Stewart wrote the opinion for a five-member majority.

Turning first to the sixth amendment claim, Justice Stewart observed that "[t]he Constitution nowhere mentions any right of access to a criminal trial on the part of the public; its guarantee, like the others enumerated, is personal to the accused." He then formulated the issue posed in *Gannett* as "whether members of the public have an enforceable right to a public trial that can be asserted independently of the parties in the litigation." Although Justice Stewart acknowledged that "there is a strong societal interest in public trials," he went on to note that "[r]ecognition of an

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191. See id. at 384. The sixth amendment reads, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . ." U.S. Const. amend. VI.

192. See 443 U.S. at 391.


194. See notes 142-53 and accompanying text supra.

195. 443 U.S. at 370. Justice Stewart was joined by Chief Justice Burger and Justices Powell, Rehnquist, and Stevens. Id. Chief Justice Burger and Justices Powell and Rehnquist also filed separate concurring opinions. Id. at 394 (Burger, C.J., concurring); id. at 397 (Powell, J., concurring); id. at 403 (Rehnquist, J., concurring). Justice Blackmun wrote a lengthy dissent, joined by Justices Brennan, White, and Marshall. Id. at 406 (Blackmun, J., dissenting).

196. Id. at 379-80.

197. Id. at 382-83.
independent public interest in the enforcement of Sixth Amend-
ment guarantees is a far cry . . . from the creation of a constitutional
right on the part of the public." 198 Any public interest involved,
moreover, is "protected by the participants in the litigation." 199
The Court also rejected the argument that the sixth amendment
embodied an historical "common-law right of the public to attend
criminal trials," 200 but seemingly qualified this statement as follows:

But even if the Sixth and Fourteenth Amendments
could properly be viewed as embodying the common-law
right of the public to attend criminal trials, it would not
necessary follow that the petitioner would have a right of
access under the circumstances of this case. For there
exists no persuasive evidence that at common law mem-
bers of the public had any right to attend pre-trial pro-
ceedings . . . 201

Moving then to the first amendment claim to a right of access,
Justice Stewart's opinion equivocated:

We need not decide in the abstract, however, whether
there is any such constitutional right. For even assuming,
arguendo, that the First and Fourteenth Amendments may
guarantee such access in some situations, a question we do
not decide, this putative right was given all appropriate
deerence by the state nisi prius court in the present
case.202

Chief Justice Burger wrote a concurring opinion in order to
point out that the case dealt only with pretrial hearings and to
clarify the nature of such proceedings and their contemporary
importance in view of the exclusionary rule and the resulting multi-
tude of motions to suppress evidence.203 The Chief Justice, thus,
reserved comment on whether the press and the public have a right
under the sixth amendment to attend actual trials themselves.204

198. Id. at 383.
199. Id.
200. Id. at 387.
201. Id. (emphasis added).
202. Id. at 392 (emphasis by the Court). In concluding that no right of
access, even if it were found to exist, had been violated, the Court noted that:
1) no members of the public, including the reporter in Gannett, had objected
when the motion was made; 2) the judge had subsequently granted the reporter
an opportunity to be heard on reopening; 3) the judge concluded that the
possibility of prejudice to the defendant outweighed any first amendment
interests; and 4) any denial of access was temporary, since the transcript was
later made available. Id. at 392-93.
203. Id. at 394-96 (Burger, C.J., concurring).
204. Id. at 397 (Burger, C.J., concurring).
Although Justice Powell joined the opinion of the Court on the sixth amendment issue, his concurring opinion addressed the first amendment issues that Justice Stewart had reserved. Justice Powell underscored "the importance of the public's having accurate information concerning the operation of its criminal justice system," and, therefore, would have held "explicitly that petitioner's reporter had an interest protected by the First and Fourteenth Amendments." However, the Justice, remaining consistent with his concurring opinion in *Branzburg v. Hayes*, thought that the Court should reach an accommodation between the first amendment rights of the public and the press and those of the criminal defendant. Here, the public's right of access, he noted, was "limited both by the constitutional right of the defendants to a fair trial . . . and by the needs of government to obtain just convictions and to preserve the confidentiality of sensitive information and the identity of informants." Justice Powell, therefore, remains willing to legitimate a right to know as a limited but enforceable right in some circumstances. Indeed, what particularly disturbed him in *Gannett* was that the majority failed to articulate a procedure or standard by which lower courts might balance first amendment rights of the public and the press against the interests of the government and the defendants' sixth amendment rights. Justice Powell abandoned in *Gannett* those justices with whom he had dissented in *Pell, Saxbe,* and *Houchins,* in finding that the actions of the trial judge in balancing first amendment interests of the public against those of the government and the defendants were acceptable.

Justice Rehnquist wrote a concurring opinion to stress that "the public does not have any Sixth Amendment right of access to such proceedings," and to address Justice Powell's understanding of the first amendment. He cautioned that the Court's reservation on the first amendment claims to access was more apparent than real: "[I]t is clear that this Court repeatedly has held that...

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205. *Id.* at 397 (Powell, J., concurring).
206. *Id.*
207. *See* 408 U.S. at 709 (Powell, J., concurring). For a discussion of *Branzburg,* see notes 54-63 and accompanying text supra.
208. 443 U.S. at 400 (Powell, J., concurring).
209. *Id.* at 398 (Powell, J., concurring).
210. *Id.* at 400 (Powell, J., concurring).
211. *See* notes 143-66 and accompanying text supra.
212. 443 U.S. at 403 (Powell, J., concurring).
213. *Id.* at 404 (Rehnquist, J., concurring) (emphasis in original).
214. *Id.* at 404.
there is no First Amendment right of access in the public or the press to judicial or other governmental proceedings.” Justice Rehnquist’s concurrence was thus prompted by Justice Stewart’s reservations on the first amendment claims in the opinion for the Court, which had, in turn, probably been required to win the votes of Justices Stevens and Powell. These latter votes were necessary since Justice Blackmun and Justice White dissented in Gannett on the basis that the sixth amendment supported the newspaper’s claim. Justice Rehnquist further reminds us of Justice Stewart’s opposition to denominating any affirmative rights for the public and the press under the first amendment by quoting from his concurring opinion in Houchins: “The First and Fourteenth Amendments do not guarantee the public a right of access to information generated or controlled by the government, nor do they guarantee the press any basic right of access superior to that of the public generally.” Justice Rehnquist concluded that “this Court has emphatically rejected the proposition that . . . the First Amendment [is] some sort of constitutional ‘sunshine law’ that requires notice, an opportunity to be heard and subsequent reasons before a government proceeding may be closed to the public and the press.”

