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ARTICLES

"DANCING IN THE COURTHOUSE": THE FIRST AMENDMENT RIGHT OF ACCESS OPENS A NEW ROUND

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I. INTRODUCTION

Shortly after World War II, concern mounted over the government's ability and tendency to institutionalize secrecy in government. The initial concern was with the anti-communist sleuthing of various legislative bodies which dramatized the power of secretly held information to control the public agenda of both domestic and foreign policy debate. From this emerged the call for a more "open" government and the political claim that the electorate had a "right to know"[1] the information acquired and relied upon by government officials. For the press in particular, "access" increasingly became the watchword, the icon, of the new era.[2] The mounting pressure for greater open-

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1. The popular origin of this term is commonly attributed to a speech given in 1945 by Kent Cooper, then Executive Director of the Associated Press. The seminal text was H. CROSS, THE PEOPLE'S RIGHT-TO-KNOW (1953).

2. A recent nationwide survey found "striking evidence" that broad-based access

ness led over time to the spate of "sunshine" and freedom of information laws passed in the 1960s and early 1970s.

Following this limited legislative success, advocates of a more open government sought to extend their gains through the courts. The press brought a series of lawsuits during the 1970s seeking to gain access to government-controlled information not covered by the various statutes. The legal claim of these suits was essentially that such a right of press access, although not specifically enumerated anywhere in the Constitution, was nonetheless implied in either the express language or the very "structural" design of the First Amendment. The apparently settled view of the cases, however, was that although the traditional libertarian philosophy of the First Amendment staunchly shielded private expression from government regulation, it did not at all affirmatively require government to provide information to the private market of expression.

This claim of First Amendment-based access to government information had been so consistently and emphatically rejected by the Supreme Court that by the late 1970s, it was considered an all but dead letter. Then, in one of the more remarkable and unanticipated turnabouts on the Court, an unconsolidated majority adopted a variation of the so-called structural theory to recognize for the first time a First Amendment-based affirmative right of public access to criminal trial proceedings. And with surprisingly little fanfare, the foundation of the First Amendment was realigned to support the diverse and increasing claims of access to an open government in a post-libertarian era.

The seminal case was *Richmond Newspapers Inc. v. Virginia*.[3] It held that the public had a First Amendment right to attend criminal trials. Although novel, the actual holding was hardly controversial. The record of the case presented a rather extraordinary, and somewhat suspect, order by the trial court excluding all members of the press and public from the third retrial of a convicted murderer. Yet, while the facts of the case

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issues had well surpassed both prior restraints and libel as the principal litigation concern of the press. Media Litigation '88, Society of Professional Journalists (on file with the *University of Richmond Law Review*).

3. 448 U.S. 555 (1980).

were compelling, there was no ready legal basis for reversal. Indeed, the Court had only recently examined and rejected a series of constitutional challenges to governmental door closings,[4] leaving itself little room to find a First Amendment violation in the trial court's closure order. But the Supreme Court did manage to reverse, and it did so by recognizing a new dimension to the underlying political, or structural, mandate of the First Amendment.

Justice Stevens referred to *Richmond Newspapers* as a "watershed case."[5] And indeed it is. It is a First Amendment case that extends the doctrine *beyond* speech. It significantly revises the "central meaning" of the First Amendment by adopting an essentially republican interpretation of the *affirmative* principles of self-government. For the central premise of *Richmond Newspapers* is that meaningful self-government requires an informed electorate, and that where the representative government itself maintains control of information essential to such an informed public discourse, the government may be affirmatively required to provide that information to the public.

The initial commentaries on *Richmond Newspapers* all heralded major changes in First Amendment jurisprudence.[6] And, to be sure, there has certainly been an expansive groundswell of case law in the lower courts. Yet there has been a remarkable absence of critical attention paid to the extraordinary character and significance of the *Richmond Newspapers* doctrine. There are many possible explanations for this curiously low profile, yet there is little point in maintaining it. This article attempts to give the doctrine its due. This requires in the first instance that the doctrine be firmly recognized and confirmed as the watershed legal development that it is. It is then necessary to look behind the doctrine to expose the critical theoretical innovations that enabled the Court to create an affirmative

4. *See infra* part I.

5. 448 U.S. at 582 (Stevens, J., concurring).

6. Lillian R. BeVier, *Like Mackerel in the Moonlight: Some Reflections on* Richmond Newspapers, 10 HOFSTRA L. REV. 311 (1982) ("*Richmond Newspapers* may well signal the arrival of an expansive new First Amendment doctrine."); Archibald Cox, *Foreword: Freedom of Expression in the Burger Court*, 94 HARV. L. REV. 1, 21 (1980) ("The full significance of *Richmond Newspapers* waits for the future."); Note, *The Supreme Court, 1979 Term*, 94 HARV. L. REV. 75, 149 (1980) ("[T]he decision should lead to a significant and salutary recasting of much First Amendment doctrine.").

right of access to government information that reaches beyond the traditional libertarian philosophy of the First Amendment. Finally, the doctrine requires a critical restatement to correct and extend its application in a number of areas.

This article, therefore, proceeds in three parts. Part II demonstrates that *Richmond Newspapers* was no marginal passage in First Amendment case law. Rather, it was a genuine transformative moment in the law when the Supreme Court acted boldly to escape the terminal logic of its own proud libertarian tradition of safeguarding First Amendment freedoms. The Court found that a strictly libertarian philosophy of freedom did not carry the Constitution far enough. The argument of this part does not attempt to represent *Richmond Newspapers* as a strictly logical unfolding of traditional pluralist First Amendment principles. Quite the contrary, the assumption here is that a true appreciation of what actually took place in *Richmond Newspapers* cannot be gained in traditional doctrinal terms. It must be grasped within the narrative context of the Supreme Court's ongoing inability to justify and maintain the traditional doctrine against the mounting pressure of a compelling public demand for greater access to government operations. It was the very exhaustion of the traditional libertarian paradigm of freedom, and its inability to secure a proactive self-government against the informational hegemony of the modern state, that forced the Court to reach beyond, but not to break, that mold. Therefore the argument of this section is essentially narrative in format. It attempts to tell the legal story of a fitful new right stumbling into its point of departure.

Part III describes the Court's revised theory of the structural role of the First Amendment which was abruptly constructed to support the new right announced in *Richmond Newspapers*. For a variety of reasons, the Supreme Court opinions do not adequately articulate, or even acknowledge, the novelty of the underlying theory. This Part identifies Justice Brennan, who wrote only a concurring opinion in *Richmond Newspapers*, as the true proponent of the new extension of First Amendment theory. But even with respect to the well-advanced First Amendment jurisprudence of Justice Brennan, *Richmond Newspapers* was a stretch. A close reading of Justice Brennan's "structural" theory in *Richmond Newspapers* reveals that he

once again returned for new inspiration to the progressive writings of Alexander Meiklejohn. Part III then demonstrates, through a more thorough unpacking of Meiklejohn's unconventional First Amendment theories, the genuinely transformative shift in *Richmond Newspapers* from a strictly libertarian to a moderately republican interpretation of the First Amendment.

Part IV proposes a significant revision to our reading of the new right of access in order to better fulfill the policy mission of the underlying structural theory. The right of access, as presently construed, attaches individually and independently to particularized items of government information pursuant to a two-prong test for inclusion. This test does not reflect the actual theory of access and barely explains the actual holdings in the individual cases. The right should be restated as a systemic right of access to all deliberative information within the Judiciary. This restatement will not only better reduce the existing case law to a coherent doctrine, but it will also permit the right to extend itself in principled fashion to the new, and perhaps more urgent, issues of access.

II. THE NEW RIGHT OF ACCESS

As of 1980, there was no recognized constitutional right of public access to information held or controlled by the government. Access to such information in the Legislative and Executive Branches was governed entirely by statute. Access to information within the Judicial Branch was limited to the common law rules providing access to various court records and exhibits. A then-recent series of attempts to gain constitutional recognition of a citizen's putative right-to-know information held by his or her elected representatives in the two political branches had been soundly thwarted by the Supreme Court. The Court had consistently held that the First Amendment protected only the liberty to be free from government restraint, not the affirmative right to acquire government information. As recently as 1979, the Supreme Court had gone so far as to refuse to grant constitutional status to the right of the public to attend a pretrial suppression hearing in a criminal case. Then, in 1980 with *Richmond Newspapers*, the Court abruptly and ironically adopted a revised formulation of the right-to-know theory to identify

a First Amendment right of access to information located within the traditionally non-representative Judicial Branch.

A. *The New Factual Paradigm: Secrecy in the Courthouse*

On December 2, 1975, a local motel manager in the small community of Hanover County, Virginia was stabbed to death. In March 1976, John Paul Stevenson and two others were indicted for the murder. The following July, the three men were tried; Stevenson and one other were convicted of second degree murder. Stevenson was sentenced to serve ten years in prison. The homicide was an "ordinary case"[7] that was only routinely reported in the local press.

Over a year later, the Virginia Supreme Court reversed Stevenson's conviction because a bloodstained shirt that connected him to the crime had been improperly admitted as evidence.[8] His retrial began in May 1978, but it ended in a mistrial because one juror had to be excused and there were no alternate jurors available.[9] Stevenson was retried again the following June, and again the judge declared a mistrial, this time because one of the jurors had read reports of the earlier mistrial and had shared that information with fellow jurors.[10]

Stevenson faced trial for a fourth time the following September. At the outset of the scheduled two-day trial, two local reporters were present in the courtroom. As a result, Stevenson's attorney made a motion he had not made in any of the three previous trials. He moved to close the courtroom to all but the trial participants because he did not "want any information being shuffled back and forth when we have a recess as to what—who testified to what."[11] The prosecutor did not object to the motion, and the judge issued an order from the bench closing the courtroom. The two ejected reporters returned to the court with counsel that afternoon to oppose the closure order. The trial court held a brief hearing at the close

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7. Brief for Appellants at 5, Richmond Newspapers Inc. v. Virginia, 448 U.S. 555 (1980) (No. 79-243).

8. Stevenson v. Commonwealth, 237 S.E.2d 779 (Va. 1977).

9. 448 U.S. at 559.

10. *Id.*

11. *Id.* at 559-60.

of the day and denied the motion to vacate the order. The judge apparently relied upon a state statute that permitted such closure at the judge's discretion.[12]

What happened in court the following day remains remarkably unclear. The only record of the proceedings is a one-page order of the trial court indicating that a defense motion for another mistrial was "taken under advisement," a defense motion to "strike the Commonwealth's evidence" was granted, the jury was dismissed, and the trial judge "doth find the accused NOT GUILTY of Murder."[13]

Counsel for Richmond Newspapers thereafter petitioned directly to the Virginia Supreme Court to review the trial court's closure order, but the Virginia Supreme Court, finding no reversible error, denied the petition.[14] The case then proceeded directly to the United States Supreme Court on a record that contained neither a written opinion by any lower court, nor even a clear account of what had transpired at the trial court.

The record thus submitted for direct review by the Supreme Court appeared in many respects to present an easy case. The trial attorneys for both sides and the trial court appeared to have cooperated, for no known or compelling reason, in the removal from the courtroom of all members of the public, including the jury, whereupon a man previously convicted by a jury of murder was secretly found not guilty by the judge alone in a manner that apparently precluded any further review or retrial on the merits. The appellant newspaper certainly had "good facts," there was an obviously vulnerable statute at the center of the case, and the Virginia Supreme Court had refused to review either the statute or the closure order. Moreover, there was the prominent finding by the Supreme Court in an

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12. The statute reads:

> In the trial of all criminal cases, whether the same be felony or misdemeanor cases, the court may, in its discretion, exclude from the trial any persons 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.

VA. CODE ANN. § 19.2-266 (Michie Cum. Supp. 1980). The Supreme Court had noted the existence of this statute, with apparent approval, in *Gannett Co. v. DePasquale*, 443 U.S. 368, 388 n.19 (1979).

13. 448 U.S. at 561-62.

14. *Id.* at 562.

earlier case that it had been "unable to find a single instance of a criminal trial conducted *in camera* in any federal, state, or municipal court during the history of this country."[15] A more compelling case for unlocking the doors of justice was unlikely.

But the case was only apparently an easy mark for reversal. For, in fact, it presented the Supreme Court with a direct challenge to its very recent refusal to recognize a constitutional right for a member of the press to gain access to a criminal proceeding or other government facilities. However compelling the claim of a constitutional right of access to Stevenson's trial, the law was definitely to the contrary.

B. *The Paradigm of Precedent: Shields vs. Swords*

The Supreme Court in several recent lines of cases had left itself little room to recognize a constitutional right of access to Stevenson's trial. Press plaintiffs had attempted to gain recognition for such a right under both the Free Press Clause of the First Amendment and the Public Trial Clause of the Sixth Amendment. The claims raised under the Free Press Clause challenged the restraining effect of a closure order on the informed reporting of a traditionally public proceeding that resolved issues of utmost public, if not political, concern. As argued by the plaintiffs in *Richmond Newspapers*: "The next morning's newspapers could report only that the defendant had been set free."[16] The parallel challenge raised under the Public Trial Clause was that a trial institution historically designed and constitutionally safeguarded for public participation in a variety of forms was reverting to a "Star Chamber." In the oft-cited words of the Supreme Court: "A trial is a public event. What transpires in the courtroom is public property."[17]

But the Court had found both the First and Sixth Amendment claims to an affirmative right of access to government sources of information quite unavailing. There was of course notable legal protection to be found for the free flow of information between private citizens, but the paradigm of protection of

15. *In re* Oliver, 333 U.S. 257, 266 n.4 (1948).
16. Brief for Appellants at 9, *Richmond Newspapers* (No. 79-243).
17. Craig v. Harney, 331 U.S. 367, 374 (1947).

speech and publication was that of the shield. The government was generally prevented from engaging in conduct which affirmatively burdened the private traffic in information, but it was nowhere constitutionally required to *provide* information as such for the private knowledge of citizens. As Justice Stevens noted with respect to the Court's earlier case law, "the Court has accorded virtually absolute protection to the dissemination of information or ideas, but never before has it squarely held that the acquisition of newsworthy matter is entitled to any constitutional protection whatsoever."[18]

The case law was actually rather misleading in this area. A good deal of language in dicta and dissent implied greater legal recognition of a citizen's right to know government information than was in fact the case. Within First Amendment doctrine, three distinct putative rights suggested the inference that the Supreme Court had tacitly acknowledged a public "right to know:" (1) a right-to-receive information over government objection; (2) a right-to-gather information for purposes of publication; and (3) a right-of-access to government facilities. Indeed, by the mid-1970s, one of our most noted First Amendment scholars claimed that "[t]he Supreme Court has recognized in a number of cases that the [F]irst [A]mendment embodies a constitutional guarantee of the right-to-know."[19] Upon close examination, however, none of these putative rights truly provided the press or public with any entitlement to wrest from a reluctant sovereign any information the sovereign did not choose to provide.[20]

The right-to-receive cases essentially established that otherwise permissible speech could not be effectively restrained by denying the speaker an audience. Several early cases had held that it was unconstitutional to impose a license tax on advertising;[21] to prohibit door-to-door distribution of literature;[22] or to

18. 448 U.S. at 582 (Stevens, J., concurring).

19. Thomas I. Emerson, *Colonial Intentions and Current Realities of the First Amendment*, 125 U. PA. L. REV. 737, 755 (1977).

20. At the close of the decade, another scholar of note reviewed the relevant case law and concluded that "the combined force of the privilege and access cases would seem thoroughly to undercut any argument that significant precedential support can still be mustered for a right to information within the government's control." Lillian R. BeVier, *An Informed Public, An Informing Press: The Search for a Constitutional Principle*, 68 CAL. L. REV. 482, 497 (1980).

21. Grosjean v. American Press Co., 297 U.S. 233 (1936).

detain communist propaganda in the mails.[23] All these methods restrained access to the information by the intended receiver. Thus, by 1969 the Supreme Court could announce that "[i]t is now well established that the Constitution protects the right-to-receive information and ideas."[24]

But this right was never more than the right of a willing recipient to obtain information from a "willing speaker."[25] It never recognized an affirmative right to obtain information on demand from an unwilling private or public source. Indeed, otherwise willing public employees *as such* do not even have a First Amendment right to *publish* government information within their possession.[26] And there certainly can be no derivative right to receive where there is no underlying right to publish. Therefore, although the press petitioners in *Richmond Newspapers* did cite the right-to-receive cases in their brief, the doctrine provided scant authority for a right of access to a judicial proceeding intentionally closed by the trial judge pursuant to a state statute.

The right to gather cases were equally unavailing to establish an affirmative right of access to a criminal trial. Here the dicta in the case law were particularly misleading. Despite a series of assertions by the Supreme Court clearly suggesting tacit recognition of an independent First Amendment right to gather information for purposes of publication,[27] the Court had never resolved a case on that basis. Indeed, whenever the issue was squarely presented before the Court, the proponents of the putative right-to-gather were emphatically denied.[28]

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22. Martin v. Struthers, 319 U.S. 141 (1943).

23. Lamont v. Postmaster Gen., 381 U.S. 301 (1965).

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

25. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 756 (1976).

26. *See* Rankin v. McPherson, 483 U.S. 378 (1987); Connick v. Myers, 461 U.S. 138 (1983); Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973).

27. *E.g.*, Branzburg v. Hayes, 408 U.S. 665 (1972). "Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated." *Id.* at 681. "The 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." *Id.* at 721 (Douglas, J., dissenting). "A corollary of the right to publish must be the right-to-gather news." *Id.* at 727 (Stewart, J., dissenting).

28. *E.g.*, Herbert v. Lando, 441 U.S. 153 (1979); Zurcher v. Stanford Daily, 436

The critical claim of the right-to-gather protagonists was that the Free Press Clause of the First Amendment conferred upon the Fourth Estate[29] a constitutional role or status that was separate from, and in some respects superior to, the more universal freedoms of speech and publication. This constitutional postulate of a "press privilege" flourished for a brief period beginning in the late 1960s, but only in the academic literature[30] and case dicta.[31] It never actually took root in the case law.[32] Indeed, the first occasion of its rejection occurred somewhat prematurely during the late Warren Court era in a case that did not even involve a press party.

In *Zemel v. Rusk*,[33] the petitioner sought to have his passport validated for travel to Cuba shortly after the Department of State had imposed restrictions on such travel. He claimed that the purpose for his travel was "to satisfy [his] curiosity about the state of affairs in Cuba and to make [himself] a better informed citizen."[34] The State Department denied his application. The petitioner raised a First Amendment claim, asserting a right to travel for purposes of exercising his right to *informed* speech. The Supreme Court's almost peremptory rejection of this argument demonstrated its fundamental opposition to the various attempts to extend the right-to-know principle of the First Amendment. The Court stated: "There are few restrictions on action which could not be clothed by ingenious argu-

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U.S. 547 (1978); Branzburg v. Hayes, 408 U.S. 665 (1972).

29. Justice Stewart emphasized the Fourth Estate metaphor to describe the structural significance of the Free Press Clause in a much-heralded speech he gave advocating recognition of an independent press privilege. Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 634 (1975).