Justice Blackmun’s dissent quarrels only with the majority’s understanding of the sixth amendment guarantee for a public trial. He concludes that the amendment by “establishing the public’s right of access to a criminal trial and a pretrial proceeding, also fixes the rights of the press.” With respect to the first amendment claims, Justice Blackmun commented only that “[t]o the extent the Constitution protects a right of public access to the proceeding, the standards enunciated under the Sixth Amendment suffice to protect that right.” He therefore concluded that he did not need to reach the first amendment claims. It is worthy of note, however, that he had remarked earlier in the opinion that “[d]espite Mr. Justice Powell’s concern . . ., this Court heretofore has not found and does not today find, any First Amendment right

215. Id. (citations omitted).
216. See notes 219-21 and accompanying text infra.
217. 443 U.S. at 405 (Rehnquist, J., concurring), quoting Houchins v. KQED, Inc., 438 U.S. at 16 (Stewart, J., concurring).
218. 443 U.S. at 405 (Rehnquist, J., concurring).
219. Id. at 446 (Blackmun, J., dissenting).
220. Id. at 447 (Blackmun, J., dissenting).
221. Id.
of access to judicial or other governmental proceedings.” 222 That
the dissenters also declined to address the first amendment issue is
understandable because of the fact that Justices White and Black-
mun had previously voted against finding rights of access in Pell
and Saxbe.228 On the other hand, Justices Brennan and Marshall,
staunch defenders of the right to know, had, predictably, expressed
their support for rights of access in Pell and Saxbe.224

\textit{Gannett} suggested that the Supreme Court would still refuse to
construct a first amendment right of access to governmental institu-
tions for the public and the press. Nevertheless, the opinion raised
more questions than it answered. In discussing the lower courts’
treatment of first amendment interests of the press under a hypo-
thetical right of access,225 the opinion of the Court severely under-
cut the effect of its statement that the Court had never recognized
such a right of access.226 Moreover, because of the Court’s hypo-
thetical treatment of the right of access, lower courts construing the
opinion as suggesting that such a right exists are left without a
standard by which to apply it.227

Sensitive both to the problematic nature and impact of \textit{Gannett}
the Court agreed to hear a challenge to the closure of a trial in
Richmond Newspapers, Inc. v. Virginia.228 The case originated
several years earlier, prior to the decision in \textit{Gannett}, but involved
the first constitutional challenge to the closure of a criminal trial.
Under Virginia law, judges may exercise their discretion in closing
a criminal trial or excluding “from the trial any person whose
presence would impair the conduct of a fair trial, provided that the
right of the accused to a public trial shall not be violated.” 229

\begin{itemize}
  \item[222.] \textit{Id.} at 411 (Blackmun, J., dissenting).
  \item[223.] See notes 143-46 and accompanying text \textit{supra}.
  \item[224.] See notes 147-48 and accompanying text \textit{supra}.
  \item[225.] See note 202 and accompanying text \textit{supra}.
  \item[226.] See 443 U.S. at 391.
  \item[227.] In the 52 weeks following the \textit{Gannett} decision, there were 272 at-
ttempts to close criminal proceedings and closure resulted in 122 pretrial
hearings and 33 trials. \textit{See} Reporters Committee for Freedom of the Press, \textit{Court
Watch Summary}, Aug. 18, 1980. \textit{See also} Lusky, \textit{Public Trial and Public
  \item[228.] 100 S. Ct. 2814 (1980). For a detailed analysis of the \textit{Richmond
Newspapers} decision, see Note, \textit{Constitutional Law—First Amendment—The
Public and Press Have a Right of Access to Criminal Trials Absent an Over-
  \item[229.] \textit{Va. Code} § 19.2-266 (1975). This section provides in pertinent part:
  In the trial of all criminal cases, whether the same be felony or mis-
demeanor cases, the court may, in its discretion, exclude from the trial
any person whose presence would impair the conduct of a fair trial,
The particular circumstances of the *Richmond Newspapers* case are illustrative of the problems of securing a fair trial and achieving a balance between prejudicial publicity and the public's right to know. Here, the closure was requested by defense counsel in the fourth trial of John Paul Stevenson for the stabbing murder of a hotel manager in 1975. In 1976, Stevenson was promptly tried and convicted of second degree murder in the Circuit Court of Hanover County, Virginia. A year later, however, the Virginia State Supreme Court reversed his conviction, finding that a blood-stained shirt purportedly belonging to Stevenson had been improperly admitted as evidence at his trial. Retried the following year, his second trial in the same court ended in a mistrial when one of the jurors asked to be excused after the trial had begun and there was no available alternate juror. The third trial, in 1978, also ended in a mistrial because a prospective juror had read about Stevenson's previous trials and told the other jurors about the case before the retrial had even begun. At the outset of Stevenson's fourth trial his attorneys requested, and the prosecution did not object to, a closed trial on the grounds that they did not "want any information being shuffled back and forth when we have a recess as to what—who testified to what." On the bench barely a year and having presided over two of the earlier mistrials, Judge Richard Taylor agreed to closure and rebuffed the arguments of two reporters from Richmond Newspapers who were excluded from the trial. Judge Taylor found his authority to close the trial in the Virginia statute and justified by the prior mistrials and the particularly small courtroom. The ironies abound in this rather routine murder trial which gave rise to the Supreme Court's watershed decision. Judge Taylor's unprecedented closure of the trial occurred in a 200-year-old courthouse where Patrick Henry once provided that the right of the accused to a public trial shall not be violated.

*Id.*

230. 100 S. Ct. at 2818-19.
231. *Id.* at 2818.
233. 100 S. Ct. at 2818.
234. *Id.*
235. *Id.* at 2819, quoting Trans. of Sept. 11, 1978 Hearing on Motion to Close Trial to the Public at 2-3.
236. 100 S. Ct. at 2819, citing Trans. of Sept. 11, 1978 Hearing on Defendant's Motion to Close Trial to the Public at 4.
237. 100 S. Ct. at 2819, citing Trans. of Sept. 11, 1978, Hearing on Defendant's Motion to Close Trial to the Public at 4-5, 19.
The closed trial which prompted Richmond Newspapers' appeal to the Supreme Court had not even attracted the attention of the local weekly newspaper in Hanover County. Finally, Stevenson was found not guilty, but not as the consequence of the jury's verdict. Instead, Judge Taylor granted the defendant's motion for a mistrial and entered a verdict of acquittal, since the case against Stevenson, without the evidence of the bloodstained shirt, was only circumstantial. Still, the details of both the evidence against Stevenson and the basis for his acquittal remain obscure because the trial was closed and the trial recording is largely inaudible.

On appeal to the Supreme Court, Harvard Law Professor Laurence Tribe argued for the appellants that the first and sixth amendments independently and interdependently guarantee a constitutional right to attend trials. The first amendment secures a right of access, he argued, because trial secrecy deprives citizens of information vital to effective self-government; whereas the sixth amendment establishes a norm of openness and gives the public standing to challenge closure of trials, since, until the instant cases, trials were traditionally open to the public and the press. A right of access, Tribe further argued, was implicit in the "interdependence" of the first and sixth amendments:

The First Amendment . . . opens a constitutional window into a proceeding already identified by the Sixth Amendment as beyond such control—assuring that, even with the connivances of the accused, the state may not bar members of the public and press from a criminal trial without compelling justification. . . . The proceedings of criminal trials are the quintessential subjects of First Amendment protection against government interference with public access: public by tradition, public by function, and public as a matter of constitutional text and structure.

241. Id. at 42 n.37.
242. Id. at 5-10, 30-41.
243. Id. at 44.
244. Id. at 36.
Rather than simply imploring the Court to reconsider the line of cases running from Pell to Gannett, Tribe distinguished those cases on the ground that access had been demanded and denied to places not traditionally or constitutionally recognized as public places or proceedings. Thus he argued that, while Branzburg had noted that the public and press have no constitutional right of access to “grand jury proceedings, [the Supreme Court's] conferences, the meetings of other official bodies gathered in executive session, and the meetings of private organizations,” the Court's prior rulings never implied that the public and press may be excluded from historically public places and proceedings.

Relying on Gannett, Virginia Attorney General Coleman defended closure of the trial, arguing that neither the sixth amendment nor customary and common law practices establish a constitutional right of public access to criminal trials. Considering the first amendment claims, he quite properly observed that “[t]he common thread of this Court's First Amendment decisions is the notion that freedom to disseminate ideas and information about public affairs is central to the purpose of the First Amendment.” He further conceded that “[t]he free flow of information concerning our courts of justice is undoubtedly a vital concern in our system of democratic self-governance.” “But it is a wholly different proposition,” Coleman insisted, “to suggest that the First Amendment guarantees access to all sources of information that may be beneficial to informed public opinion.”

No majority supported a single opinion in Richmond Newspapers, but a majority of the justices did embrace Tribe's argument that the public and press are constitutionally entitled to attend criminal trials because trials, both traditionally and under the Constitution, constitute a “public forum.” For over forty years, when elaborating a functional analysis of the first amendment, the Court has acknowledged protection for public forums as essential to the public's interests in freedom of information and each indi-

245. Id. at 31, quoting Branzburg v. Hayes, 408 U.S. at 684.
248. Id. at 20 (emphasis in original).
249. Id. at 22.
250. Id.
251. 100 S. Ct. at 2829. The Court did not decide, however, whether the public has a right to attend trials of civil cases, but noted that “historically both civil and criminal trials have been presumptively open.” Id. at 2829 n.17.
individual's right to speak, distribute publications or assemble in public places.\footnote{252} Accordingly, Chief Justice Burger's plurality opinion, joined only by Justices White and Stevens, found the right of the public to attend trials in the intersection of the first and sixth amendments.\footnote{253} Justice Stewart used the same rationale in an attempt to distinguish his opinion for the Court in \textit{Gannett} from the instant case;\footnote{254} whereas Justice Brennan's concurring opinion, joined by Justice Marshall, elaborated a more extensive theory of first amendment protection.\footnote{255} Justices Stevens, White and Blackmun also added brief concurrences celebrating the Court's decision; in Justice Blackmun's words, because it was "gratifying . . . to see the Court wash away at least some of the graffiti that marred the prevailing opinions in \textit{Gannett}.”\footnote{256} The sole dissenter, Justice Rehnquist, lamented the Court's activism.\footnote{257}

Chief Justice Burger began by clarifying that \textit{Gannett} applied only to pretrial hearings, dismissing Justice Stewart's contrary intimations in that case as dicta.\footnote{258} Affirming that the issue of public access to trials had not been previously decided, he turned to the history of the sixth amendment, surveying the "prophylactic purpose" and "therapeutic value" of open trials.\footnote{259} Reiterating that openness serves to assure fair proceedings and "satisfies the appearance of justice,”\footnote{260} he recited prior rulings that the sixth amendment's provision for public trials guarantees only the right of defendants.\footnote{261} However, the Chief Justice interpreted the "presumption of openness” in the sixth amendment as connoting that

\footnote{253} 100 S. Ct. at 2829.
\footnote{254} \textit{Id.} at 2839-41 (Stewart, J., concurring).
\footnote{255} \textit{Id.} at 2832-39 (Brennan, J., concurring). Justice Brennan concluded his concurrence by stating that our ingrained tradition of public trials and the importance of public access to the broader purposes of the trial process, tip the balance strongly toward the rule that trials be open. What countervailing interests might be sufficiently compelling to reverse this presumption of openness need not concern us now, for the statute at stake here authorizes trial closures at the unfettered discretion of the judge and parties.
\footnote{256} \textit{Id.} at 2839 (footnotes omitted).
\footnote{257} 100 S. Ct. at 2841 (Blackmun, J., concurring).
\footnote{258} \textit{Id.} at 2842-44 (Rehnquist, J., dissenting).
\footnote{259} \textit{Id.} at 2821.
\footnote{261} \textit{Id.} at 2821. \textit{See, e.g.}, Gannett Co. v. DePasquale, 443 U.S. 368 (1979). \textit{See also} notes 185-227 and accompanying text \textit{supra}.
the "people retained a 'right of visitation' which enabled them to satisfy themselves that justice was in fact being done." 262 Turning, then, to the first amendment, Chief Justice Burger reasserted the Court's broad functional analysis of freedoms of speech, press and assembly: first amendment freedoms "share a common core purpose of assuring freedom of communication on matters relating to the functioning of government." 263 Central to the first amendment's protection of freedom of information, he added, is the concept of a public forum or arena in which individuals may collectively and freely discuss matters of personal and public interest. 264 The Chief Justice thus found criminal trials analogous to other public forums to which members of the public and press have historically enjoyed access, and distinguishable from places not generally recognized as open to the public—such as prisons, jails and military bases. 265

Significantly, Chief Justice Burger's opinion did not turn on a reconsideration of the Court's previous rulings in Pell, Saxbe, Houchins and Gannett, which had denied the constitutional basis of such first amendment affirmative rights. Instead, the Chief Justice expanded the concept of a public forum to include trials and thereby recognized the public's right to attend criminal trials as protected by the first amendment. Hence, he did not denominate a first amendment affirmative right of access per se, but rather found the enforceability of such first amendment claims to be contingent upon the place or forum to which access is demanded. 266

262. 100 S. Ct. at 2825.
263. Id. at 2827.
264. Id. at 2828. The Chief Justice stated that "[f]rom the outset, the right of assembly was regarded not only as an independent right but also as a catalyst to augment the free exercise of the other First Amendment rights with which it was deliberately linked by the draftsmen." Id., citing DeJonge v. Oregon, 299 U.S. 353, 364 (1937).
266. 100 S. Ct. at 2827-28. In so doing, the Chief Justice reiterated that the access guaranteed by the Court's decision was not a constitutional "right" in and of itself, but rather was a corollary of and necessary for the effective enforcement of, the explicitly enumerated rights to speak and to publish. Id. at 2827. The Court stated:

It is not crucial whether we describe this right to attend criminal trials to hear, see, and communicate observations concerning them as a "right of access," . . . or a "right to gather information," for we have recognized that "without some protection for seeking out the news, freedom of the press would be eviscerated." . . . The explicit, guaranteed rights to speak and to publish concerning what takes place at a trial would lose much meaning if access to observe the trial could, as it was here, be foreclosed arbitrarily.