30. Floyd Abrams, *The Press is Different: Reflections on Justice Stewart and the Autonomous Press*, 7 HOFSTRA L. REV. 563 (1979); Randall P. Bezanson, *The New Free Press Guarantee*, 63 VA. L. REV. 731 (1977); David Lange, *The Speech and Press Clause*, 23 UCLA L. REV. 77 (1975); Melville B. Nimmer, *Is Freedom of the Press a Redundancy: What Does it Add to Freedom of Speech?*, 26 HASTINGS L.J. 639 (1975); Stewart, *supra* note 29. For a revived and revised presentation of this argument, see Timothy B. Dyk, *Newsgathering, Press Access, and the First Amendment*, 44 STAN. L. REV. 927 (1992).

31. *See infra* text accompanying note 37.

32. The short-lived development of a "press privilege" in case law occurred in the Ninth Circuit opinion in Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970), *rev'd sub nom.* Branzburg v. Hayes, 408 U.S. 665 (1972).

33. 381 U.S. 1 (1964).

34. *Id.* at 4.

ment in the garb of a decreased data flow. . . . The right to speak and publish does not carry with it the unrestrained right to gather information."[35] Therefore, before the press ever presented its independent claim to constitutional protection of the news gathering process, the Supreme Court had already articulated the premise that the *precommunicative* processes of gathering information fell outside the protective shadow of the First Amendment shield.

The direct claim that the information-gathering functions of the established press were independently privileged was presented and rejected in three major cases decided by the Supreme Court during the 1970s.[36] In each case, the press argued that the increasing encroachment of the legal process on the autonomy of the press required a commensurate expansion of First Amendment protection. Beginning in the late 1960s, the press argued, with some small success,[37] that the essential prepublication process of newsgathering required preventative protection against the "increasing disposition of various governmental agencies to use news reporters as fact-finding instruments."[38] In each instance, however, the Supreme Court refused to extend such protection to an otherwise lawful process that did not directly restrain or punish the very act of publication.

The seminal case was *Branzburg v. Hayes*.[39] Branzburg was one of an increasing number of investigative journalists who were issued grand jury subpoenas compelling them to testify and reveal the confidential sources for their news articles.[40] He argued that forcing him to reveal his anonymous informants would deter such sources from confiding their information,

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35. *Id.* at 16.

36. *See* Rankin v. McPherson, 483 U.S. 378 (1987); Connick v. Myers, 461 U.S. 138 (1983); Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973).

37. *In re* Grand Jury Witnesses, 322 F. Supp. 573 (N.D. Cal. 1970); State v. Knops, 183 N.W.2d 93 (Wis. 1971).

38. Brief for Petitioner at 10, Branzburg v. Hayes, 408 U.S. 665 (1972) (No. 70-1381).

39. 408 U.S. 665 (1972).

40. Brief for the American Newspapers Guild as Amicus Curiae at 6, Branzburg v. Hayes, 408 U.S. 665 (1972); *see Freedom of the Press Hearing Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 92d Congress, 2d Sess. 416-38, 669-780, 988-97 (1972).

thereby imposing an indirect burden on the constitutionally prescribed role of an informing press. Justice White, writing for the Court, appeared to concede much to the Free Press Clause argument, stating: "Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated."[41] But Justice White's final analysis resulted only in a deeper and more explicit drawing of the line first etched in *Zemel v. Rusk* between the accumulation and publication of information. The Court stated that "these cases involve no intrusions upon speech or assembly, no prior restraint or restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold."[42] Under this analysis, the Court reasoned that the process of gathering information from confidential sources was entitled to *no* constitutional protection.[43]

Branzburg was an explicit rejection of the press claim to an independent right-to-gather information. Justice White made direct reference to the burgeoning literature on the subject and expressly disavowed it.[44] The press tried twice again in that decade and suffered even more emphatic rejection. In *Zurcher v. Stanford Daily News,*[45] the police obtained a routine search warrant to search the "photographic laboratories, filing cabinets, desks and wastepaper baskets"[46] of the Stanford student newspaper for evidence of the identities of university students involved in an assault upon the police. The newspaper claimed that a routine search of the confidential files of a press organization, even if otherwise valid under to the Fourth Amendment, imposed such a burden on the news gathering process that it was effectively proscribed by the First Amendment. The Court, however, discredited the claim, finding that the burden such searches imposed on publication was merely "incremental" in nature and not sufficient to make a "constitutional difference."[47]

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41. *Branzburg*, 408 U.S. at 681.
42. *Id.*
43. *Id.* at 708.
44. *Id.* at 681 n.20.
45. 436 U.S. 547 (1978).
46. *Id.* at 551.
47. *Id.* at 566.

In *Herbert v. Lando,*[48] the Court rejected a claim of press privilege to a facet of news gathering even more closely connected with the consummate act of publication. The plaintiff, a "public figure"[49] for defamation law purposes, brought a libel suit against various media defendants in which he was required to prove that the underlying publications were the product of "actual malice."[50] The media defendants asserted an "editorial privilege" to prevent the plaintiff from making any direct inquiries into their state of mind during the course of publication. Again, the Court found no independent editorial privilege distinct from the protection accorded to the publication itself.

Certainly the most explicit repudiation of the argument that the First Amendment might be wielded as a sword of access to a criminal trial or other government-controlled information occurred in the prison right-of-access cases. The Supreme Court decided three such cases in the mid-1970s.[51] In each case, the press attempted to capitalize on the favorable dicta in the right-to-gather cases to assert a right of access to prison facilities for the purposes of newsgathering. The result was not only a rejection of the claim to a right of access, but also a more profound disclaimer of the underlying right-to-know principle.

The first two cases, *Pell v. Procunier*[52] and *Saxbe v. Washington Post Co.*,[53] were decided together. *Pell* involved a California state regulation prohibiting journalists from obtaining interviews with inmates of their choice, and *Saxbe* involved a comparable regulation promulgated by the Federal Bureau of Prisons. The press plaintiffs alleged that the effective denial of access to inmates having particular information or experiences relating to prison conditions or management was an unconstitutional burden on their right to gather and publish news on an issue of great public concern. The Court found that access to such information was totally denied in neither case. The prisons in question permitted members of the press to visit the institu-

48. 441 U.S. 153 (1979).
49. *Id.* at 156 (quoting Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967)).
50. *Id.* (quoting New York Times v. Sullivan, 376 U.S. 254, 280 (1964)).
51. Houchins v. KQED, 438 U.S. 1 (1978); Saxbe v. Washington Post Co., 417 U.S. 843 (1974); Pell v. Procunier, 417 U.S. 817 (1974).
52. 417 U.S. 817 (1974).
53. 417 U.S. 843 (1974).

tions and to interview randomly selected inmates. Therefore, reasoned the Court, the press had access to all information otherwise available to members of the public, and there was no basis for a press claim to greater-than-equal access to government information. The Court constructed the issue as one in which the press sought to claim a superior privilege vis-à-vis the general public and chose to reiterate its resolution of that same issue in *Branzburg:* "It 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."[54]

What was, perhaps, most startling about the Court's adverse rulings on this issue was that both opinions were authored by Justice Stewart. It was the strong, apparently pro-press dissent of Justice Stewart in *Branzburg* upon which the plaintiffs were principally relying in *Pell* and *Saxbe*. Yet, by his apparent misconstruction of the issue in the prison cases, Justice Stewart was able to focus on the rights of the press vis-à-vis the general public rather than the government itself. His opinion silently assumed that the general public had no constitutionally protected right of access to government facilities, and thereby inferred that the press, even when viewed as the self-informing representative of that public, had no independent right to information that could legitimately be denied to that very public. "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. . . . 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."[55]

This miscasting of the issue as one of comparative access between the press and general public, rather than one of threshold press access to proscribed sources of government information, left the latter issue apparently unresolved in *Pell* and *Saxbe*. The media was therefore constrained—in order to avoid preemptive resolution by the no-greater-access doctrine of

54. 417 U.S. at 833 (quoting *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972)).
55. *Id.* at 834.

Branzburg—to raise the independent press access issue in a setting where there was *no* underlying entitlement to access by the general public.

This issue arose in *Houchins v. KQED.*[56] An inmate at a county jail had committed suicide in a notorious area of the facility reputed to be the scene of numerous "rapes, beatings and adverse physical conditions."[57] This area of the prison was not open to members of the public under any circumstances, and KQED, which had been reporting the prison conditions story on both radio and TV, was denied permission to enter and film that area of the facility. KQED sought to enjoin the denial of access in federal district court and was granted relief. The trial court enjoined the prison from enforcing its no-access policy, ruling that the press had to be provided with access at reasonable times and under reasonable conditions.[58] The United States Court of Appeals for the Ninth Circuit affirmed the injunction, finding that the no-greater-access doctrine of *Pell* and *Saxbe* was not controlling in the circumstance of *total* closure to *both* press and public.[59]

The Supreme Court reversed the Ninth Circuit holding. Chief Justice Burger, writing for a plurality of only three justices,[60] once again cast the issue in its narrowest terms as one of mere comparative access,[61] yet went on to write by far the broadest opinion to date rejecting the very premises of a press claim to some threshold entitlement regarding access to government information. Chief Justice Burger restored the essential dichotomy relied upon in *Zemel v. Rusk*[62] between unprotected pre-

56. 438 U.S. 1 (1978).

57. *Id.* at 5.

58. *Id.* at 6.

59. KQED v. Houchins, 546 F.2d 284, 286 (9th Cir. 1976) *rev'd,* 429 U.S. 1341 (1978). ("Implicit in the trial court's memorandum granting the preliminary injunctions is the finding that the First Amendment rights of both the public and the news media were infringed by appellant's restrictive policy.").

60. The case was decided by a 4-3 vote with Justice Stewart concurring separately. Houchins v. KQED, 438 U.S. 1, 2 (1978). The two who did not take part, Justices Marshall and Blackmun, presumably would have added one vote to each side.

61. *Houchins,* 438 U.S. at 3 ("The question presented is whether the news media have a constitutional right of access to a county jail, over and above that of other persons, to interview inmates and make sound recordings, films, and photographs for publication and broadcast by newspapers, radio, and television.").

62. 281 U.S. 1 (1965). *See supra* text accompanying note 43.

publication activities and the protected act itself.[63] He explained that references in two leading First Amendment cases to the "importance of informed public opinion and the traditional role of a free press as a source of public information"[64] did not amount to a press right of access to information. "[A]n analysis of those cases reveals that the Court was concerned with the freedom of the media to *communicate* information once it is obtained; neither case intimated that the Constitution *compels* the government to provide the media with information or access to it on demand."[65] From here it was but a short step to the Court's ultimate repudiation of any tacit recognition of the press claim to access. "This Court has never intimated a First Amendment guarantee of a right of access to all sources of information within government control. Nor does the rationale of the decisions upon which respondents rely lead to the implication of such a right."[66] *Houchins* gave every appearance of being the final word on the attempt to refashion the First Amendment as an affirmative right of access to government information.[67]

C. *From* Gannett *to* Richmond: *Public Trial vs. Public Access*

Meanwhile, an even more troubling issue of access had emerged for the nation's press. Trial courts across the country had begun to exclude the press from a variety of courtroom proceedings in criminal cases. This setback was indeed an ironic development, for it was a direct result of the recent success of the press in restricting the authority of trial courts to impose direct restraints on the reporting of criminal proceedings.

Trial courts found themselves caught in the crossfire of the apparently competing interests of a fair trial and a free press.

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63. "The appellant in *Zemel* made essentially the same argument that respondents advance here." *Houchins*, 438 U.S. at 11.

64. *Id.* at 9 (citing Grosjean v. American Press Co., 297 U.S. 233, 250 (1936); Mills v. Alabama, 384 U.S. 214, 219 (1966)).

65. *Id.*

66. *Id.*

67. Sarah G. Reznek, Gannett v. DePasquale *and* Richmond Newspapers v. Virginia: *Re-opening Courtroom Doors and Constitutional Windows*, 10 CAP. U. L. REV. 101, 102 (1980) ("The door to access was securely closed by the Court . . . in a triad of cases concerning public and media access to prisons.").

In *Sheppard v. Maxwell*,[68] the 1966 Supreme Court ruling that inaugurated the modern era of fair trial/free press doctrine, the Court recognized the need to safeguard the trial process from the "increasingly prevalent"[69] occurrence of unfair and prejudicial news coverage of criminal cases. Trial courts were admonished to take "strong measures to . . . prevent the prejudice at its inception."[70] A number of trial courts took this injunction at face value and issued so-called gag orders restraining the press from reporting on a variety of matters in pending cases.[71] The lower appellate courts were inclined to uphold these restraining orders on the authority of *Sheppard*.[72] The escalating conflict between the courts and the press came to a head when one such pretrial gag order was reviewed by the Supreme Court in *Nebraska Press Association v. Stuart*,[73] which was, of course, to become a landmark First Amendment case.

In *Nebraska Press*, the Supreme Court reviewed a relatively unremarkable restraining order that prohibited the press from reporting on a variety of matters that were "strongly implicative"[74] of the guilt of the multiple-murder defendant. The immediate result was an emphatic reaffirmation of the values of a free press and a near-absolute prohibition on the type of gag order at issue.[75] *Nebraska Press* effectively re-

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68. 384 U.S. 333 (1966).

69. *Id.* at 362.

70. *Id.* at 362-63.

71. *See* A.B.A. LEGAL ADVISORY COMMITTEE ON FAIR TRIAL AND FREE PRESS, RECOMMENDED COURT PROCEDURE TO ACCOMMODATE RIGHTS OF FAIR TRIAL AND FREE PRESS (1976).

72. Ten years after *Sheppard* was decided, one of the amici curiae in the *Nebraska Press* case implored the Court to "resolve the growing legal confusion and institutional hostility between the press and the courts which has developed in the decade since this Court's decision in Sheppard v. Maxwell." Brief for The Reporters' Committee for Freedom of the Press Legal Defense and Research Fund as Amicus Curiae at 11, Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) (No. 75-817).

73. 427 U.S. 539 (1976).

74. *Id.* at 541.

75. *Id.* at 559 ("The thread running through all [our] cases is that prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights . . . For the same reasons the protection against prior restraint should have particular force as applied to reporting of criminal proceedings. . . ."). Justice Brennan, joined by two other Justices, would have imposed an absolute ban on such prior restraints. *Id.* at 572 (Brennan, J., concurring). And Justice White expressed "grave doubt" that such a prior restraint could ever be upheld. *Id.* at 570 (White, J., concurring).

moved the restraining order on the press from the arsenal of the trial court. However, the extended consequence to the press was more double-edged. Trial courts increasingly began to experiment with another remedial measure for cutting off the flow of prejudicial publicity at its inception. Judges began to close courtrooms to the press and public.[76] This alternative was equally as effective as a gag order, did not involve a direct prior restraint upon publication, and found ample authority in *Sheppard* where the Court had insisted that "the presence of the press at judicial proceedings must be limited when it is apparent that the accused might otherwise be prejudiced or disadvantaged."[77]

The Supreme Court agreed to review one such closure order in *Gannett Co. v. DePasquale*.[78] Two defendants had been indicted for a murder in a rural area of upstate New York and had filed pretrial motions to suppress certain physical evidence as well as statements they had made to the police. Two local Gannett newspapers had been following the unfolding story of the murder, the investigation, and the out-of-state arrest of the two defendants. On the day scheduled for the pretrial suppression hearing, a Gannett reporter was in the courtroom. The defense moved to exclude the press and public from the courtroom to protect the fair trial interests of the accused. The prosecution did not object, and the judge issued the exclusionary order. New York's highest court upheld the order principally on the authority of *Sheppard*.[79]

Gannett appeared to present the press petitioners with a clear opportunity to regain some of the ground lost with the earlier claims of access to government information. For one thing, the facts could readily be viewed as a straightforward

76. "Since this Court indicated in Nebraska Press that orders restraining the press from publishing information obtained in open court proceedings would rarely be consistent with the First Amendment, trial courts around the country have with increasing frequency sought to achieve the same result by denying the press access to such information by holding judicial proceedings in secret." Brief of the American Civil Liberties Union and the New York Civil Liberties Union as Amicus Curiae in Support of the Petition for a Writ of Certiorari at 7-8, Gannett Co. v. DePasquale, 443 U.S. 368 (1979) (No. 77-1301).

77. Sheppard v. Maxwell, 384 U.S. 333, 358 (1966).

78. 443 U.S. 368 (1979).

79. Gannett Co. v. DePasquale, 372 N.E.2d 544 (N.Y. 1977).

attempt by the trial court to circumvent the clear command of *Nebraska Press* not to restrain reporting on court proceedings.[80] Furthermore, *Gannett* could be distinguished from the earlier cases on principled grounds. The prior access cases had all attempted to unlock a door to information traditionally within the exclusive domain of the Executive Branch. The claim in *Gannett* did not require the Court to unlock any such doors; it required only that the Judiciary police *itself* against closing doors that had traditionally been left open. Also, there was no basis in the record for treating the claim as one for a greater-than-equal access by the press. The trial court had been sealed to press and public alike for the express purpose of preventing information from reaching the public.

Made wary, perhaps, by the consistent and emphatic rejection of the First Amendment claims to access in the earlier cases, the press petitioners introduced a new claim in *Gannett*. They argued that press access to a criminal trial was independently grounded in another provision of the Constitution, the Public Trial Clause of the Sixth Amendment.[81] This was a relatively novel assertion that was said to support the claim to access in two rather distinct ways. First, it was argued that the Sixth Amendment right to a public trial ran to the public as well as to the accused.[82] Therefore, the press argued that the public has a directly and independently enforceable right of access to a defendant's trial. Second, the press argued that a full appreciation of the contextual guarantees of the First Amendment required that it be read together with those other rights, such as the right of public trial, which shared the common, and ultimate, constitutional objective of an informed democracy.[83] The essential argument here was that the First Amendment both presumed and protected the right of the citizenry to information concerning the exercise of the political power to prosecute. This approach did not require the determination that the public had

80. This was the lead argument in Gannett's petition for certiorari. Petition for a Writ of Certiorari at 7, Gannett Co. v. DePasquale, 443 U.S. 368 (1979) (No. 77-1301).

81. Brief of Petitioner at 34, Gannett Co. v. DePasquale, 443 U.S. 368 (1979) (No. 77-1301) (citing U.S. CONST. amend. VI) ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . . ").

82. Brief of Petitioner at 34-44, *Gannett Co.* (No. 77-1301).

83. *Id.*

independent standing to raise an access claim under the Sixth Amendment, but rather simply that the putative First Amendment right of access was, in several respects, informed by the collateral guarantees of the Sixth Amendment.

The new Sixth Amendment claim put forth in *Gannett* was controversial in several respects. Most obviously, it challenged the apparently settled understanding of the Sixth Amendment as a set of rights specifically and exclusively designated for "the accused." There was very little in case law or other legal authority to support the claim of a derivative entitlement by the public or press.[84] The Sixth Amendment argument was also controversial because it tended to compromise and limit the press claim to access to judicial proceedings. To the extent the First Amendment was read to derive its authority to compel press access from the public trial provision of the Sixth Amendment, it operated to confine press access *only* to those proceedings protected by that clause. At its best, therefore, the claim of ancillary entitlement to public access recognized by the Sixth Amendment would leverage the primary press claim grounded in the First Amendment; at its worst, the argument would displace the preeminent force of the First Amendment claim and provide a more ready target for the anti-access sentiment on the Court. The worst happened.