Id. (citations and footnotes omitted). See notes 123-32 and accompanying text supra.
this point in expressly denying that the public possesses an absolute, unconditioned right to open trials, the Chief Justice emphasized that "[j]ust as a government may impose reasonable time, place, and manner restrictions upon the use of its streets in the interests of such objectives as the free flow of traffic . . . so may a trial judge, in the interest of the fair administration of justice, impose reasonable limitations on access to a trial." 267 Public forums, of course, differ as much as city streets and criminal trials differ and, therefore, the restrictions imposed on the public and press may vary from one forum to another. Chief Justice Burger recognized that public access to a trial may be limited since judges must control the decorum of court rooms, but that "the question in a particular case is whether that control is exerted so as not to deny or unwarrantedly abridge . . . the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places." 268 The problem in the instant case, in the majority's view, was that the record disclosed no attempt on the part of the trial court to use alternative measures to protect the defendant, balance the needs of the defendant against those of the public, or clearly articulate the basis upon which it determined the closure order to be necessary.269

Justice White, in his concurrence, correctly pointed out that "[t]his case would have been unnecessary had Gannett . . . construed the sixth amendment to forbid excluding the public from criminal proceedings except in narrowly defined circumstances." 270 Similarly, Justice Blackmun remained convinced that the decision could have simply rested on the sixth amendment without invoking a "veritable potpourri" of amendments.271 Their broad construction of the sixth amendment in Gannett, however, was not acceptable to a majority of the Court. Chief Justice Burger's opinion,

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267. 100 S. Ct. at 2830 n.18 (citation omitted).
269. 100 S. Ct. at 2830 & n.18.
270. Id. at 2830 (White, J., concurring).
271. Id. at 2842 (Blackmun, J., concurring). Justice Blackmun reiterated his view, expressed in Gannett, that the sixth amendment affords the public, not merely the defendant, a right to an open trial. Id. Justice Blackmun also explained his partial dissent in Gannett, stating that the public has an intense need and a deserved right to know about the administration of justice in general; about the prosecution of local crimes in particular; about the conduct of the judge, the prosecutor, defense counsel, police officers, other public servants, and all the actors in the judicial arena; and about the trial itself. Id., citing Gannett Co. v. DePasquale, 443 U.S. at 413 & n.2, 414, 428-29 (Blackmun, J., concurring in part and dissenting in part).
therefore, turned crucially on the juxtaposition of the first and sixth amendments in order to extend the concept of public forums to criminal trials and also to preclude further claims of access to pretrial hearings or other governmental facilities and proceedings not traditionally open to the public.272 In his concurrence Justice Stevens mistakenly found it "somewhat ironic that the Court should find more reason to recognize a right of access today than it did in Houchins." 273 But for the Chief Justice and Justices White, Blackmun and Stewart there was no irony at all since the touchstone for the Court's narrow holding was that the first and sixth amendments run together in safeguarding access by members of the public and press to criminal trials.

The irony for Justice Stevens arises from his willingness to make exceptions to the general rule that the first amendment protects only freedom from restraints on the dissemination of information. Dissenting in Houchins, Justice Stevens, like Justices Powell, Brennan and Marshall, remained prepared to recognize affirmative first amendment claims to access.274 Here, Justice Brennan, joined by Justice Marshall, wrote a concurring opinion in order to emphasize their divergence from the majority's interpretation of the first amendment.275 Whereas the Chief Justice endeavored to narrowly define the Court's decision, Justice Brennan gave a broader jurisprudential basis for Richmond Newspapers, stressing that "the Court has not ruled out a public access component to the first amendment in every circumstance." 276 "Read with care and in context," he argued, "our decisions must therefore be understood as holding only that any privilege of access to governmental information is subject to a degree of restraint dictated by the nature of the information and countervailing interests in security or confidentiality." 277 Justice Brennan further explained that, in his view, the Court's functional analysis of the first amendment was tantamount to a structuralist interpretation.278 The first amendment, he argued, "embodies more than a commitment to free expression and communicative inter-

272. See notes 260-69 and accompanying text supra.
273. 100 S. Ct. at 2831 (Stevens, J., concurring).
274. See notes 163-66 and accompanying text supra.
275. Id. at 2832-39 (Brennan, J., concurring).
276. Id. at 2832-33 (Brennan, J., concurring).
277. Id. at 2833 (Brennan, J., concurring), citing Houchins v. KQED, Inc., 438 U.S. at 8-9 (access to prisons); Saxbe v. Washington Post Co., 417 U.S. at 849 (prisons); Pell v. Procunier, 417 U.S. at 831-32 (prisons); Estes v. Texas, 381 U.S. at 541-42 (television in courtroom); Zemel v. Rusk, 381 U.S. at 16-17 (validation of passport to unfriendly country).
278. 100 S. Ct. at 2833 (Brennan, J., concurring).
change for their own sakes; it has a *structural* role to play in securing and fostering our republican system of self-government." 279 Far from being a mere corollary to, or tool for the implementation of, the enumerated rights, maintained Justice Brennan, "[this] 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 for the indispensable conditions of meaningful communication." 280 Hence, unlike the majority of the Burger Court, Justice Brennan would expressly denominate first amendment affirmative rights and the constitutional legitimacy of a directly enforceable public right to know, 281 albeit one which must be "invoked with discrimination and temperance . . . ." 282

In his lone dissent, Justice Rehnquist stood by his absolutist position in *Gannett* 283 and argued further that the Court was improperly attempting to extend its supervisory power over the state court systems. 284 A majority of the Supreme Court has not recognized affirmative first amendment rights for the public and the press to receive or obtain access to governmental information. 285 Contemporary criticisms of the Burger Court's approach to first amendment issues 286 demonstrate a profound misunderstanding of both the Warren and Burger Courts' treatment of the first amendment. The criticisms do illuminate once again the wide symbolic appeal for the public and the press of the first amendment and the political ideal of free-

279. Id. (emphasis in original).
280. Id.
282. 100 S. Ct. at 2834 (Brennan, J., concurring) (footnote omitted).
283. See notes 213-18 and accompanying text *supra*.
284. 100 S. Ct. at 2843 (Rehnquist, J., dissenting). Justice Rehnquist observed that:

The proper administration of justice in any nation is bound to be a matter of the highest concern to all thinking citizens. But to gradually rein in, as this Court has done over the past generation, all of the ultimate decisionmaking power over how justice shall be administered, not merely in the federal system but in each of the fifty states, is a task that no Court consisting of nine persons, however gifted, is equal to.

Id.
286. See notes 16-24 *supra* and authorities cited therein.
dom of information. That ideal, however, remains misunderstood by members of the public, the press, and the Court itself. Furthermore, Emerson's argument that contemporary constitutional developments exemplify an emerging first amendment right to know appears, at the least, overdrawn. The Court's treatment of claims to a right to receive and a right of access neither expressly nor impliedly supports the constitutional legitimacy of an independent and affirmative right to know. For, although it is true that majorities of the Supreme Court have consistently recognized that the first amendment's specific guarantees serve an important function in guaranteeing popular and accessible information about vital public affairs, and thereby serve to inform the public, the first amendment does not mandate an affirmative right to obtain information from governmental facilities and materials. In a constitutional perspective, as a majority of the Supreme Court has recognized, the issue of access to governmental information is reserved for the legislative and executive branches.