In a five to four decision, the Supreme Court upheld the closure order in *Gannett*. There was little else about this "spectacularly controversial case"[85] that was quite so definite. Although the petitioners had relied principally upon the First Amendment to challenge the closure order, this issue all but disappeared from the five separate opinions in the case. The matter was treated by the Justices on both sides almost exclusively as a Sixth Amendment issue. Indeed, the only two Justices who appeared to acknowledge that there was a First Amendment claim were in the *majority*.[86] The dissenters all joined

84. The only case to have adopted the new Sixth Amendment argument was United States v. Cianfrani, 573 F.2d 835 (3d Cir. 1978). The closest the Supreme Court had come to recognizing third party interests was in cases like Singer v. United States, 380 U.S. 24 (1965) and Barker v. Wingo, 407 U.S. 514 (1972). These cases held that such interests could be taken into account by the Court when deciding whether to grant a defendant's *waiver* of a specific Sixth Amendment right.

85. BeVier, *supra* note 20, at 489.

86. These were Justice Stewart, 443 U.S. at 392, and Justice Powell, 433 U.S. at

Justice Blackmun's opinion which did not address the First Amendment issue and even appeared to forsake it.[87]

Once again, Justice Stewart authored the opinion for the Court denying press access. He began his discussion with a reference to *Sheppard* and the trial court's "affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity."[88] He then offered a rather unqualified endorsement of closure as a remedial measure within the broad discretion of the trial judge: "Closure of pretrial proceedings is often one of the most effective methods that a trial judge can employ to attempt to ensure"[89] trial fairness. He acknowledged the long common law tradition of public trials but held it to nothing more than that—a common law tradition that established only a common law rule.[90] With respect to the public trial provision of the Sixth Amendment, Justice Stewart found that its protection was in the nature of a shield held only by the accused. "The 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."[91]

Justice Blackmun's dissent argued essentially that the common law tradition of open trials had indeed been incorporated into the Sixth Amendment as a right that ran to the public as well as the accused. There was an extraordinary amount of rich historical material to support the policy argument that public trials served a public good beyond the specific interests of the accused—and Justice Blackmun made use of most of it[92]—but there was virtually no legal authority to support such third-party standing for any of the rights specified in the Sixth Amendment. Indeed, as Justice Stewart noted pointedly in his majority opinion, even Justice Blackmun had previously appeared to acknowledge that Sixth Amendment rights were re-

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87. *See infra* note 101 and accompanying text.

88. 443 U.S. at 378.

89. *Id.* at 379.

90. *Id.* at 384.

91. *Id.* at 379.

92. In the subsequent case, where Justice Blackmun found himself in the majority, he said he found it "gratifying" to find the Court "relying upon legal history in determining the fundamental public character of the criminal trial." Richmond Newspapers v. Virginia, 448 U.S. 555, 601 (1980).

served to the accused.[93] The only case authority to acknowledge third-party standing—but not necessarily even third-party *rights*—under the Sixth Amendment was a single, recent case decided by the Third Circuit, *United States v. Cianfrani*.[94] *Cianfrani* held that the press, by virtue of the strong public interest in open proceedings, had standing under the public trial provision of the Sixth Amendment to challenge the trial court's closure of a pretrial suppression hearing. Justice Blackmun followed the contours of the *Cianfrani* opinion but also took it one step further. He concluded that the Sixth Amendment conferred up to the public not merely a litigable interest, but a direct constitutional right of access.[95] He also found that modern pretrial suppression hearings were "the close equivalent of the trial on the merits"[96] and that the Public Trial Clause, therefore, included such proceedings.[97]

In retrospect, *Gannett* has acquired the aura of a judicial "slip-and-fall," a quirky case that simply caught the Justices off stride in their ongoing reaction to an insistent, yet compelling, quest for political access.[98] However, at the moment of decision, it appeared to be the equal of the Supreme Court's other one-vote majorities, like *Branzburg* and *Houchins*, which effectively foreclosed the development of a public right-of-access doctrine.[99] What was perhaps most striking about the *Gannett* opinions was their virtual dismissal of the First Amendment claim to access.[100] The majority opinion merely concluded that

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93. "I believe the specific guarantees of the Sixth Amendment are personal to the accused. . . ." Faretta v. California, 422 U.S. 806, 848 (1975).

94. 573 F.2d. 835 (3d Cir. 1978).

95. *Gannett*, 443 U.S. at 446.

96. *Id.* at 436.

97. *Id.*

98. *See, e.g.*, James C. Goodale, Gannett: *Loopholes May Send Case Way of Court's Other Aberrations*, NAT'L L.J., Aug. 13, 1979, at 56.

99. One noted commentator, writing shortly after *Gannett* was decided, concluded that "the public's 'right-to-know' is not emerging, but is rather likely to continue to be submerged in dicta and dissenting opinions." David M. O'Brien, *The First Amendment and the Public's "Right-to-Know"*, 7 HASTINGS CONST. L.Q. 579, 630 (1980).

100. The Justices were not alone in their apparent sense that pursuing the First Amendment claim was no longer a promising endeavor. Immediately prior to the Court's decision in *Gannett*, the American Bar Association released its revised standards for courtroom closures. The new standards took a very pro-access position, equating closure with a prior restraint on the press and utilizing a First Amendment formula of restriction, yet argued that the revised standards were grounded in the

if there were such a right, it had been satisfied by the modest findings of the trial judge.[101] But Justice Blackmun's dissent arguably went even further. His opinion appeared designed to enhance the propriety of his Sixth Amendment approach to trial access by disavowing the pertinence of the First Amendment claim to such access. Although he claimed that he "need not reach the issue of First Amendment access,"[102] he also made it clear that he saw nothing to be gained by that approach. He referred to the petitioner's argument that the public and press had a First Amendment right to gather information protected by the right to publish, and retorted: "I do not agree. . . . [T]his case involves no restraint upon publication. . . . It involves an issue of access to a judicial proceeding."[103] Indeed, he appeared to affirm the rejection of the First Amendment approach, stating:

> This Court heretofore has not found, and does not today find, any First Amendment right of access to judicial or other governmental proceedings. . . . One turns then, instead, to that provision of the Constitution that speaks most directly to the question of access to judicial proceedings, namely, the public trial provision of the Sixth Amendment.[104]

It therefore appeared at least temporarily settled that the First Amendment provided scant claim to access to governmental information, even when generated within a much-revered institution originally designed for *compulsory* public attendance.[105]

The critical reaction to *Gannett*, though perhaps predictable, was exceptionally strident. The *New York Times* immediately accused the Court of "endorsing secrecy,"[106] and the academic journals soon followed suit.[107] The public counterreaction of

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public trial provision of the Sixth Amendment. ABA STANDARDS FOR CRIMINAL JUSTICE, Standard 8-3.2 (1979).

101. "[T]his putative right was given all appropriate deference by the state *nisi prius* court in the present case." Gannett Co. v. DePasquale, 443 U.S. 368, 392 (1978).

102. *Id.* at 447.

103. *Id.*

104. *Id.* at 411.

105. *Id.* at 368.

106. *Private Justice, Public Injustice*, N.Y. TIMES, July 5, 1979, at A16.

107. Justice Blackmun later made pointed reference to some of this literature.

the Justices themselves, however, was even more extraordinary. *Gannett* was decided in early July, 1979. By the end of that summer, in direct response to the immediate "tide of criticism"[108] sweeping over the Court, four individual justices had made exceptional, and exceptionally defensive, extrajudicial statements in the public forum.[109] Then, in October, Justice Brennan contributed the most extended public response to *Gannett* in an address that was subsequently published.[110] Indeed, the unprecedented outpouring of reaction on all sides has been viewed as distinctly cathartic and ultimately transformative of First Amendment doctrine. Several noted Court commentators have even concluded that the regeneration of First Amendment doctrine occasioned the following year in *Richmond Newspapers* would not have occurred without the seeming death blows delivered by *Gannett*.[111] And, as if the popular reaction in print were not generating sufficient heat, there was the dramatic response of the trial courts across the nation to the new closure mandates of *Gannett*. Prior to *Gannett*, there were apparently no reported instances of complete trial or suppression hearing closures.[112] But in an informal survey that began with the date of the *Gannett* decision, it was revealed that within the following year there were at least 272 motions made to close some portion of a criminal case, and that 146 of them were granted. Moreover, forty-seven of these motions had been directed at the trial itself, and thirty-three of them granted.[113]

Richmond Newspapers v. Virginia, 448 U.S. 555, 602 n.1 (1980).

108. Reznek, *supra* note 67, at 114 n.66.

109. The four justices were: Justice Burger, N.Y. TIMES, Aug. 18, 1979, at 18; Justice Powell, N.Y. TIMES, Aug. 14, 1979, at 13; and Justices Blackmun and Stevens, N.Y. TIMES, Sept. 9, 1979, at 41.

110. Justice William J. Brennan, Jr., Address at the Dedication for the S.I. Newhouse Center for Law and Justice (Oct. 17, 1979), *in* 32 RUTGERS L. REV. 173 (1979).

111. Cox, *supra* note 6, at 24 ("To correct an unwarranted departure from 'our system of justice'—and perhaps to escape further pummeling by the press—the Court was drawn into creating yet another new federal constitutional right."); Anthony Lewis, *A Public Right-to-Know About Public Institutions: The First Amendment as Sword*, 1980 SUP. CT. REV. 1, 14 ("I am convinced . . . that Gannett in fact helped significantly to create the conditions for Supreme Court acceptance of a doctrine of public access to public institutions under the First Amendment.").

112. "If any such cases exist, which is doubtful, they are few indeed." Gannett Co. v. DePasquale, 443 U.S. 368, 431 (1979) (Blackmun, J., dissenting).

113. THE REPORTER'S COMMITTEE FOR FREEDOM OF THE PRESS, COURT WATCH SUM-

Exactly one week after the decision in *Gannett*, the Virginia Supreme Court relied upon it to uphold the closure order of the trial court in Hanover County, Virginia, which had excluded the Richmond Newspapers reporters from the fourth murder trial of John Paul Stephenson. This otherwise obscure case, with no reported opinion by any lower court, thus entered upon a fast track to the Supreme Court. Notice of appeal from the July 9, 1979 Virginia Supreme Court ruling was filed on August 13, 1979;[114] the case was argued the following February; and, perhaps not entirely by coincidence, the decision was released exactly one year to the day after the decision in *Gannett*. The seven-to-one[115] reversal of the closure order in *Richmond Newspapers*, relying entirely upon the First Amendment, represented an extraordinary reevaluation by, and realignment of, the Court on the issue of access. It was, as Justice Stevens described it, "a watershed case."[116] Thus, within the space of a single year, *Richmond Newspapers* did for *Gannett* what *Sullivan*[117] had done for *Chaplinsky*,[118] and what *Grosjean*[119] had done for *Schenck*:[120] it restructured the core meaning of the First Amendment to advance the central political purposes of the Constitution. The shield of the First Amendment had for the first time developed a cutting edge.[121]

MARY (Aug. 1980).

114. The Supreme Court was to decide later that, although appellate jurisdiction did not lie, the notice of appeal would be treated as a petition for certiorari, and the case was properly before it. Richmond Newspapers v. Virginia, 448 U.S. 555, 562 (1980).

115. Only Justice Rehnquist dissented. *Id.* at 604.

116. *Id.* at 582 (Stevens, J., concurring).

117. New York Times v. Sullivan, 376 U.S. 254 (1964) (holding that prosecution for seditious libel is inconsistent with the central protection of the First Amendment).

118. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (holding that libel is not within the protection of the First Amendment).

119. Grosjean v. American Press Co., 297 U.S. 233 (1936) (holding that the central purpose of the First Amendment is to protect informed public opinion, which is broader than protecting against prior restraints).

120. Schenck v. United States, 249 U.S. 47 (1919) (holding that the central purpose of the First Amendment is to protect against prior restraints).

121. *Cf.* Lewis, *supra* note 111.

D. *The* Richmond Newspaper *Doctrine: A Quick Measure*

We will return to *Richmond Newspapers* in the following section to provide a close reading of the remarkable, yet under appreciated, new theory of First Amendment access adopted by the Supreme Court. But it will presently serve our purposes to focus on, and underscore, the truly "watershed" quality of this case by first taking a quick look at the actual doctrine which has spilled forth in little more than a decade. Neither the individual cases nor the scant literature on the new right adequately reveal the extraordinary character of the doctrinal transformations wrought by *Richmond Newspapers*.

There are three aspects to the emerging doctrine worth summarizing. The first is the forceful, yet short-lived, role of the Supreme Court in guiding the doctrine. The Court quickly decided three more access cases which confirmed, but did not significantly expand, the new right. Since 1986, however, the Court has abandoned the field to the initiatives of the lower courts. The second aspect of significance is the extraordinary expansion of the new right of access by the lower courts. The cases quickly extended the new right to virtually all legal proceedings, civil as well as criminal, and then to the multivarious documents attendant to those proceedings. The courts have floundered, however, in their various attempts to extend the right of access to non-judicial proceedings or documents. The third aspect of the doctrine worth highlighting is the expanding dissonance of the contemporary laws of access. There are now multiple bodies of access law, none of which are internally settled or externally consistent with one another. As one circuit court remarked, judges confronted with a claim to access are now required to enter a "legal minefield"[122] of conflicting and overlapping laws.

1. The Supreme Court Cases

Since *Richmond Newspapers*, the Supreme Court has decided only three First Amendment access cases and one closely relat-

122. Federal Sav. & Loan Ins. Corp. v. Blain, 808 F.2d 395, 399 (5th Cir. 1987).

ed Sixth Amendment public trial case.[123] Although these cases did verify the Court's commitment to the abruptly promulgated right of access, they only marginally expanded the scope of the right. Essentially, the successor cases merely extended *Richmond Newspaper's* critical concept of the "criminal trial" to several closely related criminal proceedings.

The first case was *Globe Newspaper Co. v. Superior Court.*[124] In *Globe*, the defendant was charged with the rape of three minor girls. Pursuant to a state statute, the trial court closed the courtroom during the trial testimony of the minor victims. The Massachusetts Supreme Court found that the closure presented an exception to the *Richmond Newspapers* right of access because the state's historical practice had been to require closure during such testimony. The Supreme Court held that the *mandatory* closure provision violated the First Amendment. The Court found that the right of access applied to *all* criminal trials, regardless of any particularized closure practices,[125] and emphasized the state's heavy burden to demonstrate a "compelling governmental interest"[126] to support closure. *Globe* was noteworthy because it produced the first opinion for the Court on the First Amendment right of access. That opinion was written by Justice Brennan, immediately establishing him as the principal exponent of the new right. The case was also noteworthy for its explicit and controversial disregard for the traditional practice of closing the testimony of minor rape victims.[127]

The next case was *Press-Enterprise Co. v. Superior Court (I).*[128] This case involved the capital trial of a defendant charged with the rape-murder of a teenage girl. The trial court had closed the courtroom during the individual voir dire of the prospective jurors. The Court held that the *Richmond* right applied to the voir dire since "[t]he process of jury selection is

123. The Supreme Court has also issued a summary reversal of a Puerto Rico statute that required the closure of a preliminary hearing at the defendant's request. El Vocero De Puerto Rico v. Puerto Rico, 113 S. Ct. 2004 (1993).

124. 457 U.S. 596 (1982).

125. *Id.* at 605 n.13.

126. *Id.* at 606-07.

127. Chief Justice Burger wrote a stinging dissent on this point. *Id.* at 612-13.

128. 464 U.S. 501 (1984).

itself a matter of importance, not simply to the adversaries but to the criminal justice system."[129] Chief Justice Burger wrote the opinion for a unanimous court and returned to a principled reliance on the specific historical tradition of open jury selection.[130]

The fourth and last of the Supreme Court cases bore the same name as the third. *Press-Enterprise Co. v. Superior Court (II)*[131] involved a nurse charged with the murder by poisoning of twelve patients. The trial court closed the courtroom during the forty-one-day preliminary hearing. The California Supreme Court held that the *Richmond* right applied "only to actual criminal trials."[132] The Supreme Court held, in an opinion again by Chief Justice Burger, that the preliminary hearing in California was "sufficiently like a trial to justify the same conclusion"[133] and therefore found that the closure violated the First Amendment.

The Supreme Court has never directly returned, since its controversial decision in *Gannett Newspapers*, to the issue of the right of access to a suppression hearing in a criminal case. However, it did do so indirectly in *Waller v. Georgia*.[134] In *Waller* the trial court had closed the courtroom over the defendant's objection during a seven-day suppression hearing concerning the state's wiretap evidence. The Supreme Court held this closure violated the defendant's Sixth Amendment right to a public trial, finding that "suppression hearings often are as important as the trial itself."[135] The Court then expressly announced that the Sixth Amendment standard for closure of a suppression hearing was identical to the First Amendment standard of the *Richmond Newspapers* line of cases.[136] Therefore, although no single case has expressly done so, the combination of *Richmond Newspapers* and *Waller* has effectively overruled *Gannett*.

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129. *Id.* at 505.
130. *Id.*
131. 478 U.S. 1 (1986).
132. *Id.* at 5.
133. *Id.* at 12.
134. 467 U.S. 39 (1984).
135. *Id.* at 46.
136. *Id.* at 47.

2. The Lower Court Cases

The holding in *Richmond Newspapers*, in removing the doctrinal barrier to recognizing a public right of access to governmental information, operated like the finger removed from the dike. There was an immediate and unrestrained rush of lower court case law that appeared to move simultaneously in all directions. It is not feasible to reduce this explosion of case law to any simple paradigm of development. But it is possible at least to characterize the terminological stages of expansion. The first stage simply carried forward the work of the Supreme Court cases in extending the right of access beyond the "trial" itself to virtually every legal "proceeding."[137] The next stage was represented by the extension of the concept of a legal proceeding to include all the "related" documents, papers, and exhibits.[138] The third stage has been represented by the lower courts' continuing failed attempts to extend the right beyond legal proceedings and documents to various forms of non-judicial governmental information. It will be possible here only to illustrate by example these various stages of the case law.

The cases have extended the *Richmond* right of access to the following legal proceedings: suppression hearings;[139] bail hearings;[140] sentencing hearings;[141] change of venue hearings;[142] plea hearings;[143] contempt proceedings;[144] pretrial

137. "It makes little sense to recognize a right of public access to criminal courts and then limit that right to the trial phase of a criminal proceeding, something that occurs in only a small fraction of criminal cases." New York Times v. Biaggi (I), 828 F.2d 110, 114 (2d Cir. 1987). "Because the taking of a guilty plea serves as a substitute for a trial, it may reasonably be treated in the same manner as a trial for First Amendment purposes." Washington Post Co. v. Soussoudis, 807 F.2d 383, 389 (4th Cir. 1986).

138. "There is no reason to distinguish between pretrial proceedings and the documents filed in regard to them. Indeed, the two principal justifications for the first amendment right of access to criminal proceedings apply, in general, to pretrial documents." Associated Press v. United States Dist. Court, 705 F.2d 1143, 1145 (9th Cir. 1983).

139. Herald Co. v. Klepfer, 734 F.2d 93 (2d Cir. 1984); United States v. Brooklier, 685 F.2d 1162 (9th Cir. 1982).

140. United States v. Chagra, 701 F.2d 354 (5th Cir. 1983).

141. United States v. Byrd, 20 Media L. Rep. (BNA) 1804 (D.S.C. 1992).

142. Charlotte Observer v. Bakker, 882 F.2d 850 (4th Cir. 1989).

143. Washington Post Co. v. Soussoudis, 807 F.2d 383 (4th Cir. 1986).

144. *In re* Iowa Freedom of Info. Council, 724 F.2d 658 (8th Cir. 1983).

ex parte recusal proceedings;[145] post-conviction proceedings;[146] parole revocation hearings;[147] parole release hearings;[148] executions;[149] bench conferences;[150] chambers conferences;[151] juvenile proceedings;[152] courts martial;[153] civil case proceedings;[154] preliminary injunction proceedings;[155] and, to be sure, closure proceedings.[156]

The cases have also extended the First Amendment right of access to the following documents: indictments;[157] all motion documents;[158] all pretrial documents;[159] post-trial documents;[160] closed criminal case files;[161] trial exhibits;[162] recusal motion documents;[163] plea hearing documents;[164] sealed plea agreements;[165] bail hearing documents;[166] submitted Criminal Justice Administration (CJA) forms;[167] affidavits of already-executed search warrants;[168] jury lists;[169] juror

145. Storer Communications v. Presser, 828 F.2d 330 (6th Cir. 1987).
146. CBS, Inc. v. United States Dist. Court, 765 F.2d 823 (9th Cir. 1985).
147. Herald Co. v. Board of Parole, 499 N.Y.S.2d 301 (N.Y. Sup. Ct. 1985).
148. Newman v. Graddick, 696 F.2d 796 (11th Cir. 1983).
149. KQED, Inc. v. Vasquez, 18 Media L. Rep. (BNA) 2323 (N.D. Cal. 1991); *see* William B. & Beth S. Brinkmann, *Televising Executions: The First Amendment Issues*, 32 SANTA CLARA L. REV. 1135 (1992).
150. United States v. Valenti, 987 F.2d 708 (11th Cir. 1993) (holding that the conference itself may be closed, but the transcript of the conference must be released at the earliest reasonable point). *But see* United States v. Edwards, 823 F.2d 111 (5th Cir.), *reh'g denied*, 828 F.2d 772 (5th Cir. 1987), *cert. denied sub. nom.* Times-Picayune Pub. Corp. v. Edwards, 485 U.S. 934 (1988); United States v. Moody, 746 F. Supp. 1090 (M.D. Ga. 1990).
151. CNN v. United States, 824 F.2d 1046 (D.C. Cir. 1987); United States v. Smith, 787 F.2d 111 (3d Cir. 1986).
152. *In re* Chase, 446 N.Y.S.2d 1000 (N.Y. Fam. Ct. 1982).
153. United States v. Hershey, 20 M.J. 433 (C.M.A. 1985).
154. Publicker Indus., Inc. v. Cohen, 733 F.2d 1059 (3d Cir. 1984).
155. Stanley Works v. Newell Co., 21 Media L. Rep. (BNA) 1120 (D. Conn. 1993).
156. Storer Communications, Inc. v. Presser, 828 F.2d 330 (6th Cir. 1987).
157. United States v. Smith, 776 F.2d 1104 (3d Cir. 1985).
158. New York Times v. Biaggi, 828 F.2d 110 (2d Cir. 1987), *cert. denied*, 485 U.S. 977 (1988).
159. Associated Press v. United States Dist. Court (DeLorean), 705 F.2d 1143 (9th Cir. 1983).
160. CBS v. United States Dist. Court, 765 F.2d 823 (9th Cir. 1985).
161. Globe Newspaper Co. v. Fenton, 819 F. Supp. 89 (D. Mass. 1993).
162. United States v. Peters, 754 F.2d 753 (7th Cir. 1985).
163. Storer Communications, Inc. v. Presser, 828 F.2d 330 (6th Cir. 1987).
164. *In re* Washington Post Co., 807 F.2d 383 (4th Cir. 1986).
165. United States v. Haller, 837 F.2d 84 (2d Cir. 1988).
166. Seattle Times Co. v. United States Dist. Court, 845 F.2d 1513 (9th Cir. 1988).
167. United States v. Suarez, 880 F.2d 626 (2d Cir. 1989).
168. *In re* Search Warrant, 855 F.2d 569 (8th Cir. 1988).

questionnaires;[170] appellate briefs;[171] and all documents in a civil suit.[172]

The lower courts have been much less successful in extending the right of access to non-judicial proceedings or documents. Several cases have held straightforwardly that the First Amendment right of access does not extend to government information outside the Judicial Branch.[173] The seminal case that appears to find a First Amendment right of access to executive information involved the very narrow issue of a broadcaster's right to *equal* access to cover certain "limited coverage" events at the White House.[174] Subsequent cases, although ultimately vacated or reversed on appeal, have initially found a right of access to the following governmental information: judicial review board proceedings;[175] federal administrative fact-finding hearings;[176] state legislative meetings;[177] city council meetings;[178] and governor's executive travel

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169. *In re* Globe Newspaper Co. v. Hurley, 920 F.2d 88 (1st Cir. 1990). *But see* United States v. Edwards, 823 F.2d 111 (5th Cir. 1987) (holding that the First Amendment was not violated by redaction of juror names from transcript), *reh'g denied*, 828 F.2d 772, *cert. denied*, 485 U.S. 934 (1988).

170. United States v. George, 20 Media L. Rep. (BNA) 1511 (D.D.C. 1992).

171. *In re* Grand Jury Proceedings, 983 F.2d 74 (7th Cir. 1992), *cert. denied*, 62 U.S.L.W. 3551 (1994).

172. Johnson v. Turner Constr. Co., 598 N.E.2d 406 (Ill. App. Ct. 1992).

173. The leading case is Capital Cities Media v. Chester, 797 F.2d 1164 (3d Cir. 1986) (en banc) (state environmental agency records); *see also* ACLU of Miss. v. Mississippi, 911 F.2d 1066 (5th Cir. 1990) (records of state agency dedicated to maintaining racial segregation); Calder v. I.R.S., 890 F.2d 781 (5th Cir. 1989) (I.R.S. records of Al Capone); Combined Communications Corp. of Okla., Inc. v. Boger, 689 F. Supp. 1065 (W.D. Okla. 1988) (NCAA letter of inquiry to state college); Dean v. Guste, 414 So. 2d 862 (La. Ct. App.) (school board executive session), *cert. denied*, 459 U.S. 1070 (1982).

174. CNN v. ABC, 518 F. Supp. 1238 (N.D. Ga. 1981); *see also* WPIX, Inc. v. League of Women Voters, 595 F. Supp. 1484 (S.D.N.Y. 1984) (right of equal access to presidential debates).

175. First Amendment Coalition v. Judicial Inquiry & Review Bd., 579 F. Supp. 192 (E.D. Pa. 1984), *vacated*, 784 F.2d 467 (3d Cir. 1986).

176. Society of Professional Journalists v. Secretary of Labor, 616 F. Supp. 569 (D. Utah 1985), *vacated*, 832 F.2d 1180 (10th Cir. 1987).

177. League of Women Voters v. Adams, 13 Media L. Rep. (BNA) 1433 (Alaska Super. Ct. 1986) (holding based on Alaska state constitution but relying upon *Richmond Newspapers* doctrine), *rev'd sub. nom.* Abood v. League of Women Voters, 743 P.2d 333 (Alaska 1987).

178. WJW-TV, Inc. v. City of Cleveland, 686 F. Supp. 177 (N.D. Ohio 1988), *vacated*, 878 F.2d 906 (6th Cir.) (per curiam), *vacated*, 870 F.2d 658, *cert. denied*, 110 S.Ct. 74 (1989).

records.[179] Therefore, it is a fair summary of the doctrine to state that the First Amendment right of access has been extended to almost every variety of legal proceeding or document, but it has *not* been so extended beyond the courthouse.

3. The Mounting Dissonance

Despite the overwhelming trend of the case law to expand the reach of the public right of access, the path has not been smooth. There are several varieties of dissonance within the contemporary law of access. One area of confusion derives simply from the indefinite, inchoate character of the doctrine. As will be developed more fully in the next section, the Supreme Court cases have relied upon "two complementary considerations"[180] as the structural bases for finding a First Amendment right of access to designated information. The first is a tradition of openness ("history" prong), and the other is the instrumental utility of access to proper governmental functioning ("functional" prong). This two-prong test adequately served the Supreme Court's construction of a right of access to the venerable institution of the American criminal jury trial. But the test has not traveled well. In most respects, it fails to justify the extraordinary extension of the right of access to proceedings and documents with no real history of access and no real utility to the governing process.[181] Many courts have in fact quite explicitly forsaken the two-prong standard while at the same time extending the right.[182]

The overly qualified definition of the First Amendment right of access has contributed to the parallel development of alternative bodies of access law. This has provided another dimension of dissonance, for there are now multiple sources of access law

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179. El Dia, Inc. v. Colon, 783 F. Supp. 15 (D.P.R. 1991), *rev'd*, 963 F.2d 488 (1st Cir. 1992).

180. Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 8 (1986).

181. "[T]he (two-prong) test is seriously flawed, for it both abandons the Court's established approach to First Amendment adjudication and bears little relation to the underlying rationale for the right of access." Michael J. Hayes, Note, *What Ever Happened to the "Right-to-Know"?: Access to Government-Controlled Information Since* Richmond Newspapers, 73 VA. L. REV. 1111, 1112 (1987).

182. *See, e.g.*, United States v. Chagra, 701 F.2d 354, 363 (5th Cir. 1983) ("the lack of an historic tradition . . . does not bar . . . a right of access").

with no clear correspondence among them. The law is now something of an amalgam of federal constitutional law, state constitutional law,[183] federal statutory law,[184] state statutory law;[185] federal common law;[186] and state common law.[187] Different courts have almost arbitrarily relied upon different bodies of law to resolve common issues of access, often arriving at different results.[188]

A poignant illustration of this doctrinal dissonance occurs when courts find that an inferior body of law effectively prevails over the First Amendment law of access. For instance, the press often learns, only after the fact, that a legal proceeding has been conducted in secret. The press then brings a claim of access to the transcript of the proceeding, claiming a First Amendment right of access to the proceeding as such. Under these circumstances, some courts have concluded that although the claimant did have a constitutionally protected right to attend the proceeding itself, the claimant has only a common law right to see the transcript of that proceeding. Therefore, a claimant who is constitutionally entitled to access to information presented at a proceeding, yet denied access to that pro-

183. *See, e.g., In re* Keene Sentinel, 612 A.2d 911 (N.H. 1992) (N.H. CONST. pt. I, art. VIII); Oregonian Publishing Co. v. O'Leary, 736 P.2d 173 (Or. 1987) (OR. CONST. art. I, sec. 10); Allied Daily Newspapers v. Eikenberry, 848 P.2d 1258 (Wash. 1993) (WASH. CONST. art. I, § 10). Florida will remain at the cutting edge of access law with the recent passage of an "open government" constitutional amendment.

184. *See, e.g.*, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, LITIGATION UNDER THE FEDERAL OPEN GOVERNMENT LAWS.

185. *See, e.g.*, John J. Watkins, *Open Meetings Under the Arkansas Freedom of Information Act*, 38 ARK. L. REV. 268 (1984).

186. Nixon v. Warner Communications, Inc., 435 U.S. 589, 589 (1978) (holding that while "courts of this country recognize a general right to inspect and copy public records and documents, . . . the right to inspect and copy judicial records is not absolute.").

187. Commonwealth v. Fenstermaker, 530 A.2d 414 (Pa. 1987).

188. The most notorious example of this was the varying responses of the federal circuit courts to nationwide claims of access to search warrant affidavits filed under seal as part of a nationwide criminal investigation. *Compare In re* Search Warrant, 855 F.2d 569 (8th Cir. 1988) (holding that refusal to unseal documents was justified by compelling government interest), *cert. denied*, 496 U.S. 931 (1990); Baltimore Sun Co. v. Goetz, 886 F.2d 60 (4th Cir. 1989) (stating the proposition that only a qualified common law right of access exists) *with In re* Newsday, Inc., 895 F.2d 74 (2d Cir.) (finding a common law right to access obviates the need to look to the First Amendment), *cert. denied*, 496 U.S. 931 (1990) *and* Times Mirror Co. v. United States, 873 F.2d 1210 (9th Cir. 1989) (holding that neither a First Amendment nor a common law right to access exists).

ceeding, may nonetheless be denied access to the transcript of that information because a lesser standard of closure is applied to documents.[189] This result makes little sense and highlights the kind of structural defect in the doctrine that must be addressed prior to the next generation of case law.

III. THE NEW THEORY OF ACCESS

Concerning the abrupt turnaround by the Supreme Court from *Gannett* to *Richmond Newspapers*, one sage commentator has noted that, "[n]ot since Gertrude has anyone posted with such dexterity from one set of sheets to another."[190] Indeed, even the very dexterity of this doctrinal passing has been open to question.[191] For in *Richmond Newspapers*, the Supreme Court arguably ignored, rather than informed, traditional First Amendment doctrine in its efforts to escape the cul-de-sac of its own access rulings. The Court accomplished this extraordinary transformation by turning to a popular, yet constitutionally novel, theory of self-government. This theory was loosely adapted, without explicit or consistent elaboration, from a set of classical republican ideas commonly associated with the writings of the political scientist and educator, Alexander Meiklejohn, and other advocates of a people's right-to-know.[192]

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189. A striking example of this occurred with respect to the trial court's handling of press claims to access to the transcripts of intercepted tape recordings of the defendant General Noriega. The transcripts were admitted at a previous hearing on a motion to enjoin the broadcasting of the tapes themselves.

> The court notes at the outset that the press has no First Amendment right of access to the transcripts at issue. Although the press and public have a First Amendment right of access to criminal trials, the right of access to judicial records is not of constitutional dimension but rather derives from common law. Thus, in contrast to the compelling justification required for closure of criminal trials, the trial court has broad latitude where only the common-law right of access to court records is implicated.

United States v. Noriega, 752 F. Supp. 1037, 1040 (S.D. Fla. 1990) (citations omitted); *see also* People v. Glogowski, 517 N.Y.S.2d 403 (1987) (constitutional right of access to videotapes played at hearing extends only to actual in-court viewing; lesser common law right of access applies to subsequent viewing and copying).

190. Lewis, *supra* note 111, at 1 (citing WILLIAM SHAKESPEARE, HAMLET act 1, sc. 2).

191. Perhaps the most cogent, as well as the most pungent, criticisms of the opinions in the case may be found in BeVier, *supra* note 6.

192. *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOV-

While these political ideas were certainly resonant within the subtext of First Amendment doctrine, they had the benefit of almost no explicit legal recognition or adaptation. They were nonetheless ideas whose time had apparently come.

A. *Richmond Newspapers*

Richmond Newspapers was certainly a groundbreaking judicial assertion, yet one that spoke with many conflicting voices.[193] Despite the apparent inability to recognize a constitutional right of access in the earlier First Amendment case law,[194] seven of the Justices in *Richmond Newspapers* found that the First Amendment required a reversal of the trial closure order.[195] Only Justice Rehnquist dissented. Seven of the eight Justices who participated in the decision wrote separately.[196] Chief Justice Burger's plurality opinion was joined by only two other Justices. Justice Brennan's concurring opinion, which was subsequently to become the actual touchstone for the new doctrine of access,[197] was joined by only one other Justice. Chief Justice Burger insisted that the case involved merely a

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ERNMENT (1948), *quoted in* Hayes, *supra* note 181, at 1113 n.14.

193. "Despite the near unanimity of the result in *Richmond Newspapers*, the Court was unable to present even the facade of a unifying rationale." BeVier, *supra* note 6, at 313.

194. Even the attorney who conducted the oral argument on behalf of Richmond Newspapers before the Supreme Court began his presentation by arguing the Sixth Amendment grounds for reversal until Justice Stewart suggested that he move on to his First Amendment argument. Oral Arguments at 19, Richmond Newspapers v. Virginia, 448 U.S. 555 (1980) (No. 79-243).

> Justice Stewart: Mr. Tribe, surely, did you rely—I know you rely here, and I assume you relied in the Virginia courts, on the First Amendment as well.
>
> Mr. Tribe: I'm about to turn to that.
>
> Justice Stewart: Well, I hope you will.

Id.

195. Justice Powell did not take part in the consideration of the case, although he had indicated in his concurring opinion in *Gannett* that he did recognize a press right of access within the First Amendment. Gannett Co. v. DePasquale, 443 U.S. 368, 397 (1979) (Powell, J., concurring).

196. Only Justice Marshall, who joined the concurring opinion of Justice Brennan, did not write separately.

197. "Of more lasting importance than the Chief Justice's opinion was the concurrence of Justice Brennan, which became the foundation for subsequent decisions in this area." Hayes, *supra* note 181, at 1117.

"narrow question,"[198] while Justice Stevens declared it to be nothing less than a "watershed case."[199] The case produced a quick, although brief, flurry of critical commentary, most of which applauded the holding but characterized the opinions as "unclear,"[200] "fail[ing] to articulate a rule,"[201] and "generat[ing] intractable problems of interpretation."[202]

The opinions in *Richmond Newspapers* certainly invite critical examination at a variety of levels, yet much of this work is already accomplished and need not be extended here.[203] What is of critical concern for present purposes, however, is to identify the essential legal innovation which enabled the Court to elevate its holding beyond the restraints of its own recent and emphatic precedents. For this purpose, it is possible to restrict our investigation to the two principal opinions in the case—those of Chief Justice Burger and Justice Brennan. And here we see that the critical element behind the *Richmond Newspapers* holding is a revised characterization of the American criminal jury trial as a public institution with a political mandate impliedly guaranteed by the very structural design of the Constitution.

The opinions of Chief Justice Burger and Justice Brennan have been duly noted for their ultimately disparate treatment of the issue of trial access.[204] But at first glance, the opinions are strikingly similar. Each opinion, for example, is remarkable for its almost insouciant disregard of precedent,[205] leading to the dissenting barb by Justice Rehnquist that the jurisprudential tone of the opinions was best expressed in a Gilbert and Sullivan operetta.[206] More positively, each opinion is outlined by the same two interrelated concepts: the history and the

198. 448 U.S. at 558.

199. *Id.* at 582.

200. Note, *supra* note 6, at 157.

201. Reznek, *supra* note 67, at 127.

202. BeVier, *supra* note 6, at 314.

203. *See id.*; Cox, *supra* note 6; Craig H. Lubben, Note, *First Amendment—Constitutional Right of Access to Criminal Trials*, 71 J. CRIM. L. & CRIMINOLOGY 547 (1980); Reznek, *supra* note 67; Note, *supra* note 6.

204. Note, *supra* note 6, at 153.

205. "[T]he prison access cases fairly cry out for reconciliation." BeVier, *supra* note 6, at 322. "Surely, some effort to explain the relation between the decision in *Richmond Newspapers* and those earlier cases was required." Cox, *supra* note 6, at 26.

206. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 604 (1980).

instrumental utility of open trials. Indeed, the two opinions give every appearance of having been written decidedly with the other in mind. Each covers much the same ground but with a radically different purpose, and ultimately, each appears to suffer from an overextended effort to capture, or reconstruct, the principal arguments of the other. To be sure, Chief Justice Burger's opinion, which relies principally on the limiting factor of tradition, makes an unsuccessful attempt to tie in that factor with the arguments of instrumental utility. Conversely, Justice Brennan's opinion relies almost entirely on the more unlimiting factor of the instrumentalism of open trials, yet exhibits precisely the corresponding flaw of overinclusion. Regardless of whatever dialectical tides may have urged this apparent convergence of such opposing approaches, the opinions did create a sufficiently stable groundwork to support the almost unanimous backing of the Justices, as well as the enthusiastic support of the new doctrine by the lower courts.