C. The Doctrine of No Prior Restraints and the Right to Know

A further measure of the significance of the political ideal of freedom of information and an informed public is the commitment to the policy against prior restraints, borne out in the controversies over the "Pentagon Papers" and Progressive cases. By construing the elimination of prior restraints on publications as the "leading purpose" of the first amendment, the Supreme Court articulated a presumption of the unconstitutionality of prior restraints, thereby ensuring the primary bulwark for the political ideal of an informed public. In one of the Court's earliest rulings on the first amendment, Justice Holmes observed: "[T]he main purpose of such constitutional provisions is 'to prevent all such previous

287. See notes 21-25 and accompanying text supra.
288. See notes 43 & 153 and accompanying text supra. See also text accompanying note 349 infra.
292. Grosjean v. American Press Co., 297 U.S. 233, 244, 249 (1936) (invalidating a state tax on gross advertising receipts of publications with over 20,000 subscribers as a violation of the first amendment).
restraints upon publications as had been practiced by other governments,' and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare.” 293 Thus, prior restraints are subject to exacting judicial scrutiny because, as Justice Blackmun explained, “a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand.” 294

Yet despite the strong policy against prior restraints, vexatious problems occasionally arise concerning the scope of the amendment’s protection. The Pentagon Papers 295 and Progressive cases exemplify the difficulty of the policy against prior restraint and its bearing on the scope of the first amendment and claims to a right to know. Those cases are especially hard since the information withheld by the government did not fall within a category of unprotected speech, 296 and because the restraints threatened to diminish the public’s first amendment interests in knowing about governmental affairs more directly than restrictions on the time, place and manner of disseminating information, 297 or acquiring access to governmental facilities 298.

The constitutional presumption against prior restraints, however, remains rebuttable. Indeed, “[p]rior restraints are not uncon-


294. Southeastern Promotions Ltd. v. Conrad, 420 U.S. 546, 559 (1975) (emphasis in original) (holding unconstitutional the rejection, without adequate procedural safeguards, of a promoter’s application to use a municipal theater for a production of the musical “Hair”).

This principle was elucidated by Chief Justice Hughes in Near v. Minnesota, 283 U.S. 697 (1931):

The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any less necessary the immunity of the press from previous restraint in dealing with official misconduct. Subsequent punishment for such abuses as may exist is the appropriate remedy, consistent with constitutional privilege.

Id. at 720. For a discussion of Near, see notes 303-11 and accompanying text infra.


296. See notes 71-78 and accompanying text supra.

297. See notes 76-77 and accompanying text supra.

298. See notes 142-66 and accompanying text supra.
In *Kingsley Books, Inc. v. Brown*, Justice Frankfurter, writing for the Warren Court, cautioned against concluding that the first amendment prohibition of prior restraint is absolute:

The phrase “prior restraint” is not a self-wielding sword. Nor can it serve as a talismanic test. The duty of closer analysis and critical judgment in applying the thought behind the phrase has thus been authoritatively put by one who brings weighty learning to his support of constitutionally protected liberties: “What is needed,” writes Professor Paul A. Freund, “is a pragmatic assessment of its operation in the particular circumstances. The generalization that prior restraint is particularly obnoxious in civil liberties cases must yield to more particularistic analysis.”

The Burger Court continues to adhere to such a balancing test for determining the constitutional permissibility of prior restraints. As Justice Frankfurter implied, this balancing approach is possible because the policy against prior restraints admits of fundamental exceptions that pertain to the content of the information restrained. In *Near v. Minnesota*, the Court’s first major discussion of prior restraints, Chief Justice Hughes wrote for the majority: “The objection has also been made that the principle as

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300. 354 U.S. 436 (1957). At issue was the constitutionality of a New York statute providing for limited injunctive relief against persons selling or distributing obscene material. *Id.* at 440. Although the Court acknowledged that imposition of prior restraints was to be “closely confined,” it sustained the provision, noting with approval the carefully tailored procedural safeguards. *Id.*

301. *Id.* at 441-42, quoting Freund, *The Supreme Court and Civil Liberties*, 4 VAND. L. REV. 533, 539 (1952).

302. See *Nebraska Press Ass’n v. Stuart*, 427 U.S. at 562. To determine whether an order restraining publication of accounts of admissions or confessions of the accused in a widely reported murder trial was an invalid infringement upon first amendment rights, the Court in *Nebraska Press* examined the following: “(a) the nature and extent of pretrial news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity; and (c) how effectively a restraining order would operate to prevent the threatened danger.” *Id.* at 562. Accord, *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 106 (1979) (Rehnquist, J., concurring) (“we have eschewed absolutes in favor of a more delicate calculus that carefully weighs the conflicting interests to determine which demands greater protection under the particular circumstances presented”).

303. 283 U.S. 697 (1931) (holding unconstitutional the enjoining of publication of a magazine pursuant to a statute permitting injunctions against publication of “malicious, scandalous and defamatory” periodicals).
to immunity from previous restraint is stated too broadly, if every such restraint is deemed to be prohibited. That is undoubtedly true; the protection even as to previous restraint is not absolutely unlimited." The Chief Justice, thereupon, articulated three exceptions to the policy against prior restraints. First, the government may, while the nation is at war, permissibly restrict dissemination of information that might hinder the war effort or the survival of the polity. Chief Justice Hughes reasoned that no one would gainsay that "a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number or location of troops." Accordingly, the first amendment does not protect individuals who pass classified defense information to enemy agents. "On similar grounds," the Chief Justice also thought that "the primary requirements of decency may be enforced against obscene publications," and that "[t]he security of the community life may be protected against incitements to acts of violence and the overthrow by force of orderly government." In other words, speech and press that serve "no essential part of any exposition of ideas" receives no exemption from regulation under the rule against prior restraint any more than it receives first amendment protection against subsequent punishment.

While the Court's opinion in Near is indeed important in suggesting that obscenity and incitements to violence may be subject to prior restraints, it is notable that such speech is unprotected anyway. More important for the purposes of this article is the suggestion that matters related to national defense—matters clearly politi-

304. Id. at 715-16.
305. Id. at 716.
306. Id. (footnote omitted).
307. See, e.g., United States v. Rosenberg, 195 F.2d 583, 591-92 (2d Cir. 1952), cert. denied, 344 U.S. 838 (1953) ("communication to a foreign government of secret material connected with the national defense can by no far-fetched reasoning be included within the area of First Amendment protected free speech"); United States v. Donas-Botto, 363 F. Supp. 191, 194 (E.D. Mich. 1973) ("when matters of foreign policy are involved the government has the constitutional authority to prohibit individuals from divulging 'technical data' related to implements of war to foreign governments").
311. See notes 66-86 and accompanying text supra.
The vexatious problems of balancing the first amendment, and claims to a right to know, against governmental withholding of information relating to national security and the affairs of governance infrequently rise to the level of constitutional adjudication. Nonetheless, Pentagon Papers and Progressive illustrate that there persist serious constitutional issues as to what the first amendment requires and permits within the framework of our constitutional system. On the one hand, both constitutional practice and principle affirm the necessity of official governmental secrecy in times of war and international crisis, with regard to technological materials related to defense strategy and in the conduct of diplomatic and foreign affairs.\(^{312}\) On the other hand, the first amendment guarantees for speech and press ensure the vital interests of the public in knowing about governmental operations.\(^{313}\)

Historically, the Supreme Court has often been spared the task of deciding such hard cases and balancing these competing interests, perhaps because, in times of crisis, the government has generally fostered openness\(^{314}\) while the press has accepted self-censorship.\(^{315}\) Still, reconsideration of the Supreme Court’s treatment of the policy against prior restraints and the dilemma of balancing first amendment claims against national security interests aids in understand-


ing the contours of the amendment with respect to claims to a right to know. Indeed, such an understanding is becoming more important because of the courts' increasingly frequent confrontations with first amendment challenges to government regulations restricting dissemination of technical information pertaining to national defense,316 requiring secrecy agreements of some government employees,317 and imposing limitations on the political activities of government employees.318 The Progressive case illuminated this conflict and the difficulty of delineating the requirements of the first amendment and the acceptable limits on the political ideal of an informed public.319 Although, in that case, the government abandoned its efforts to enjoin publication, it did so only because of the publication of similar material by another source.220 Furthermore, reflection on Progressive leads to a re-examination of the perplexing prior restraint decision in Pentagon Papers.321

Although the Court refused to enjoin publication in Pentagon Papers,322 the case does not establish a precedent forbidding the government from enjoining publication of classified or confidential


317. See United States v. Snepp, 444 U.S. 507 (1980) (per curiam). In Snepp, the Court imposed a constructive trust in favor of the government on profits received from publication of a book on the CIA, because it contained unclassified information published without permission in violation of an express term of the author's employment contract with the CIA. Id. at 508-09. In rejecting the author's first amendment claim that the contract was an unenforceable prior restraint on protected speech, the Court noted: "The Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service." Id. at 509 n.3. See also Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362, 1368-70 (4th Cir.), cert. denied, 421 U.S. 1999 (1975) (first amendment is no bar to an injunction forbidding disclosure of classifiable information acquired during an employee's term of employment where disclosure is forbidden by agreement); United States v. Marchetti, 466 F.2d 1309, 1313-16 (4th Cir.), cert. denied, 409 U.S. 1063 (1972).


319. For a discussion of Progressive, see notes 10-16 and accompanying text supra; notes 350-57 and accompanying text infra.

320. See note 15 and accompanying text supra.

321. See notes 322-39 & 358-60 and accompanying text infra.

322. 403 U.S. at 714.
materials. Instead, the majority of the Court indicated acceptance of two fundamental principles. First, five justices acknowledged that the first amendment does not provide absolute protection for the dissemination of all information. Second, a majority of the members of the Court concluded that the executive branch possesses no inherent power to impose a prior restraint on publications. Indeed, only Chief Justice Burger and Justice Harlan were unwilling to embrace this last proposition. Justices Brennan and Blackmun also might be understood to recognize limited inherent power to withhold information. Nevertheless, Justices Black, Douglas, White, Marshall, and Stewart specifically rejected the position that the executive branch possessed any such inherent power.

Justice Marshall's concurring opinion in Pentagon Papers remains the most instructive for illuminating the constitutional issues raised in that case and Progressive. Justice Marshall found that Pentagon Papers turned not on the first amendment, but on the doctrine of separation of powers, since the ultimate issue "is whether this Court or the Congress has the power to make law." He began by noting that the President had the power, as authorized

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323. Id. at 714; id. at 726-27 (Brennan, J., concurring); id. at 730 (Stewart, J., concurring); id. at 731 (White, J., concurring); id. at 749 (Burger, C.J., dissenting); id. at 756-58 (Harlan, J., dissenting); id. at 761 (Blackmun, J., dissenting).

324. See 403 U.S. at 714; id. at 726 (Brennan, J., concurring); id. at 729-30 (Stewart, J., concurring); id. at 731 (White, J., concurring); id. at 749 (Burger, C.J., dissenting); id. at 761 (Blackmun, J., dissenting). See also notes 299-311 and accompanying text supra.

325. See 403 U.S. at 718-19 (Black, J., concurring); id. at 723-24 (Douglas, J., concurring); id. at 728 (Stewart, J., concurring); id. at 732-33 (White, J., concurring); id. at 741-47 (Marshall, J., concurring). See also notes 350-57 and accompanying text infra.

326. See 403 U.S. at 750-51 (Burger, C.J., dissenting); id. at 756-58 (Harlan, J., dissenting).

327. See id. at 726 (Brennan, J., concurring) (pointing out that "there is a single, extremely narrow class of cases in which the First Amendment's ban on prior judicial restraint may be overridden"); id. at 761 (Blackmun, J., dissenting) (stating that "[w]hat is needed here is a weighing, upon properly developed standards, of the broad right of the press to print and of the very narrow right of the Government to prevent").

328. Id. at 718-19 (Black, J., concurring).

329. Id. at 728 (Douglas, J., concurring).

330. Id. at 731-33 (White, J., concurring).

331. Id. at 741-47 (Marshall, J., concurring).

332. Id. at 728 (Stewart, J., concurring).

333. See note 325 and accompanying text supra.

334. 403 U.S. at 741 (Marshall, J., concurring).
by Congress, to classify documents and information,\textsuperscript{335} and the power, as chief executive\textsuperscript{336} and commander-in-chief\textsuperscript{337} to ensure the national security and discipline employees who disclose confidential or classified information.\textsuperscript{338} Consequently, the first question in \textit{Pentagon Papers} is whether the executive branch possessed authority to invoke the equity powers of the courts to protect what it perceived to be the interests of national security.\textsuperscript{339} Here, for Justice Marshall, the reasoning in \textit{Youngstown Sheet & Tube Co. v. Sawyer}\textsuperscript{340} was controlling.\textsuperscript{341}

In \textit{Youngstown}, the Court struck down an executive order\textsuperscript{342} directing the Secretary of Commerce to seize and operate most of the nation's steel mills, in spite of the President's belief that a nationwide steel strike would jeopardize the national defense and war efforts in Korea.\textsuperscript{343} Although a majority of the Court concluded that the President had no constitutional authority to confiscate the mills in the absence of congressional authorization,\textsuperscript{344} only Justices Black and Douglas specifically found that the President has no inherent powers.\textsuperscript{345} Justice Marshall nevertheless interpreted their understanding to be determinative of the Court's holding, and elaborated on Justice Black's position in \textit{Youngstown} that "[t]he President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself."\textsuperscript{346} Justice Marshall stated:

\textsuperscript{335} Id. See Freedom of Information Act, 5 U.S.C. § 552 (1976 & Supp. II 1978); Exec. Order No. 12065, 3 C.F.R. 190 (1979) (creating a new executive classification scheme designed "to balance the public's interest in access to Government information with the need to protect certain national security information"); notes 325-27 and accompanying text supra.

\textsuperscript{336} See U.S. Const. art. III, § 1, cl. 1. This section provides that the executive power of the United States is vested in the President. Id.

\textsuperscript{337} See id. § 2, cl. 1. This clause states, in pertinent part: "The President shall be the Commander in Chief of the Army and Navy of the United States, and of the Militia of the several states, when called into the actual service of the United States . . . ." Id.

\textsuperscript{338} 403 U.S. at 741 (Marshall, J., concurring).

\textsuperscript{339} Id.

\textsuperscript{340} 343 U.S. 579 (1952). See note 3 and accompanying text supra.

\textsuperscript{341} 405 U.S. at 742 (Marshall, J., concurring).

\textsuperscript{342} Exec. Order No. 10340, 3 C.F.R. 861 (1949-53 Compilation).