Chief Justice Burger's plurality opinion essentially treats the American criminal jury trial as a historically and politically unique governmental institution, which by tradition and nature abhors closure. The first major section of his opinion marshalls the historical evidence to support the finding that "a presumption of openness inheres in the very nature of a criminal trial under our system of justice."[207] However, the opinion concedes that the tradition of open trials, by itself, does not establish a constitutional right to attend such proceedings.[208] The other major section of the opinion is therefore directed at establishing that the historical record reveals an "implicit"[209] legal recognition of such a right in order to guarantee the specifically enumerated First Amendment rights of speech, press, and assembly. "The Bill of Rights was enacted against the backdrop of the long history of trials being presumptively open."[210] Chief Justice Burger states that "it is not crucial"[211] how this right is labeled, but he refers to it throughout as merely a "right to

207. *Id.* at 573.
208. *Id.* at 575.
209. *Id.* at 580.
210. *Id.* at 575.
211. *Id.* at 576.

attend"[212] criminal trials. His opinion insists that the right is a "narrow question"[213] limited to the spatial contours of a historical "right of visitation" apparently retained by the people.[214]

Justice Brennan's opinion also contains two major sections dealing separately with the history and functional utility of open trials. But these two sections are preceded by a section of critical import that reveals the more fundamental basis for the opinion's declaration that the public enjoys a constitutional right of access to criminal trials.

Justice Brennan begins by dismissing all prior First Amendment precedents that appear to reject any affirmative right of access to government information.[215] He then points out that while traditional First Amendment doctrine focuses on shielding the freedom of communication between speaker and listener, this is not a necessary limitation on the constitutional reach of that amendment. For "the First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a *structural* role to play in securing and fostering our republican system of self-government."[216] Justice Brennan thereby announced the critical new theory of public entitlement guaranteed, by the First Amendment, that enabled recognition of a public right of access that transcended the speech-based limitations of earlier First Amendment doctrine. This passage is certainly the analytical transition point in Justice Brennan's opinion, yet the legal authority he presents in support of it is curious. He cites only three cases, all from the 1930s, and several scholarly works.[217]

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212. *Id.* at 558, 564, 575, 576, 579, 580.

213. *Id.* at 558.

214. *Id.* at 572.

215. "These cases neither comprehensively nor absolutely deny that public access to information may at times be implied by the First Amendment and the principles which animate it." *Id.* at 586.

216. *Id.* at 587.

217. *Id.* The cited cases are the following: United States v. Carolene Products Co., 304 U.S. 144 (1938); Grosjean v. American Press Co., 297 U.S. 233 (1936); and Stromberg v. California, 283 U.S. 359 (1931). The cited scholarly works are the following: Brennan, *supra* note 110; ELY, DEMOCRACY AND DISTRUST (1980); THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970); MEIKLEJOHN, *supra* note 192; and Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

From this primary assertion of the First Amendment's structural role in fulfilling the political goals of the Constitution, Justice Brennan quickly develops the logic of access. An essential aspect of self-government is public debate, and the "antecedent assumption that valuable public debate—as well as other civic behavior—must be informed."[218] The public, therefore, is affirmatively entitled to access to government-held information on matters of public debate, regardless of any connection to speech-based activity. Having thus established the existence of a public right of access in the very structural design of the Constitution, Justice Brennan then acknowledges that "the stretch of this protection is theoretically endless."[219] The theoretical right of access, therefore, must be balanced against "the opposing interests invaded."[220] This, then, is the proper and limited role of the twin factors of history and instrumental utility. Justice Brennan refers to these factors as "two helpful principles"[221] to guide the balancing analysis of access. A historical tradition of openness serves to identify the demonstrated value of access to certain information, while the utility of access to a given governmental process serves to establish the corresponding absence of worthy opposing interests of government. In the succeeding sections of his opinion, Justice Brennan demonstrates, in a manner not entirely dissimilar to that of Chief Justice Burger, that there is a historical tradition of openness to criminal jury trials as well as a definite utility of public access to "the trial process itself."[222]

Although Chief Justice Burger and Justice Brennan each resorted to an instrumental analysis to conclude that there was an implied public right of access to John Paul Stephenson's trial, the difference in their two approaches is absolutely fundamental to the ultimate scope and legal integrity of the new doctrine of access. There are three separate ways in which the openness of a criminal trial may be said to bear some instrumental utility entitled to constitutional protection. First, openness may serve the interests of the specifically enumerated

218. 448 U.S. at 587.
219. *Id.* at 588 (quoting Brennan, *supra* note 110, at 177).
220. *Id.*
221. *Id.* at 589.
222. *Id.*

First Amendment freedoms by fostering better informed speech and debate. Second, openness may enhance the very performance of the trial process itself. Third, an open trial may serve the informational needs of a self-governing citizenry that is ultimately responsible for the public system of justice; here the goal is not so much informed speech as it is informed suffrage. These three separate forms of instrumentalism were loosely combined in the respective opinions of Chief Justice Burger and Justice Brennan in *Richmond Newspapers*, but they need to be clearly distinguished.

The first example, that of utility to the textual First Amendment freedoms, is essentially the right-to-gather argument. It had arguably been rejected quite emphatically in the access cases described in the previous section.[223] Indeed, it was Chief Justice Burger who concluded in *Houchins v. KQED, Inc.*, that the precommunicative processes of gathering information, even when conducted for the express purpose of press publication, were entitled to no constitutional protection.[224] The second strand of instrumental argument, that of utility to the trial process itself, had similar difficulties. The Court's Sixth Amendment precedents, most notably *Gannett Co. v. DePasquale*,[225] essentially established that the administrative function of openness was intended to be safeguarded by an accused's personal entitlement to a public trial.[226] In *Gannett*, the Court stated that "[i]n an adversary system of criminal justice, the public interest in the administration of justice is protected by the participants in the litigation."[227] Therefore, only the third instrumental argument, that of utility to the structural goal of creating an informed self-governing electorate, provided an independent and uncompromised basis for recognizing a new public right of access to trials.[228]

The introduction of the "structural" argument was Justice Brennan's unique and dispositive contribution to the doctrine of

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223. See *supra* text accompanying note 27.

224. *See* Houchins v. KQED, Inc., 438 U.S. 1 (1978); *see also supra* text accompanying note 61.

225. 443 U.S. 368 (1979).

226. *Id.* at 383-84.

227. *Id.* at 383.

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

access. Chief Justice Burger limited his opinion to the first two instrumental arguments, although he did acknowledge the third.[229] Structuralism as such has not been a mainstay of the instrumentalist canon in any field of jurisprudence; it has been more a concept of political, rather than legal, science. Justice Brennan apparently appreciated this and therefore asserted that deriving rights from the structure of the Constitution is no different from the more accepted practice of implying rights from the actual text.[230] Yet the difference is manifest.[231] The right to vote is the strongest example of a structurally derived right cited by Justice Brennan;[232] however, the early right of suffrage cases indeed relied upon the explicit textual reference to an "election" to derive a constitutionally protected right to vote.[233]

The essential conflict between the opinions of Chief Justice Burger and Justice Brennan in *Richmond Newspapers* is apparent. For Chief Justice Burger, history itself provided the essential characteristic of the American jury trial as an utterly unique public event, while for Justice Brennan, the very political structure of the Constitution was controlling. In stark terms, Justice Burger's approach to access opens no new doors to governmental information.[234] His approach ensures only that access traditionally granted is not lightly denied. In equally stark contrast, Justice Brennan's approach has a "theoretically endless" potential to alter the balance of power over governmental information and it is perhaps the ultimate expression of his individual First Amendment jurisprudence that had been

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229. *Id.* at 571. Chief Justice Burger stated that open trials had "therapeutic" as well as "educational" utility. *Id.*

230. *Id.* at 588 n.4.

231. *See generally* Joseph F. Kobylka & David M. Dehnel, *Toward a Structuralist Understanding of First and Sixth Amendment Guarantees*, 21 WAKE FOREST L. REV. 363 (1986).

232. *Richmond Newspapers*, 448 U.S. at 588 n.4.

233. *See, e.g., Ex parte* Yarbrough, 110 U.S. 651, 662-65 (1884).

234. This, of course, was consistent with Chief Justice Burger's earlier reservations about recognizing a constitutional right of access in Houchins v. KQED, Inc., 438 U.S. 1 (1978). "This Court has never intimated a First Amendment guarantee of a right of access to all sources of information within government control." *Id.* at 9. Chief Justice Burger determined that "[t]here is no discernible basis for a constitutional duty to disclose . . . " *Id.* at 14. The Court then held that "[n]either the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control." *Id.* at 15.

developing over several decades. Justice Brennan's approach posits a political destiny beyond civil liberty, to which the textual freedoms are but handmaidens. First Amendment freedoms are explicitly protected in their own right, but not merely "for their own sakes."[235] The ultimate goal is that of a self-governing democracy. Information itself is essential to the individual autonomy of a self-governing electorate; therefore, information itself is a positive democratic liberty interest affirmatively guaranteed by the Constitution.[236]

The underlying conflict between the two different approaches to access surfaced in the Court's next access case, decided two years after *Richmond Newspapers*. This time, Chief Justice Burger and Justice Brennan found themselves at opposite ends of the holding. *Globe Newspaper Co. v. Superior Court*[237] involved the closure of a Massachusetts trial of a defendant charged with the rape of three minor victims. A state statute *required* that the trial be closed during the testimony of the three teenage women.[238] The Massachusetts Supreme Judicial Court reviewed the constitutionality of the statute in light of *Richmond Newspapers* and upheld the statute because trials for sexual assault were "one notable exception" to the historical tradition of open trials.[239] History was the deciding factor for the state court. The United States Supreme Court reversed, finding the mandatory closure statute unconstitutional on its face.[240] Although the facts in *Globe* were harder than those of *Richmond Newspapers*, the case produced the first majority opinion on the new right of access. Justice Brennan, writing for the Court, once again relied upon the structural theory of representative self-government.[241] Chief Justice Burger wrote a

235. *Richmond Newspapers*, 448 U.S. at 587.

236. *See id.* at 587-88 n.3.

237. 457 U.S. 596 (1982).

238. The trial court had interpreted the statute to require closure of the entire trial, but the Massachusetts Supreme Judicial Court concluded that only the actual testimony of the minor witnesses had to be closed. *Id.* at 599-600.

239. *Id.* at 601 (citing Globe Newspaper Co. v. Superior Court, 423 N.E.2d 773, 778 (1981)).

240. 457 U.S. at 602. The Court held that the mandatory closure rule violated the First Amendment. *Id.*

241. *Id.* at 606. According to Justice Brennan, "in the broadest terms, public access to criminal trials permits the public to participate in and serve as a check upon the judicial process—an essential component in our structure of self-government." *Id.*

vigorous dissent, reaffirming his principal reliance upon the factor of historical practice.[242] Justice Brennan's opinion in *Globe*, therefore, has become the operative authority for the lower courts and the reason why the history prong of the new access doctrine has so quickly faded from prominence.

B. *Justice Brennan: The Critical Contribution*

To comprehend fully the new First Amendment doctrine of access, it is essential to enlarge our understanding of the new structural theory advanced by Justice Brennan, adopted by a majority of the Court, and now significantly extended by the lower courts.

What was novel about Justice Brennan's opinion in *Richmond Newspapers* was not that it appeared to rely upon on essentially political, rather than textual, interpretation of the First Amendment. This corner of constitutional interpretation had long since been turned. Yet, to be sure, the original understanding of the reach of the First Amendment had been avowedly non-political. The original understanding was that the amendment protected no more than the common law doctrine of free speech.[243] The common law protection was limited to freedom from prior restraint.[244] Beginning in the 1930s with some of the cases cited by Justice Brennan, the Court had progressively, if haltingly, expanded First Amendment guarantees by resort to an increasingly political interpretation of the First

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(footnote omitted).

242. *See id.* at 612-20.

243. *See* Robertson v. Baldwin, 165 U.S. 275, 281 (1897) ("The law is perfectly well settled that the first ten amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guarantees and immunities which we had inherited from our English ancestors.").

244. *See* Near v. Minnesota *ex rel.* Olsen, 283 U.S. 697 (1931):

> The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity.

Id. at 713 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES 151, 152) (emphasis added).

Amendment as a revolutionary document *intended* to protect more than the common law.[245]

Stromberg v. California,[246] the lead case cited by Justice Brennan as authority for his structural theory in *Richmond Newspapers*, is a fitting example. The *Stromberg* case involved a California statute prohibiting virtually any public display of a red flag "as a sign, symbol or emblem of opposition to organized government. . . ."[247] The Supreme Court struck down the statute without resorting to prior-restraint or clear-and-present-danger analysis. Instead, the statute was held unconstitutional per se because it prohibited speech on the basis of its seditious content alone.[248] This censoring of political debate was viewed as inconsistent with the political purpose of the First Amendment.[249] Chief Justice Hughes advanced the then-novel view that the freedom of political opposition was itself a political goal of the Constitution and therefore intended to be protected by the First Amendment. According to Chief Justice Hughes, "[t]he maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people . . . is a fundamental principle of our constitutional system."[250] Assertions such as this increasingly began to characterize the Court's more affirmative, expansive interpretation of the First Amendment as a constitutional check on governmental power. Seditious comment, the speech hardly

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245. *See* Bridges v. California, 314 U.S. 252 (1941).

> Ratified as it was while the memory of many oppressive English restrictions on the enumerated liberties was still fresh, the First Amendment cannot reasonably be taken as approving prevalent English practices. On the contrary, the only conclusion supported by history is that the unqualified prohibitions laid down by the framers were intended to give to liberty of the press, as to the other liberties, the broadest scope that could be countenanced in an orderly society.

Id. at 265. Since cases like *Near* and *Bridges*, "[o]ne can hardly imagine a tradition of reasoning about the meaning of the first amendment that did not depend heavily on postulates deriving from democratic theory." Vincent Blasi, *Learned Hand and the Self-Government Theory of the First Amendment*: Masses Publishing Co. v. Patten, 61 U. COLO. L. REV. 1, 36 (1990).

246. 283 U.S. 359 (1931).

247. *Id.* at 361 (citing CAL. PENAL CODE § 403(a) (repealed 1933)).

248. *Id.* at 369-70.

249. *Id.* at 369.

250. *Id.* This passage was also cited by Justice Brennan in New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964).

protected at common law, became the speech that represented the "core purpose" of the guarantees of the First Amendment. Thus, by 1966, the Court was able to refer to the "practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs."[251]

However, until *Richmond Newspapers*, the Court had refused to cross a certain line with respect to its increasingly affirmative, political interpretation of the First Amendment. The paradigm of protection of free speech, even "political speech," remained that of the shield. The Court required government to respect it, but not necessarily to promote it. Freedom of individual expression was increasingly protected against interference or inhibition by the state. The political branches were increasingly required to maintain a laissez-faire posture towards an ever-expanding marketplace of private information. The Court, however, had consistently refused, particularly in the prison access cases,[252] to exceed this libertarian paradigm. The Court had not affirmatively required government to intervene in, regulate, promote, privilege, expand, or subsidize the market of private communication.

The structural theory employed by Justice Brennan in *Richmond Newspapers* was more than just another milestone in the political or instrumental analysis of the First Amendment. Even for Justice Brennan did not, in the end, rely upon the libertarian guarantees of free speech or press to fashion a right of access. Instead, he identified a political right of sovereignty or self-government that was both beyond and independent of the individual liberty of speech.[253] This right was a political liberty implied not by the Constitution's textual guarantees, but rather by the political structure of the Constitution in general

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251. Mills v. Alabama, 384 U.S. 214, 218 (1966). One of those who adamantly opposed this universal agreement was Justice Frankfurter, who said that "[t]he historic antecedents of the First Amendment preclude the notion that its purpose was to give unqualified immunity to every expression that touched on matters within the range of political interest." Dennis v. United States, 341 U.S. 494, 521 (1951) (Frankfurter, J., in affirmance).

252. See *supra* text accompanying note 52.

253. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 551, 587 (Brennan, J., concurring).

and the First Amendment in particular.[254] Consequently, *Richmond Newspapers* does not vindicate a freedom of speech so much as it does a freedom of self-rule. Self-rule is an entitlement that belongs to all citizens in their sovereign capacity, regardless of any act of speech or publication on their part. It was therefore a right not necessarily limited by, or even closely related to, prior interpretations of the parameters of the textual guarantees.

Justice Brennan's structural theory was novel, even radical, but it was also flawed. It was an adaptation of earlier workings on a structural theory that did not entirely fit the situation of a courtroom right of access. Most significantly, the theory appeared to be premised on a theory of representative democracy that had little or no bearing on a right of *public* access to the *non-representative* branch of the Judiciary. Yet Justice Brennan's structural theory has indeed provided the essential legal bases for the breakthrough development of the *Richmond Newspapers* doctrine. It is therefore a theory that merits a more exacting scrutiny than it has yet received in the case law or the legal literature.

1. The Underlying Contribution: Alexander Meiklejohn

The seminal figure in the modern development of the political theory of the First Amendment is Alexander Meiklejohn.[255] For someone of such undisputed influence on the First Amendment, Meiklejohn is also an unlikely figure. He did not believe in the philosophy of individual rights independent of govern-

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254. *Id.* at 587-88.

255. *See* BeVier, *supra* note 20, at 503 ("[Meiklejohn's] insights into the relevance of self-government to First Amendment analysis have been of seminal importance."); Ronald A. Cass, *First Amendment Access to Government Facilities*, 65 VA. L. REV. 1287, 1311 n.147 (1979) (Meiklejohn "gave this principle [of political speech] its first general theoretical expression."); Thomas I. Emerson, *Legal Foundations of the Right-to-Know*, 1976 WASH. U. L.Q. 1, 4 ("It has been suggested that the right-to-know be adopted as the sole, or at least the principal, basis for the constitutional protection afforded by the First Amendment. Alexander Meiklejohn is the primary source of this theory."); Robert Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109, 1111 (1993) ("The most influential exposition of the collectivist theory of the First Amendment is by the American philosopher Alexander Meiklejohn; his work continues to inspire and guide the theory's contemporary advocates.") (footnote omitted).

ment;[256] he disdained "licentious individualism;"[257] he abhorred Locke;[258] his mentor and model was Rousseau.[259] Like Rousseau, Meiklejohn's influence was more in the spirit than in the letter of his works.[260] His central contribution to First Amendment theory was a reassertion of the classical values of republican self-government. This premise of a *constitutional* commitment to self-government has become the central fixture in the "standard rationale for a first amendment right of access to government information. . . ."[261] It is therefore necessary, in order to capture the central significance of the new doctrine of access, to trace this doctrine to its source.

Alexander Meiklejohn was a progressive educator and teacher of philosophy. Prior to World War I, he served as Dean of Brown University and then President of Amherst College. During the progressive era between the world wars, he directed several experimental colleges and wrote extensively on education and its critical relation to the American experience. By 1938, he had effectively retired as an active educator and begun his work on a general theory of education. When his final, highly visionary theory was published in 1942,[262] he was already seventy years old and had not yet taken up his principal involvement with the freedom of expression. But the antisubversive campaigns of that period, which he perceived as a galling attack on intellectual freedom, led him into a second and more distinguished career as a constitutional theorist. When he died in 1964 at the age of ninety-two, he was widely

256. *See* ALEXANDER MEIKLEJOHN, EDUCATION BETWEEN TWO WORLDS 80 (1942).

257. *Id.* at 82.

258. *See id.* at 26-35.

259. *See generally id.* at 71, 210 (stating that we should "take our view" from Rousseau).

260. Meiklejohn was keenly aware of the irony of Rousseau's influence and appears to have cast himself in a like mold. According to Meiklejohn:

> This is the sort of mind which is needed as a disintegrating culture is torn to shreds, and preparation is made for the forming of a new culture to take its place. It is easy to disagree with Rousseau. He is essentially a transitional, a preparatory thinker. Few men of sober mind would be inclined to accept his theories as he frames them. And yet he cannot be ignored.

Id. at 71-72.

261. BeVier, *supra* note 6, at 314.

262. *See generally* MEIKLEJOHN, *supra* note 256.

revered as a "militant champion of freedom" for his provocative views on the First Amendment.[263]

Meiklejohn was not a lawyer. He neither wrote nor argued in the legal idiom.[264] His constitutional theory was, in many respects, as idealistic and as visionary as his educational theory. Yet, Meiklejohn disdained the view that his lack of legal training represented any compromise or disqualification of his constitutional arguments.[265] Noting the absence in the historical record of any evidence of original intent to support his constitutional views, Meiklejohn graciously excused the founders for being too preoccupied with a revolution in progress to clearly express their views. "In that sense, the Framers did not know what they were doing."[266] Yet as a champion of intellectual freedom who espoused an heroic role for the Supreme Court in the safeguarding of American democracy,[267] his views enjoyed an innate, resonant appeal that appeared to transcend the palpable limitations of his legal scholarship.

As a constitutional advocate, Meiklejohn was also very much a product of his times. The early formulations of Cold War

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263. William J. Brennan, Jr., *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 1 (1965).

264. Meiklejohn made no real attempt to support his constitutional theories with traditional legal authority. There was, in fact, much legal theory that he passed over. Most notably, Meiklejohn failed to seize upon then-district court Judge Learned Hand's opinion in Masses Publishing Co. v. Patten, 244 F. 535 (S.D.N.Y. 1917), *rev'd*, 246 F. 24 (2d Cir.), in which Judge Hand dismissed one of the first prosecutions under the Espionage Act of 1917. Justice Holmes later rejected Judge Hand's approach in favor of his own clear-and-present danger test. *See* Schenck v. United States, 249 U.S. 47, 52 (1919). "But Meiklejohn did not notice that Judge Hand's *Masses* opinion was based on the self-government theory." Blasi, *supra* note 246, at 14.

265. Meiklejohn was never at a loss to respond to his lawyer friends who suggested that his views might not hold up to lawyerly scrutiny. When Justice Frankfurter suggested that Meiklejohn's theories would be much improved by spending three years at a good law school, Meiklejohn responded that he would be happy to do so, if only the Justice would spend the same three years at a good school of philosophy. And when his friend Professor Harry Kalven, Jr. made a similar suggestion, Meiklejohn, at the age of 88, produced his most often-cited law review article, *The First Amendment is an Absolute*. CYNTHIA S. BROWN, ALEXANDER MEIKLEJOHN: TEACHER OF FREEDOM 46-47, 246 (1981).

266. Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 264.

267. *See* ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 32 (1965) [hereinafter POLITICAL FREEDOM].

ideology were then raging in the form of a congressional assault on all subversive political thought. Ideas, not merely speech, were at issue. In the Supreme Court, this tension was expressed in the form of a protracted debate over whether the First Amendment provided "absolute" protection against such legislative abridgement.[268] Meiklejohn's constitutional theory had one immediate concern: to disempower government, but particularly Congress, from interfering with the intellectual freedom of its sovereign people. Meiklejohn expressed little patience with non-absolute legal formulations like the clear-and-present-danger test to accomplish this goal in an era when "[w]e are officially engaged in the suppression of 'dangerous' speech."[269]

As might be expected, Meiklejohn's constitutional theory began with his educational theory. His view of the state was classically idealistic and borrowed generously from Rousseau's General Will.[270] Individuals did not secure or compromise natural rights in the social compact; instead they gained the only rights that they had: "On the contrary, the state is the best of us, trying to control and to elevate the worst of us. It is ourselves seeking to be reasonable, to live in justice and freedom with one another."[271] In *Education Between Two Worlds*,[272] his major theoretical work, Meiklejohn posits a world of warring nation-states on its way to becoming a single "world-state." Public education's purpose is to prepare people for their most vital role as self-governing citizens in the democratic world-state. "Every human being, young or old, should be taught, first of all, to be a citizen of the world, a member of the human fellowship. All other lessons are derivatives of that primary lesson."[273] For Meiklejohn, as for Rousseau, individuals could at-

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268. The principal proponent of the absolutist view during this period was Justice Black. *See* Hugo L. Black, THE BILL OF RIGHTS, 35 N.Y.U. L. REV. 865 (1960).

269. MEIKLEJOHN, POLITICAL FREEDOM, *supra* note 267, at 107.

270. MEIKLEJOHN, *supra* note 256, at 84.

271. *Id.*

272. The title is taken from a poem by Matthew Arnold, "The Grand Chartreuse":

> Wandering between two worlds, one dead,
> The other powerless to be born,
> With nowhere yet to rest my head,
> Like these, on earth I wait forlorn.

Id. at 48.

273. *Id.* at 286.

tain freedom only through their educated participation in a self-governing republic. Thus, the state had an *affirmative* obligation to educate and prepare all citizens for their role as sovereign. "To be free does not mean to be well governed. It does not mean to be justly governed. It means to be self-governed."[274] True liberty was therefore not an individual but rather a collective condition of enlightened self-sovereignty.

The constitutional interpretation that emerged from this democratic theory was straightforward. The primary and overriding purpose of our revolutionary Constitution was to create a self-governing republic. Everything else was derived from and informed by this central premise. Each individual passage, as well as the overall structure of the Constitution, revealed and confirmed this revolutionary intent. Self-government was the touchstone of all constitutional analysis, specifically including the central meaning of the First Amendment. "The principle of the freedom of speech springs from the necessities of the program of self-government. It is not a Law of Nature or of Reason in the abstract. It is a deduction from the basic American agreement that public issues shall be decided by universal suffrage."[275]

The actual establishment of a *representative* democracy did little to temper Meiklejohn's premise of a direct, self-governing democracy. He found the operative paradigm for American democracy in the "traditional American town meeting."[276] The genius of the Constitution was that the sovereign power of the people was neither ceded nor delegated to the political representatives. This was what separated the American experiment from parliamentary democracy. By virtue of the structure of the Constitution, the people remained the "First Branch" of government.[277] The three created branches were inferior, or "subordinate," agencies of government.[278] This "master-servant" rela-

274. MEIKLEJOHN, *supra* note 267, at 98.

275. *Id.* at 27.

276. *Id.* at 24-26.

277. *Testimony on the Meaning of the First Amendment Before the Hennings Senate Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 84th Cong., 1st Sess. (Nov. 14, 1955) (testimony of Alexander Meiklejohn) *in* MEIKLEJOHN, *supra* note 267, at 116.

278. MEIKLEJOHN, *supra* note 267, at 99.

tionship was essential to the success of the constitutional experiment.[279] The freedom of thought and expression was essential to the informed exercise and maintenance of an operative popular sovereignty. "The revolutionary intent of the First Amendment is, then, to deny to all subordinate agencies authority to abridge the freedom of the electoral power of the people."[280]

For the perennial dilemmas of what speech is protected and to what degree, Meiklejohn proposed a structural solution. He posited "two radically different kinds of utterances,"[281] one guaranteed by the First Amendment and one guaranteed by the Fifth Amendment. Each type of utterance received a different degree of protection. The first type was a general category of speech which was a liberty regulated by the Due Process Clause of the Fifth Amendment.[282] This category included all speech conducted in a private or individual capacity unrelated to the exercise of sovereignty. The government could abridge this speech as it could any other liberty interest, subject to the standards of due process. The other category of speech involved the citizen's power to speak in a sovereign capacity. This was the *only* speech protected by the First Amendment and it was protected absolutely. Certainly, this speech was unabridgable by any subordinate power, such as Congress. "The guarantee given by the First Amendment is not, then, assured to all speaking. It is assured only to speech which bears, directly or indirectly, upon issues with which voters have to deal—only, therefore, to the consideration of matters of public interest."[283] Lawyers, of course, would insist that the devil was in the details of such an assertion, but Meiklejohn was not inclined to further define or delineate these two categories of speech. He was satisfied to provide a structural solution which essentially severed the First Amendment from traditional libertarian doctrine and interposed new and absolute citizen powers over government.

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279. *Id.* at 72.

280. *Id.* at 248; *see id.* at 115-16.

281. *Id.* at 37.

282. This Fifth Amendment protection was consistent with the doctrine stated in Gitlow v. New York, 268 U.S. 652 (1925). *Gitlow* stated that the Due Process Clause of the Fourteenth Amendment protected speech as a fundamental liberty. *Id.* at 666.

283. MEIKLEJOHN, *supra* note 267, at 79.

It is at this point in Meiklejohn's theory that the implications for access to government information become manifest. Although Meiklejohn did not directly address rights of access to government information, his principles of self-governing democracy have proven seminal to the development of such putative rights. For if one accepts the premise that the people have an affirmative obligation to exercise their sovereign will upon government, it follows perforce that government has an affirmative obligation to disclose. "The primary purpose of the First Amendment is, then, that all the citizens shall, so far as possible, understand the issues which bear upon our common life. That is why no idea, no opinion, no doubt, no belief, no counter-belief, no relevant information, may be kept from them."[284]

Without question, then, Meiklejohn's basic understanding of the First Amendment was less than traditional. Indeed, his structural theory was, in many ways, so eccentric as to make curious his undeniable influence on a broad spectrum of more conventional jurists[285] and scholars.[286] However radical he was as a democrat, Meiklejohn was certainly no radical libertarian. He did not believe in individual rights, nor did he concern himself with the personal values of individual autonomy or self-fulfillment.[287] He did not believe that liberty was inherently threatened by governmental action, but rather that liberty required an active, affirmative role for government. Indeed, on the very first occasion that Meiklejohn was cited in a Supreme Court opinion, he was employed for ironic contrast in a dissent by Justice Jackson "But even he," intoned the Justice, "does not support unlimited speech."[288]

And, indeed, Meiklejohn did not. The speech that was entitled to the absolute protection of the First Amendment was, for

284. *Id.* at 75.

285. Since 1951, Meiklejohn has been cited by the Supreme Court on 23 separate occasions by 11 different Justices. *See generally* Edward J. Bloustein, *The First Amendment and Privacy: The Supreme Court Justice and the Philosopher*, 28 RUTGERS L. REV. 41 (1975).

286. Meiklejohn has influenced legal scholars as disparately located as Thomas Emerson and Robert Bork. *See, e.g.*, Bork, *supra* note 217, at 26-27; Emerson, *supra* note 255, at 4-5.

287. For these reasons, Professor Emerson found Meiklejohn's general theory of the First Amendment inadequate. Emerson, *supra* note 255, at 4.

288. Kunz v. New York, 340 U.S. 290, 300 n.3 (1951).

Meiklejohn, a serious matter. First Amendment free speech had nothing to do with "unregulated talkativeness."[289] Free speech mattered only to the extent that the contents of that speech be heard.

> [T]he First Amendment is not, in the first instance, concerned with the "right" of the speaker to say this or that. It is concerned with the authority of the hearers to meet together, to discuss, and to hear discussed by speakers of their own choice, whatever they may deem worthy of their consideration.[290]

Meiklejohn was more concerned with the corporate body's right to hear than the individual's right to speak. He regarded a philosophy of individual or prior rights as pernicious and made bitter attacks on prevailing First Amendment doctrine, particularly that of Justice Holmes.[291] Meiklejohn considered Holmes' development of the clear-and-present-danger test in *Schenck v. United States*[292] as the signal failure of First Amendment jurisprudence: "That ruling annuls the most significant purpose of the First Amendment. It destroys the intellectual basis of our plan of self-government."[293] Certainly, Meiklejohn's constitutional theory was not grounded in the libertarian concept of self-expression. His contribution to First Amendment doctrine, and in particular to right-to-know theory, was made not in terms of an enhanced understanding of informed speech, but rather in a renewed appreciation of informed suffrage.

The apparent dissonance of Meiklejohn's structural theory of the Constitution with traditional First Amendment doctrine was overcome by his reassertion of the classical values of republican self-government.[294] His insistence that citizens could not be treated as subjects and that the political views of government, and not those of the people, were subject to restriction struck a

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289. MEIKLEJOHN, *supra* note 267, at 26.

290. *Id.* at 119.

291. "The philosophy of Mr. Holmes was . . . one of excessive individualism." *Id.* at 61.

292. 249 U.S. 47 (1919).

293. MEIKLEJOHN, *supra* note 267, at 30.

294. *See* sources cited *infra* note 386 (discussing the new republican revival).

responsive chord with a First Amendment struggling to resolve its authority over government abridgement of subversive beliefs[295] and seditious libel.[296] Prior to *Richmond Newspapers*, Meiklejohn had been cited in twenty-two Supreme Court opinions by ten different justices. Indeed, even Chief Justice Burger's opinion in *Richmond Newspapers*, which did not cite him directly, appears to bear some markings of Meiklejohn.[297] He is also routinely cited in the legal literature discussing structural theory[298] or self-government.[299] There is little question, however, that the writings of Meiklejohn found their ultimate voice in law through the opinions of Justice Brennan.[300]

Justice Brennan has readily acknowledged the influence of Meiklejohn on his First Amendment opinions. Several months after Meiklejohn's death in 1964, Justice Brennan delivered an address in his honor.[301] He traced the evolving approaches of the Supreme Court to First Amendment issues and referred to Meiklejohn as one of those who advocated an "absolutist" view of the Amendment which had "not yet"[302] become the majority view of the Court. Justice Brennan then described the Court's recent majority opinion in the landmark case of *New York Times Co. v. Sullivan*,[303] written by Justice Brennan, as a possible point of departure for the Court. He suggested that the opinion represented a "departure from" earlier approaches and "the adoption, not of Mr. Justice Black's 'absolute' reading of

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295. *See, e.g.*, Kimm v. Rosenberg, 363 U.S. 405, 408 (1960) (Douglas, J., dissenting); Yates v. United States, 354 U.S. 298, 340 (1957) (Black, J., concurring & dissenting).

296. Meiklejohn was a major influence on the Court's opinion in New York Times Co. v. Sullivan, 376 U.S. 254 (1964). *See* Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191.

297. With respect to one passage in the opinion, one commentator has noted: "The words could have been Meiklejohn's." Lewis, *supra* note 111, at 16.

298. *See, e.g.*, Kobylka & Dehnel, *supra* note 231.

299. *See, e.g.*, Blasi, *supra* note 245.

300. "Recently, the views of Professor Alexander Meiklejohn have seemed to play an extremely important role in determining the dramatic turn in Supreme Court free expression theory, signaled by the *New York Times* case." Bloustein, *supra* note 285, at 72 (footnote omitted).

301. Brennan, *supra* note 263.

302. *Id.* at 4.

303. 376 U.S. 254 (1964).

the first amendment, but of a reading in substantial agreement with that which Dr. Meiklejohn has urged."[304] Justice Brennan asserted that the *Sullivan* court had reexamined the "central meaning" of the First Amendment and found that it resided in the maintenance of the sovereign power of the people over their agents of government.[305]

Justice Brennan also pointed out that his opinion in *Sullivan* bears an even more direct debt to Meiklejohn. Meiklejohn had supported his absolutist view of the First Amendment by referring to the absolute constitutional immunity provided for House debate by members of Congress.[306] Meiklejohn reasoned that since these subordinate agents were given absolute protection for their political speech, surely the sovereign people were entitled to no less protection on the same grounds.[307] Justice Brennan used a variation of this same analogy in *Sullivan* to conclude that the people were privileged to criticize, even libel, their subordinate political officials.[308] Justice Brennan cited the earlier case of *Barr v. Matteo,*[309] which held that executive officials were absolutely privileged against libel suits,[310] and concluded that "[a]nalogous considerations support the privilege for the citizen-critic of government."[311] This argument is vintage Meiklejohn. One astute commentator concluded: "At this point in its rhetoric and sweep, the opinion almost literally incorporated Alexander Meiklejohn's thesis that in a democracy, the citizen as ruler is our most important public official."[312] Later that same term, in a case that extended the *Sullivan* test to the defamation of sitting judges, Justice Brennan once again closely paraphrased Meiklejohn: "For speech concerning public affairs is more than self-expression; it is the essence of self-government."[313]

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304. Brennan, *supra* note 263, at 10.
305. *Id.* at 15.
306. U.S. CONST. art. I, § 6, cl. 1.
307. MEIKLEJOHN, *supra* note 267, at 249.
308. *Sullivan,* 376 U.S. 254 (1964).
309. 360 U.S. 564 (1959).
310. *Id.* at 574.
311. *Sullivan,* 376 U.S. at 282.
312. Kalven, *supra* note 296, at 209.
313. Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964). Justice Brennan has acknowledged Meiklejohn as the source of this paraphrase: "Doubtless some of you may think that [this] sentence of the opinion . . . echoes Dr. Meiklejohn's statement. . . ."

In his First Amendment opinions prior to *Richmond Newspapers*, Justice Brennan relied upon Meiklejohn to the same ends as other Justices in extending the protection afforded speech. The principle of self-government was employed to support the argument that "political speech" was at the core of the First Amendment and therefore entitled to enhanced constitutional protection. However, after the bitter battle over courtroom access in *Gannett Newspapers*, Justice Brennan returned to Meiklejohn for something quite different.

In an address Justice Brennan delivered several months after the decision in *Gannett Newspapers*, he posited "two distinct models" for First Amendment analysis.[314] The first of these models was the "speech model." This was the traditional libertarian approach which Justice Brennan described "as comfortable as a pair of old shoes."[315] But these old shoes had apparently done most of their walking without arriving at the ultimate destination of the First Amendment. For "[t]he 'speech' model," according to Justice Brennan, "has its limitations."[316] Justice Brennan did not spell out those limitations, but he was certainly writing within the context of a discussion of the Court's recent rulings adverse to access. To extend the reach of the First Amendment beyond the traditional protection of the speech model, Justice Brennan posited another approach, which he referred to as the "structural model."[317] This model was premised on the Constitution's structural guarantee of self-government: "The Amendment . . . forbids the government from interfering with the communicative processes through which we citizens exercise and prepare to exercise our rights of self-government. . . . Another way of saying this is that the First Amendment protects the structure of communications necessary for the existence of our democracy."[318] This address was Justice Brennan's first attempt at a theory of an affirmative governmental obligation to maintain the structure of communications contemplated by the Constitution.[319] There was no

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Brennan, *supra* note 263, at 18.