\textsuperscript{343} 343 U.S. at 583, 589.

\textsuperscript{344} Id. at 587-88.

\textsuperscript{345} Compare id. at 585-89 and id. 629-34 (Douglas, J., concurring) with id. at 597 (Frankfurter, J., concurring) and id. at 639-40 (Jackson, J., concurring). See also Corwin, \textit{The Steel Seizure Case: A Judicial Brick Without Straw}, 53 Colum. L. Rev. 58 (1953).

\textsuperscript{346} 343 U.S. at 585.
It would, however, be utterly inconsistent with the concept of separation of powers for this Court to use its power of contempt to prevent behavior that Congress has specifically declined to prohibit. There would be a similar damage to the basic concept of these co-equal branches of Government if when the Executive Branch has adequate authority granted by Congress to protect "national security" it can choose instead to invoke the contempt power of a court to enjoin the threatened conduct. The Constitution provides that Congress shall make laws, the President execute laws, and courts interpret laws.\(^{347}\) Accordingly, Justice Marshall concluded that the Supreme Court may not legitimately enforce prior restraints on the dissemination of information in the absence of specific authorization by Congress.\(^{348}\) He concluded: "It is not for this Court to fling itself into every breach perceived by some Government official nor is it for this Court to take on itself the burden of enacting law, especially a law that Congress has refused to pass."\(^{349}\)

In both the *Pentagon Papers* and *Progressive* cases, the government improperly claimed an inherent power to restrain the publication of materials.\(^{350}\) But *Pentagon Papers* and *Progressive* are nonetheless distinguishable in one significant respect: in the latter case the government sought the injunction pursuant to the specific authorization of Congress in the Atomic Energy Act regarding the publication of technical information concerning the construction of thermonuclear weapons.\(^{351}\) Thus, from a constitutional perspective, the fundamental issue in *Progressive* was whether the government may permissibly rely on the courts to enjoin publication of materials that Congress specifically defines as "restricted data" and authorizes the government to seek, and the courts to provide, injunctions against the dissemination of that information.\(^{352}\)

Justice Marshall prophetically addressed that issue in *Pentagon Papers* when he emphasized that the executive branch had improperly sought an injunction against publication of materials that Congress had not expressly restricted by statute or empowered the
government and the courts to enjoin. Justice Marshall also noted that the executive branch and the judiciary may constitutionally restrain publications that threaten national security interests when and where Congress has given its express authorization. Indeed, with virtual clairvoyance, the Justice suggested as an example that the government and the courts may enjoin publications when authorized by Congress as under the Atomic Energy Act. Accordingly, in the Progressive case, after Judge Warren wrestled with the claim of a first amendment right to know—concluding that he could “find no plausible reason why the public needs to know the technical details about hydrogen bomb construction”—he quite properly rested with the finding that the injunction was appropriate as contemplated by Congress.

In Pentagon Papers, several members of the Court anticipated Progressive by acknowledging that the rule against prior restraints is not absolute. More importantly, several of the opinions suggested that the government may enjoin publications when authorized by a narrowly drawn statute in order to safeguard interests in national security. Justice White, in his concurring opinion in Pentagon Papers, implied the existence of difficulties involved in leaving such decisions to the courts when he wrote that “[t]o sustain the Government . . . would start the courts down a long and hazardous road that I am not willing to travel, at least without congressional guidance and direction.” Congress and state legislatures are indeed the appropriate institutions for vindicating the public’s interests in obtaining politically and technically sensitive materials that pertain to national security, and for determining the nature and scope of the public’s right to know. The Supreme Court thus appears to have recognized that, within our constitutional system, the judicial forum remains inappropriate for either

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353. 403 U.S. at 742, 745-46 (Marshall, J., concurring). In this respect, Justice Marshall’s opinion was very similar to those of Justices Douglas, Stewart and White, each of whom stressed the lack of congressional authorization for restraining publication as a ground for his concurrence. See id. at 720-21 (Douglas, J., concurring); id. at 730 (Stewart, J., concurring); id. at 731-33 (White, J., concurring).

354. Id. at 743-44 (Marshall, J., concurring).

355. Id. at 743 n.3 (Marshall, J., concurring).

356. 467 F. Supp. at 994.

357. Id. at 999-1000.

358. See note 324 and accompanying text supra.


360. 403 U.S. at 733 (White, J., concurring).
legitimating the government's unauthorized withholding of information or fashioning a constitutional right to know in order to augment governmental openness.

III. CONCLUSION

That members of the public and the press have increasingly urged the Supreme Court to fashion affirmative rights to information under the first amendment is a measure of the salience of the political ideal of freedom of information and an informed public. Claims to a public's right to know have been made in efforts to obtain special privileges for the press,\textsuperscript{361} to permit publication and receipt of materials constituting unprotected speech,\textsuperscript{362} to obtain access to governmental facilities and information,\textsuperscript{363} and to prevent or invalidate prior restraints on the dissemination of political and technical information.\textsuperscript{364} These wide-ranging claims seek support in a constitutional common law argument for denominating a right to know. Contrary to the expressed view of Emerson,\textsuperscript{365} however, that argument enjoys faint support from the Supreme Court's rulings on the first amendment.

The contemporary attraction of freedom of information and governmental openness has indeed prompted some members of both the Warren and Burger Courts to accept the constitutional legitimacy of a right to know. Various justices have, on occasion, embraced claims to an enforceable right to know under the first amendment to justify protection for the confidentiality of news reporters' sources.\textsuperscript{366} Moreover, several justices have construed the first amendment to confer entitlements on the public and the press to receive information,\textsuperscript{367} to obtain access to governmental facilities,\textsuperscript{368} and to an unqualified liberty to publish without prior restraint and fear of subsequent prosecution.\textsuperscript{369} Still, these expressions of support for a first amendment right to know remain only in dicta and dissenting opinions, and have never been used to sup-

\textsuperscript{361} See notes 54-65 & 142-66 and accompanying text supra.
\textsuperscript{362} See notes 66-86 and accompanying text supra.
\textsuperscript{363} See notes 141-286 and accompanying text supra.
\textsuperscript{364} See notes 312-60 and accompanying text supra.
\textsuperscript{365} See also notes 17-35 and accompanying text supra.
\textsuperscript{366} See, e.g., note 56 and accompanying text supra.
\textsuperscript{367} See notes 111-12, 114-15, 124 & 133 and accompanying text supra.
\textsuperscript{368} See notes 142-70 and accompanying text supra.
\textsuperscript{369} See New York Times Co. v. United States, 403 U.S. at 717 (Black, J., concurring); id. at 720 (Douglas, J., concurring).
port claims to obtaining information from sources not voluntarily making it available.

In retrospect a constitutional right to know appears plausible only on the basis of a policy argument that the recognition of such a right would entail beneficial consequences for the polity. The historical argument proves neither compelling nor accurate with regard to the founding period and drafting of the first amendment. Constitutional developments under the first amendment, as the preceding discussion has shown, further undermine any recourse to constitutional history in support of a first amendment right to know. The policy argument thus appears to be the only possible foundation. Indeed, those justices willing to fashion a right to know are so inclined because of their policy orientation toward the first amendment and the role of the Court in ensuring the political ideal of an informed public. In other words, denomination of a constitutional right to know fundamentally depends on justices who maintain that: a) the political ideal of freedom of information and an informed public necessarily entails an affirmative right to know; and b) in order to ensure the ideal of an informed public, the Court may permissibly fashion such a right to know under the first amendment.