314. Brennan, *supra* note 110, at 175.

315. *Id.* at 176.

316. *Id.*

317. *Id.*

318. *Id.*

319. Justice Brennan had earlier made note of the critical connection between a

mistaking Justice Brennan's appreciation of the novelty and significance of the structural approach. "It significantly extends the umbrella of the press' constitutional protections. The press is not only shielded when it speaks out, but when it performs all the myriad tasks necessary for it to gather and disseminate the news."[320] Indeed, because the affirmative reach of this approach was "theoretically endless,"[321] structurally-derived rights could not be afforded the near absolute protection of textually-derived rights. Structural rights required balancing.

Justice Brennan limited this initial description of his structural theory of the First Amendment to the institutional press (although not to the Press Clause). Although his analysis borrowed heavily from Meiklejohn's theory of affirmative structural guarantees, Justice Brennan limited his analytical model to the "structure of communications" guaranteed by the Constitution rather than to the structure of the Constitution itself. Thus, Justice Brennan's initial analysis was essentially a structural theory of press privilege. The Supreme Court had, of course, consistently denied such a privilege during the 1970s.[322]

Justice Brennan's initial theory of a press privilege, however, was not the structural theory that evolved several months later into his opinion in *Richmond Newspapers*. In that opinion, Justice Brennan reworked his structural analysis. He created an affirmative right of public as well as press access to governmental institutions, based upon the public's inherent right to information necessary for self-governance. The structural model was refashioned, but, the central import remained the same.

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free press and a responsible Judiciary:

> Commentary and reporting on the criminal justice system is at the core of First Amendment values, for the operation and integrity of that system is of crucial import to citizens concerned with the administration of government. Secrecy of judicial action can only breed ignorance and distrust of courts and suspicion concerning the competence and impartiality of judges; free and robust reporting, criticism, and debate can contribute to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system, as well as improve the quality of that system by subjecting it to the cleansing effects of exposure and public accountability.

Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 587 (1976) (Brennan, J., concurring).

320. *Id.*

321. *Id.*

322. *See supra* text accompanying note 30.

The constitutional imperative of self-government created an affirmative public right, which required the government to provide access to the information necessary for an informed exercise of sovereignty.

The Supreme Court decided the *Sullivan* case only months before Alexander Meiklejohn died. Meiklejohn reviewed the opinion and did not fail to appreciate the political analysis underlying Justice Brennan's opinion. In a conversation with a friend concerning his reaction to the opinion, Meiklejohn proclaimed, "It is an occasion for dancing in the streets."[323] He, of course, did not live to witness the Court's decision in *Richmond Newspapers*, but his reaction may be assumed: the dancing was to continue and it had moved into the courthouse.

IV. A REVISED RIGHT OF ACCESS

It is necessary to revise both our understanding and our appreciation of the right of access recognized in *Richmond Newspapers*. The right should be restated to center upon the governmental decision-making power of the Judiciary, rather than the functional utility of access to a given judicial process. This restatement of the right would recognize a constitutional right of access to the Judiciary analogous, in principle and practice, to the statutory rights of access applicable to the Executive Branch. It is a revision fully supported by broader doctrinal developments that articulate and espouse a modern view of the Judiciary. In First Amendment terms, at least three separate factors call for such a revision: (1) the revision better conforms the right to the underlying structural theory adopted by the Court; (2) the revision creates a more definitive rule of access for the courts; and (3) the revision facilitates the principled, and seemingly inexorable, expansion of the new doctrine of access.

The central task of this section is to defend the following proposed restatement of the *Richmond Newspapers* doctrine:

> The public has a right of access to all information, located within the adjudicative process, relevant to an evaluation of

323. Kalven, *supra* note 296, at 221 n.125.

> the exercise or performance of judicial authority over substantive matters of official court business, unless there is a sufficiently compelling reason not to so provide access.

The doctrinal revision accomplished by this proposal transforms the *Richmond Newspapers* right from an instrumental right to observe proceedings or documents to a systemic right to obtain information relevant to a public review of all official judicial transactions.

The structural theory of the First Amendment adopted in *Richmond Newspapers* does not strictly support a right of access centered upon the functional utility of access to an instrument of court-based information. The theory proves both too much and too little for the determination of such a right. The underlying theory does, however, support a right construed in terms of an affirmative public right of access to information related to the exercise of judicial power over cases and controversies submitted to the courts for resolution.

A. *The Broader Doctrinal Context*

It is necessary to underscore the limited ambitions of the argument in this Part. What follows is not intended to be a defense of the structural theory of the Constitution or even of the Court's modified adoption of it in the *Richmond Newspapers* line of cases. No such effort occurs here despite the fact that these matters are logically antecedent to a defense of the doctrine that relies upon the theory. Rather, this article *assumes* the qualified adoption of the structural theory, as described above, and argues instead for a revision of the doctrine to better fulfill and conform with the theory. Yet, it may still prove useful to the purposes of this article to articulate more precisely the broader doctrinal context that supports the foregoing assumption.

The central proposition of the newly adopted structural theory is that the Judiciary is itself a governing instrumentality, and that judges exercise sovereign political power through their binding juridic acts. This central premise is indeed controversial. The extent to which the Judiciary is a proactive agency of government, as well as the extent to which it may be deemed a

"representative" institution of government, continues to be a well-contested proposition in the judicial review literature, particularly in the ambitious reconstructions of the "republican revival" theorists.[324]

Traditionally, the Third Branch has been viewed as decidedly non-representative,[325] non-governmental[326] and non-political.[327] This view is central to much of the contemporary theory of judicial review.[328] The essential logic of this position is that the legitimacy of judicial review is premised on the capacity for judicial neutrality, which in turn is premised on the courts' capacity for political indifference. More broadly, the extended logic of this requirement of an apolitical Judiciary suggests that critical discourse concerning the operation of the courts inherently threatens the judicial impartiality upon which all freedoms depend.[329] Indeed, this somewhat hallowed view of judicial neutrality was central to the traditional authority of courts to punish a mere "contempt by publication."[330]

But in the modern era, this line has not held. During the same period that the Court was developing the doctrine of "political speech" as central to the First Amendment,[331] the Court

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324. *See infra* text accompanying note 386.

325. *See e.g.*, Stokes v. Fortson, 234 F. Supp 575, 577 (N.D. Ga. 1964) ("Manifestly, judges and prosecutors are not representatives in the same sense as are legislators or the executive. Their function is to administer the law, not to espouse the cause of a particular constituency."); Buchanan v. Rhodes, 249 F. Supp. 860, 865 (N.D. Ohio 1960) ("Judges do not represent people, they serve people.").

326. *See e.g.*, Wells v. Edwards, 347 F. Supp 453, 455 (M.D. La. 1972), *aff'd mem.*, 409 U.S. 1095 (1973) ("[T]he rationale behind the one man-one vote principle, which evolved out of efforts to preserve a truly representative form of government, is simply not relevant to the makeup of the Judiciary.").

327. *See e.g.*, League of United Latin Am. Citizens Council No. 4434 v. Clements, 914 F.2d 620, 631 (5th Cir. 1990), *rev'd sub. nom.* Houston Lawyers Ass'n v. Attorney Gen., 501 U.S. 2376 (1991) ("Judicial offices and judicial selection processes are sui generis in our nation's political system; they determine the referees in our majoritarian political game.").

328. *See infra* text accompanying note 383.

329. *See* Bridges v. California, 314 U.S. 252, 282 (1941) (Frankfurter, J., dissenting) ("The administration of justice by an impartial Judiciary has been basic to our conception of freedom ever since Magna Carta.").

330. *See id.* This common law doctrine held that courts had the inherent power to shield themselves from outside influence by punishing as contempt any extrajudicial publication concerning a pending case that tended to influence the proceedings.

331. *See* Mills v. Alabama, 384 U.S. 214, 218 (1966) (Free speech doctrine now relies upon the "practically universal agreement that a major purpose of [the First]

also reviewed the premise that speech about the Judiciary was not so included. The seminal case is *Bridges v. California.*[332] A California trial court used its contempt powers to punish newspapers for publishing information concerning matters pending before the court. The Supreme Court of California upheld the contempt findings on the traditional premise that "[l]iberty of the press is subordinate to the independence of the Judiciary. . . ."[333] The Supreme Court held, over the forceful dissent of Justice Frankfurter, that comment upon matters pending before the Judiciary was in fact central to the mandate of the First Amendment. "It is therefore the controversies that command most interest that the decisions below would remove from the arena of public discussion."[334] *Bridges* was soon followed by several closely related contempt cases.[335] These cases firmly established that "[t]here is no special perquisite of the Judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it."[336]

The political realism of *Bridges* has also influenced the development of the modern view of the Judiciary in contexts outside of the First Amendment. Central to the modern view is the notion that the Judiciary, as a coordinate institution of government, is not politically neutral and, therefore, must be held politically accountable for its own exercise of governmental power.[337] The clash, as well as the evolution, of the traditional and modern views of the least dangerous branch is most evident in the apportionment cases. In the early cases, the tradi-

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Amendment was to protect the free discussion of government affairs.").

332. 314 U.S. 252 (1941).

333. Times-Mirror Co. v. Superior Court, 98 P.2d 1029, 1040 (Cal. 1940) (quoting *In re* Indep. Publishing Co., 240 F. 849, 862 (9th Cir. 1917).

334. 314 U.S. at 269.

335. Craig v. Harney, 331 U.S. 367 (1947).

336. *Id.* at 374.

337. Even Justice Frankfurter, who dissented fervently in *Bridges*, was keenly sensitive to the need to accompany judicial power with sunshine. As Justice Frankfurter stated:

> Of course freedom of speech and of the 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.

Bridges, 314 U.S. at 284.

tional view prevailed to the effect that judicial elections were treated as an exception to the one person-one vote principle. This occurred because the Judiciary was not "representative" in nature, and the equal protection rationale of the apportionment cases was "simply not relevant to the makeup of the Judiciary."[338] The Supreme Court adopted this position by way of summary affirmance in *Wells v. Edwards*.[339] Yet even in *Wells*, Justice White's dissent offered the following premonition of what has become the prevailing view: "Judges are not private citizens who are sought out by litigious neighbors to pass upon their disputes. They are state officials, vested with state powers and elected (or appointed) to carry out the state government's judicial functions. As such, they most certainly 'perform governmental functions.'"[340]

Most recently, this modern view has prevailed in limited respects in two separate areas of statutory interpretation. These areas include voter apportionment and age discrimination statutes as applied to the Judiciary. *Chisom v. Roemer*[341] and *Houston Lawyers' Ass'n v. Attorney General*[342] were apportionment cases involving the Federal Voting Rights Act. Both cases addressed the issue of whether the statutory law of apportionment applied to judicial elections. In each case, the Fifth Circuit relied upon *Wells* to hold that a section of the Act covering elections of "representatives" did not apply to judicial elections. The Fifth Circuit stated that "the Judiciary serves no representative function whatever: the judge represents no one."[343] The Supreme Court reversed both cases. While the Court limited the majority opinion in *Chisom* to an analysis of the statutory terms in question, the Court did find occasion to reject the traditional view relied upon by the circuit court: "The fundamental tension between the ideal character of the judicial office and the real world of electoral politics cannot be resolved by cred-

338. Wells v. Edwards, 347 F. Supp. 453, 455 (M.D. La. 1972), *aff'd mem.*, 409 U.S. 1095 (1973).

339. *Id.*

340. 409 U.S. at 1096-97.

341. 501 U.S. 380 (1991).

342. 501 U.S. 419 (1991).

343. League of United Latin Am. Citizens Council No. 4434 (LULAC) v. Clements, 914 F.2d 620, 625-26 (5th Cir. 1990), *rev'd sub. nom.* Houston Lawyers' Ass'n v. Attorney Gen., 501 U.S. 419 (1991).

iting judges with total indifference to the popular will while simultaneously requiring them to run for elected office."[344]

The issue in *Gregory v. Ashcroft*[345] was whether state court judges were government employees "at a policymaking level" and therefore not protected by the federal Age Discrimination in Employment Act of 1967.[346] The Supreme Court held that they were. Justice O'Connor noted in her opinion for the Court that the issue of a state's power to select its judges and to limit their terms implicated the following concerns: "The authority of the people of the States to determine the qualifications of their most important government officials;"[347] "the unique nature of state decisions that 'go to the heart of representative democracy;'"[348] and a concern for "judges' general lack of accountability."[349] The opinion therefore concluded that the manifest differences between judicial and other governmental officials were mooted by the common characteristic of public governance: "It may be sufficient that the appointee is in a position requiring the exercise of discretion concerning issues of public importance. This certainly describes the bench, regardless of whether judges might be considered policymakers in the same sense as the executive or legislature."[350]

Therefore, while it cannot be said that the Court has definitively revised its self-conception as a political institution, the critical political characterization of the Judicial Branch expressed in *Richmond Newspapers* is not out of context with respect to the Court's modern view of the Judiciary. The real aim of the present article, in any event, is not to join issue with any of the broader debates over the proper institutional characterization of the Judiciary. For instance, we will visit the republican-revival literature only to identify the remarkable, and apparently unappreciated, coincidence between the new right of access and the republican call for the development of

344. *Chisom*, 501 U.S. at 400-01.
345. 501 U.S. 452 (1991).
346. Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621-634 (1993)).
347. *Gregory*, 501 U.S. at 463.
348. *Id.* at 461 (quoting Sugarman v. Dougall, 413 U.S. 634, 647 (1973)).
349. *Id.* at 472.
350. *Id.* at 466-67.

affirmative liberties not countenanced by the traditional liberal-pluralist reading of the Constitution. Therefore, this part will not attempt to demonstrate the essentially political or representative character of the Judiciary. Rather, the starting point here is that the Supreme Court, in the *Richmond Newspapers* line of cases, *has* adopted a structural theory of the Constitution which assumes the Judicial Branch to be a governing agency subject to the sovereign limitations of the self-governing electorate.

There is no question that the Justices in *Richmond Newspapers* appreciated this aspect of their decision. Justice Brennan, in particular, appeared to realize that a right of public access premised on a theory of self-government would not hold unless the claim were directed at an actual political agency of government. If the Judiciary did not perform acts of "governance," principles of self-governance could not be implicated. After initially characterizing the "crucial" issue of access as one of determining the utility of access to a designated "government process,"[351] Justice Brennan later returned with the following observations:

> [T]he trial is more than a demonstrably just method of adjudicating disputes and protecting rights. It plays a pivotal role in the entire judicial process, and, by extension, in our form of government. Under our system, judges are not mere umpires, but, in their own sphere, lawmakers—a coordinate branch of *government*. While individual cases turn upon the controversies between parties, or involve particular prosecutions, court rulings impose official and practical consequences upon members of society at large. Moreover, judges bear responsibility for the vitally important task of construing and securing constitutional rights. Thus, so far as the trial is the mechanism for judicial factfinding, as well as the initial forum for legal decisionmaking, it is a genuine governmental proceeding.[352]

And although Justice Brennan certainly expressed the greatest appreciation of the issue, he was not alone in his willingness to characterize the Judiciary as a political branch of government as a prerequisite to finding a right of access in the

351. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 589 (1980).
352. *Id.* at 595-96.

self-governing public. Even Chief Justice Burger, who found the right of access to be implied rather than structurally guaranteed, claimed a unique political significance for the trial process:

> [The] expressly guaranteed freedoms share a common core purpose of assuring freedom of communication on matters relating to the functioning of government. Plainly it would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted.[353]

Furthermore, Justice Stevens, in commenting on the apparent anomaly of the Court recognizing a self-governing right of access with respect to the Judicial Branch while repeatedly denying it with respect to the Executive Branch, also explicitly adopted a characterization of the Judiciary as a political arm of government:

> It is somewhat ironic that the Court should find more reason to recognize a right of access today than it did in *Houchins*. . . . In any event . . . I agree that the First Amendment protects the public and the press from abridgement of their rights of access to information about the operation of their government, including the Judicial Branch.[354]

The difficulty with the Court's analysis of the Judiciary as a co-political branch of government, at least for the purpose of analyzing the essential attributes of self-government, is that the analysis appears to prove too much for the right of access. Quite simply, if the right of access applies to the Judiciary *because* it is a co-equal political branch, it follows perforce that the right of access must apply at least equally to the other two branches. Clearly, however, this is not the case. The Supreme Court, as we have seen, has been adamantly opposed to recognizing any affirmative constitutional right of access to information held by the other two branches. The Court has viewed this

353. *Id.* at 575.
354. *Id.* at 583-84.

as a political question that is foreclosed to the courts by traditional principles of separation of powers.[355]

Our proposed restatement of the doctrine continues, as it must, to recognize the Judiciary as a distinctly governmental agency, exercising sovereign power on behalf of the self-governing electorate. However, it does not view the Judiciary as necessarily co-equal for all purposes. Rather, it assumes that pertinent differences among the three branches, particularly those characterizing the different representational capacities of each branch, renders legitimate a different, yet nonetheless constitutionally derived, entitlement of public access. Therefore, a constitutional right of access limited to the Judiciary may be recognized on the basis of traditional principles of self-government without breaching the walls of political separation.

The revised reading of the right of access therefore addresses the "theoretically endless" quality of the doctrine in its present form, and at the same time restructures its claim to constitutional legitimacy. It also restructures the doctrine itself. The revised right of access is a right of access to the Judicial Branch as a whole rather than to a particular proceeding or process. This right recognizes more than a simple "interest" in access that is subject to being balanced against competing governmental interests. It establishes instead a right of access subject only to a set of compelling exceptions.

B. *Adopting the Revised Right of Access*

Assuming that the Supreme Court has adopted the view that the Judiciary is a governing agency subject to the access imperatives of a self-governing public, there are three principal reasons for adopting the proposed restructuring of the right of access. First, and certainly foremost, the underlying theory compels the revision. Second, the revised right provides a more definitive standard of access for the case law. Finally, the proposed revision facilitates the principled extension of the right to the new and more controversial issues of access.

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355. *See infra* text accompanying note 373.

1. The Structural Theory Compels the Revision

The structural theory of the First Amendment adopted in *Richmond Newspapers* is a political theory of the primary and subtextual guarantees of the Constitution. It views the Constitution as not only a legal text, but also as a seminal act of self-government. It asserts that the primary political or structural purpose of the Constitution is the building of a self-governing republic. All provisions of the Constitution are informed by, and must conform to, this prior objective. The Constitution itself is viewed as a formative act of self-governance that expresses and preserves the sovereignty of the republicans. This power of self-government, including the power to revoke or amend any provision of the Constitution, is realized through the democratic institution of suffrage. Thus, an electorate that is duly informed on the issues of government is a necessary precondition of self-government, even in a duly constituted representative democracy. Public access to all information concerning the conduct of government is therefore necessary to sustain the legitimacy of the government itself.

The structural theory posits the value of the political process of self-government as prior to, and higher than, the enumerated guarantees of the Constitution. In Meiklejohn's terms, free speech serves self-government and not the other way around.[356] The structural theory is therefore a theory of political process, not of individual rights, which embodies an implied critique of the limitations of traditional libertarian philosophy. It advances an optimal condition of self-government that is beyond both the optimal self-acquisition of economic theory and the optimal self-expression of libertarian theory. It is a republican theory of government adapted to the American Constitution which ultimately manifests the traditional tensions between republican and libertarian philosophies.[357]

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356. "The freedom that the First Amendment protects is not, then, an absence of regulation. It is the presence of self-government." Meiklejohn, *supra* note 267, at 252.