The divisions within the Burger Court highlight the allure and complexity of the political ideal of freedom of information and an informed public. The Burger Court promises to remain divided because of differences among the justices regarding the fundamental role of the courts and the permissibility of prescriptive policymaking.

If the strength of their past opinions is any indicator, the Chief Justice and Justices Stewart and Rehnquist will likely remain steadfast in their denial of the constitutional legitimacy of a directly enforceable right to know under the first amendment. Justices Blackmun and White promise to agree rather consistently with them. Although agreeing that the first amendment ensures the conditions for freedom of information, they maintain that proper exercise of judicial power precludes both articulation of unenu-

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370. See notes 26-33 and accompanying text supra. See also O'Brien, supra note 31, at 609-11.
371. See O'Brien, supra note 31; notes 30-32 and accompanying text supra.
372. See notes 156-58 and accompanying text supra (Chief Justice Burger); notes 59-61, 141 & 145-46 and accompanying text supra (Justice Stewart); notes 91, 98-106, 213-18 & 283-84 and accompanying text supra (Justice Rehnquist).
373. See notes 130-33, 219-24 & 327 and accompanying text supra (Justice Blackmun); notes 54-55, 91 & 530 and accompanying text supra (Justice White).
merated rights and prescriptive policy-making, since the Court thereby substitutes its wisdom for legislative judgments with respect to government information policies. In principle, first amendment affirmative rights are precluded, regardless of their anticipated utility for contributing to an informed public, because the first amendment only secures the conditions for an informed public by guaranteeing freedom of speech and press in the absence of constitutionally permissible restraints. The amendment does not constitutionally mandate the liberty, nor confer any rights, to demand information or obtain access to governmental materials and facilities. The propriety of governmental openness with respect to documents and other materials, or public access to facilities such as prisons and other governmental institutions, pose issues of public policy reserved for the legislative and executive branches. The first amendment neither requires nor permits judicial formulation of information policies via the denomination of novel and unenumerated rights.

In contrast, Justices Brennan and Marshall are the principal proponents of first amendment affirmative action because they apparently believe both that the first amendment does not prohibit what it does not require, and that a judicially created constitutional right to know serves important policy objectives. Accordingly, they demonstrate a willingness to engage the Court in reviewing government policies which they believe unjustifiably limit the free flow of information essential to an informed public. While Justices Stevens and Powell maintain that a right of the public to know about governmental operations is defensible in terms of vindicating the interests of an informed public, they disagree with Justices Brennan and Marshall on the scope of first amendment substantive protection and, specifically, on the permissible scope of a constitutional right to know. Justices Stevens and Powell may well abandon Justices Brennan and Marshall, as they did in Gannett, when they find that the government has, in a reasonable manner, considered the interests of an informed public when denying access to particular materials, proceedings, or facilities.

Within the constitutional framework of our representative republic, as a majority of the Burger Court recognizes, the hard

374. See text accompanying notes 66-78 & 291-318 supra.
375. See notes 124, 133 & 276-82 and accompanying text supra (Justice Brennan); notes 109-11, 133 & 334-49 and accompanying text supra (Justice Marshall).
376. See notes 163-66 and accompanying text supra (Justice Stevens); notes 150-55 & 205-12 and accompanying text supra (Justice Powell).
377. See notes 185-227 and accompanying text supra.
questions in terms of what the public has a right to know require legislative determinations, not judicial proclamations. Indeed, apart from the historical background and understanding of the first amendment, there are several policy considerations that caution against judicial construction of an affirmative constitutional right to know. While recognition of a right to know no more assures an informed public than does safeguarding express first amendment guarantees so as to insure dissemination of wide-ranging information and opinions, denomination of such a constitutional right might well produce unanticipated and inauspicious consequences for the courts and the public. Legitimating an affirmative constitutional right to know inevitably leads to determinations of what the public has or has not a right to know, and resulting determinations of what the public does not have a right to know may well entail restrictions on freedom of speech and press. In other words, elaboration of the public’s right to know might well prove pernicious because courts must balance the public’s need to know against governmental interests in limited access, confidentiality and freedom from interruptions in the conduct of its operations. The potential for prior restraint which attends the necessity of the courts determining what the public is entitled to know, moreover, indicates further deleterious consequences. Judicial determinations would be substituted for legislative and political evaluations. Thus, upon fashioning a constitutional right to know, the Supreme Court would be destined to assume the role of super-legislature—determining the wisdom, need, and propriety of permitting public access to legislative and executive materials, policy-making processes, and governmental institutions.

The Supreme Court’s failure to denominate a first amendment right to know, therefore, does not reflect insensitivity to the political ideal of freedom of information and an informed public. Rather it reflects a refusal to engage in extra-constitutional decision-making. Indeed, recent rulings in the commercial speech area illustrate the important ways in which the political ideal of freedom of information and an informed public remains integral to first amendment analysis. First amendment guarantees for free speech and


379. See Bathory & McWilliams, Political Theory and the People’s Right to Know, in Government Secrecy in Democracies 5-21 (I. Gannor ed. 1977); O’Brien, supra note 31, at 605-12.

380. See notes 143-62 & 334-60 and accompanying text supra.

381. See notes 87-106 and accompanying text supra.
press ensure the conditions for an informed public only by safeguarding the dissemination of information against constitutionally impermissible restraints or constraints.\textsuperscript{382} The amendment neither mandates nor entitles the Supreme Court to fashion unenumerated affirmative rights so as to enhance the prospects for governmental openness. On the other hand, the first amendment does not prohibit or foreclose the possibility of Congress and the executive branch adopting policies promoting public access to government materials and facilities. Indeed, Congress in the last decade has enacted extensive legislation designed to further the ideal of freedom of information and an informed public.\textsuperscript{383} In particular the Freedom of Information Act \textsuperscript{384} established a statutory right to know in mandating public access to federal documents, records, and other materials, except where subject to statutory exemption.\textsuperscript{385} The impressive successes over the last decade by Congress and state legislatures in furthering governmental openness and freedom of information, and the dangers inherent in constitutional theory and practice for the Court's denomination of a first amendment right to know, underscore the appropriateness of legislatures and political processes for translating the political ideal of freedom of information into affirmative rights of access to government materials and facilities.

In historical perspective, the Supreme Court has acknowledged the importance of freedom of information and an informed public, but has construed that ideal to attain constitutional fulfillment by safeguarding the express guarantees of the first amendment. Instead of cultivating a constitutional right to know against the government, the Court has recognized the limits of its guardianship and that the hard questions posed by claims to a right to know are ultimately matters of public policy reserved for Congress, state legislatures, and the executive branches of government. Thus, the Burger Court's analysis of the first amendment and claims to a right to know demonstrate an appreciation for the integrity and limitations of the judicial power and the first amendment.

\textsuperscript{382} See text accompanying notes 43-44 & 291-318 \textit{supra}.