357. "Understood in some narrower sense, republicanism stood in opposition to other forms of democratic and constitutional theory, such as Lockean natural rights and social contract theory." Richard A. Epstein, *Modern Republicanism-Or the Flight from Substance*, 97 YALE L.J. 1633, 1635 (1988).

A right of access limited to mere observation of, or attendance at, certain designated legal proceedings, where "access to a particular government process is important in terms of that very process,"[358] does not satisfy the principal goal of the structural theory. The information essential to informed self-government is not satisfied by mere "passive access" to those relatively few and highly formalized proceedings which have traditionally countenanced, if not assumed, a public audience. The notion of peeling back the limited and formalized expressions of information provided by public officials, in order to expose the "real" information that drives the political process, is precisely what originally led to the wide-ranging development of "open government" laws in the several decades prior to *Richmond Newspapers*. Today, a genuine right of access to government information implies not so much the simple increased flow of information to an otherwise passive population, but rather the recognition of an affirmative entitlement by an inquisitive, self-sponsored public.

Stated differently, the structural theory of the Constitution would command sovereign public access to the judicial system, regardless of the particularized form of its institutions and proceedings. Such access is justified because the right of access is to the system itself and not to its particular and variable features. Thus, if the process of adjudication by trial were abolished in America, the structural theory would still command access to whatever governmental adjudication process took its place. This is a telling point when considering the increasingly limited and less consequential occurrence of trials within the American legal system, both civil and criminal.[359] Quite simply, a fully informed understanding of how, and how well, the Judiciary is performing can no longer be gleaned from the back row of the courtroom.[360]

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358. *Richmond Newspapers*, 448 U.S. at 589.

359. In the New York City Criminal Court which handled 213,000 non-felony cases in 1990, fewer than one-half of one percent [0.4%] of the cases went to trial. OFFICE OF COURT ADMIN., EXECUTIVE SUMMARY, CRIMINAL COURT OF THE CITY OF NEW YORK FOR THE JUDICIAL YEAR TO DATE 4 (Dec. 30, 1990) (Table 1).

360. Indeed, today it is even difficult to make it to the back row. For a charming account of one person's day-long attempt to gain entry to a major trial, see *Trial*, THE NEW YORKER, Mar. 26, 1990, at 28-29.

The traditional libertarian philosophy of the First Amendment provides a negative freedom from governmental interference with individual expression. This philosophy proved incapable of recognizing a positive freedom to compel government to provide publicly held information.[361] The structural theory provided the missing basis for recognizing such an affirmative liberty by positing a First Amendment value wholly independent of speech and expression: an informed electorate. The primary concern of the structural theory is informed suffrage, not informed speech. Therein lies both the novelty, and the rub, of the new right of access. Our proposed revision to the right, making *all* judicial acts presumptively subject to public scrutiny, more fully complies with the structural goal of the theory.

Additionally, this revised version of the right more directly reflects the principal of popular sovereignty that underlies the structural theory. More specifically, judges would be subject to public review as public officials. Each exercise of judicial authority would be an act of governmental power, performed on behalf of the self-governing public. To paraphrase the famous dictum of *Craig v. Harney*, what transpires before the judge is public business.[362] Thus, judicial conduct cannot be self-privileged by the courts. This was in fact, Justice Brennan's most pointed critique of the majority's holding in *Gannett Newspapers*: "*Gannett* holds that judges, as officers of [the] government, may in certain circumstances remove themselves from public view and perhaps also holds that they can make this decision without even considering the interests of the people."[363]

The Judiciary must itself be accountable for its performance to the sovereign public. Although judges have the power of judicial review over the other branches, the ultimate review is political and belongs to the sovereign public. As one state court judge commented, "[T]he most direct expression of this right of access may be stated this way—the court is a part of government and what goes on in court is the business of the peo-

361. *See supra* Part I.

362. Craig v. Harney, 331 U.S. 367, 374 (1947) ("What transpires in the courtroom is public property.").

363. Brennan, *supra* note 110, at 177.

ple."[364] One Seventh Circuit judge expressed the point even more emphatically:

> What happens in the halls of government is presumptively open to public scrutiny. Judges deliberate in private but issue public decisions after public arguments based on public records. The political branches of government claim legitimacy by election, judges by reason. Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat; this requires rigorous justification.[365]

This notion of access as a means of ensuring judicial accountability is directly expressed by Justice Brennan in *Richmond Newspapers*. After describing how a trial is in fact a "genuine governmental proceeding,"[366] Justice Brennan asserts that "[i]t follows that the conduct of the trial is pre-eminently a matter of public interest. More importantly, public access to trials acts as an important check, akin in purpose to the other checks and balances that infuse our system of government."[367] It is indeed possible to conclude, as has one noted commentator, that "the democratic principle of accountability underlies the decision in *Richmond Newspapers*."[368]

Another theoretical difficulty surrounding the Court's adoption of the structural theory of the First Amendment is that it appears too wide-ranging for a right of access limited solely to the Judicial Branch. If the sovereign public is entitled to access to all information bearing upon decision-making by governmental officials, then how can the right not apply equally to the other two branches? The structural theory of a self-governing electorate would appear to apply with even greater force to the elected representatives who govern in the public's stead. Indeed, it was not until *Richmond Newspapers* that the right-to-know implications of the structural theory of the First Amendment had ever been applied to the Judicial Branch. In fact, the lead-

364. *In re* Marriage of Johnson, 598 N.E.2d 406, 410 (Ill. App. Ct. 1992) (wrestling with the issue of access).

365. *In re* Krynicki, 983 F.2d 74, 75 (7th Cir. 1992) (resolving persistent claims to secrecy within the appellate process).

366. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 596 (1980).

367. *Id.* (citation omitted).

368. Lewis, *supra* note 111, at 2.

ing proponent of a First Amendment-based right-to-know government information did not even include the Third Branch as an object of the putative right.[369] The apparent irony of employing a theory of representative self-government to establish a right of access, limited to the least representative branch of government, cannot be ignored.[370]

It is worthwhile to note that this problem of an underinclusive right is not unique to our proposed revision to the right and poses an equally vexing conundrum for the right in its present formulation. In the initial expression of the right of access enunciated in *Richmond Newspapers*, the overinclusive quality of the underlying theory was resolved by reference to the "history prong" of the two-part analysis. The right of access was said to apply in particular to the criminal jury trial because that institution was historically open to the public. The notion was that the structural design of the Constitution both informed and was informed by historical practice. While Chief Justice Burger and Justice Brennan employed the historical factor differently, both ultimately used it to explain how their rather broad revisions to First Amendment theory had a limited, if not unique, application to criminal trials. For Justice Brennan in particular, the historical factor was a "helpful principle"[371] that explained how the "theoretically endless"[372] quality of the structural theory could be reasonably limited. Today, however, the so-called history prong of the test has essentially been abandoned by the access doctrine.[373] The right of access, as developed and expanded in recent case law, relies almost exclusively on the "functional utility" prong of the original test. Historical practice no longer operates to establish or corroborate a putative entitlement to access to judicial infor-

369. *See* Emerson, *supra* note 255.

370. BeVier, *supra* note 6, at 313 ("When the result in a particular case portends significant new doctrinal developments that will necessarily expand the Court's power to review the actions of other governmental branches, both state and federal, it is fair to demand that its proffered rationales sustain a particularly heavy burden of justification.").

371. *Richmond Newspapers*, 448 U.S. at 589.

372. *See* Brennan, *supra* note 110, at 177, *noted in Richmond Newspapers*, 448 U.S. at 588.

373. *See supra* text accompanying note 181.

mation. Thus, the dilemma of underinclusion has been compounded in the more recent case law.

The answer to this riddle may indeed be straightforward: perhaps the First Amendment right of access does not apply to the other branches of government simply because it *cannot* be so applied. In other words, the limitation is practical, or political, but not theoretical. While the political theory of self-governing access does apply equally to all branches of government, the separation of powers doctrine precludes the Judiciary from applying the right of access to any branch other than itself. In other words, the very reason why the Court could not grant a right of access to non-judicial information in cases such as *Houchins v. KQED*, is the same reason why such a right of access could be granted in *Richmond Newspapers*.

It must be recalled that all of the access cases prior to *Gannett Newspapers* involved claims to information held or controlled by the Executive Branch. As we have seen, the Supreme Court, despite some encouraging dicta, consistently rejected all claims to such access.[374] And the Court did so ostensibly on the basis of the libertarian, shield-only paradigm of the First Amendment. But other, perhaps more fundamental, reasons were also expressed by the individual Justices to excuse the Court's failure to acknowledge an otherwise compelling claim of access to government information. For example, the members of the Court repeatedly expressed their concern that a judicially-enforced right of access to executive information would force the Court beyond the wall of political separation. Thus, in *Houchins v. KQED, Inc.*[375] three of the Justices, expressing three separate and distinct points of view as to the holding in the case, shared a common aversion to the political consequences of the claim to access:

> The respondent'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

374. *See supra* Part I.

375. 438 U.S. 1 (1978) (the penultimate prison access case that was thought to foreclose Supreme Court recognition of a constitutional right of access).

> to involve itself in what is clearly a legislative task which the Constitution left to the political processes.[376]
>
> Forces and factors other than the Constitution must determine what government-held data are to be made available to the public.[377]
>
> Such matters involve questions of policy which generally must be resolved by the political branches of government.[378]

Justice Powell, in dissent to an earlier denial of access in *Saxbe v. Washington Post Co.*,[379] expressed a similar concern: "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."[380]

This conspicuous concern with the "political question" aspects of the putative right of access may help to explain the Court's reversal of posture from *Gannett Newspapers* to *Richmond Newspapers*. As discussed earlier, *Gannett Newspapers* was the first Supreme Court case involving a claim of access to judicial information. The Court routinely applied the precedents of the earlier access cases and denied the claim of access to a pretrial suppression hearing. But, as we have seen,[381] the result proved immediately and profoundly unsatisfactory to the Justices themselves. The Court quickly granted certiorari in *Richmond Newspapers* and *Gannett* was effectively overruled within a year of its release. Taken only at face value, it is exceedingly difficult to reconcile the holding in *Richmond Newspapers* with the Court's earlier access holdings.[382] A better understanding of this "watershed" development emerges from the simple fact that the claim in *Gannett*, unlike the earlier cases, did not afford the Court the cover of the separation of powers doctrine.

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376. *Id.* at 12 (Burger, C.J., plurality opinion).
377. *Id.* at 16 n.* (Stewart, J., concurring) (citation omitted).
378. *Id.* at 34 (Stevens, J., dissenting).
379. 417 U.S. 843 (1974).
380. *Id.* at 872.
381. *See supra* text accompanying note 106.
382. *See* BeVier *supra* note 6, at 320-22.

It had proven far easier to excuse a denial of public access to public information than it did to justify it.

Therefore, the answer to the dilemma of underinclusion in the structural right of access is itself structural. This answer acknowledges not only the unique constitutional responsibility that the Judiciary bears with respect to the other two branches, but also with respect to the electorate. To the extent the structural theory adopted in *Richmond Newspapers* assumes the Judiciary is a governing agency, the theory posits a direct agency relationship as well as responsibility between the Judiciary and the self-governing public. The public is entitled to access because the governing Judiciary is accountable to it, although not necessarily by way of direct electoral control. The principle of accountability extends to juridic conduct as a whole and not merely to particularized proceedings or occurrences.

At first glance, this notion of a Judiciary directly accountable to the public is problematic. It assumes that the purveyors of judicial review are themselves in some manner subject to popular review. This would contradict several of the basic premises of the orthodox theories of judicial review. These theories characteristically posit the necessity of a Judiciary insulated from the momentary majoritarian pressures exerted upon the other two branches. The extraordinary power of judicial review is typically deemed legitimate only to the extent that judicial decision-making is neutral to all commands save that of the constitutional text.[383] The "counter-majoritarian difficulty"[384] posited by judicial review is resolved by assuming that the Judiciary is uniquely capable of a constitutional fidelity, or virtue, precisely because of its non-majoritarian posture. Yet the orthodox premise of neutrality is not inconsistent with the structural premise of accountability. The latter simply asserts that the neutrality of judges is required in fact as well as theory, and that the actual decision-making of judges is, in the end, not en-

383. Bork, *supra* note 217, at 4 ("If [the Court] does not have and rigorously adhere to a valid and consistent theory of majority and minority freedoms based upon the Constitution, judicial supremacy, given the axioms of our system, is, precisely to that extent, illegitimate."). The constitutional text, however, is itself a non-momentary, transcendent expression of majority will.

384. This phrase is attributed to ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 16 (2d ed. 1986).

tirely privileged. Under the more modern view, judges are properly required to be both neutral and accountable.[385]

The command of the structural theory adopted in *Richmond Newspapers* for a systemic, as opposed to a particularized, right of access, finds a good deal of collateral support in the burgeoning literature of the "republican revival" theorists.[386] These "new republican" theories are essentially structuralist reinterpretations of the Constitution. They find in the very structure of the Constitution a classical republican commitment to disinterested, non-pluralist civic deliberation. This process-based commitment to realizing the true general will of the public requires a government that affirmatively sponsors and secures an informed electorate.

Republicanism is of course most commonly associated with this reliance upon the possibility of a genuine "civic virtue." This virtue is not, however, a freedom. It is an affirmative obligation of the citizen which expresses the very purpose of government in a self-governing polity. In turn, the government is affirmatively obligated to promote and facilitate the maintenance of this civic virtue. Although individual rights are not inconsistent with republican theory,[387] interest-based factions

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385. This is not to deny the genuine tension between this structural theory of "Judiciary review" and the more traditional theory of judicial review. The latter typically assumes that judicial review is a counter-majoritarian power that is consistent with political democracy only to the extent that the Judiciary is itself politically neutral and confines itself to the application of the majoritarian will expressed in the very text of the Constitution. In that sense, the Judiciary is presumed to derive its legitimacy from the fact that it is insulated from the momentary expressions of popular will, and therefore from popular review, by the fixed and superior will of the text. The structural theory assumes, somewhat to the contrary, that the Judiciary is itself a proactive political agency which is legitimate only to the extent that it *is* subject to public review. Once again, Justice Brennan provides the critical observation:

> The interpretation and application of constitutional and statutory law, while not legislation, is lawmaking, albeit of a kind that is subject to special constraints and informed by unique considerations. Guided and confined by the Constitution and pertinent statutes, judges are obliged to be discerning, to exercise judgment, and to prescribe rules.

Richmond Newspapers, 448 U.S. at 595, n.20 (citations omitted).

386. *See, e.g.*, Symposium, *Classical Philosophy and the American Constitutional Order*, 66 CHI.-KENT L. REV. 3 (1990); Symposium, *The Republican Civic Tradition*, 97 YALE L.J. 1493 (1988).

387. "Republican theories are not, however, hostile to the protection of individual or group autonomy from state control. Indeed, legal rights have quite consistently accompanied republican systems." Cass R. Sunstein, *Beyond the Republican Revival*,

are certainly anathema to the realization of civic virtue.[388] Rights are a necessary, but insufficient, condition for the republican theorist. Obligations to the collective self are the critical and distinguishing feature of a republican system.

In the new republican theories, civic virtue is manifested in the democratic institution of political discourse,[389] or what is referred to as "deliberative democracy."[390] The transformation of self-interest into collective interest typically implies a dialogical imperative of sorts. The government is therefore principally burdened with the affirmative obligation to facilitate an informed public discourse. And almost invariably, the new republican theorists commend an exalted role for the Judiciary as either guardian[391] or actual practitioner[392] of such virtuous discourse.[393] These juriscentric theories are still in the formative, experimental stages of constructing a communitarian antidote to the interest-based theories of pluralist constitutional jurisprudence—they have as yet had little bearing on any actu-

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97 YALE L.J. 1539, 1551 (1988).

388. "Intellectually, [republicanism] promises escape from the dead end in which pluralist constitutional theory finds itself. Politically, it moves toward fulfilling the deepest human impulses that underlie liberalism." Paul Brest, Comment, *Further Beyond the Republican Revival: Toward Radical Republicanism*, 97 YALE L.J. 1623 (1988).

389. "The republican and the interpretive approaches share an understanding of community as the locus of discourse. Speaking, not governing, is the main activity of the theorists' constitutional community." PAUL W. KAHN, LEGITIMACY AND HISTORY 1 (1992).

390. In the legal literature the term is most commonly associated with the writings of Cass Sunstein. *See, e.g.*, Sunstein, *supra* note 386. But the term, as is true of much in the republican revival, has its origins in the political science literature. *See, e.g.*, Joseph M. Bessette, *Deliberative Democracy: The Majority Principle in Republican Government*, *in* HOW DEMOCRATIC IS THE CONSTITUTION? 102 (Robert A. Goldwin & William A. Schambra eds., 1980) (cited in Sunstein, *supra* note 386, at 1562, n.127).

391. *See, e.g.*, Sunstein, *supra* note 386.

392. *See, e.g.*, Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984); Frank I. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986).

393. The heavy reliance of the new republicans on the Judiciary as the saving grace of their various systems has drawn a good deal of critical comment. *See, e.g.*, Brest, *supra* note 387, at 1625 ("[I]t is at least ironic that much of the legal scholarship of the republican revival, rather than working to promote participation and discourse in those [non-judicial] forums, is as court-centered as the pluralist scholarship from which it distinguishes itself.").

al doctrinal developments.[394] However, they have had an enormous impact within the realm of constitutional discourse.[395]

The critical accomplishment of the republican revival has been its successful reemphasis of the essential role of public discourse in legitimizing the outcomes of the political process. It has also, although somewhat less successfully, refocused attention on the role of the Judiciary in guaranteeing the essential due process of this deliberative self-government. The new republicans have not as yet focused on the more concrete issues of what exactly would constitute legitimate discourse in a neorepublican era. Yet it is indeed striking how resonant the *Richmond Newspapers* right of access is with the major themes of the republican revival. These themes include the affirmative obligation of government, independent of any right of individual expression, to promote an informed, self-governing electorate on matters of governmental affairs. In retrospect, Alexander Meiklejohn appears as a republican revivalist before the revival.[396]

Another compelling collateral development that serves to underscore the essential soundness of reconstructing the *Richmond Newspapers* doctrine as a systemic right of access is the independent legislative development of a systemic right of access to the Administrative Branch. The popular clamoring for a positive right-to-know government information began in the early 1940s.[397] The essential modern insight of the right-to-know advocates was that in an Age of Information, where information is power, there appeared to be an inherent tendency on

394. "The republican revival is designed, above all, as a response to understandings that treat governmental outcomes as a kind of interest-group deal, and that downplay the deliberative functions of politics and the social formation of preferences." Sunstein, *supra* note 386, at 1590.

395. "[C]urrently one of the most significant movements in constitutional jurisprudence. . . ." Stephen M. Feldman, *Republican Revival/Interpretive Turn*, 1992 WIS. L. REV. 679, 680 (1992).

396. "Meiklejohn's interpretation is radical and appeals to contemporary proponents of a constitutional 'right-to-know' precisely because it denies that the First Amendment guarantees a right of citizens, recognizing instead a public power." O'Brien, *supra* note 99, at 617.

397. The phrase "right-to-know" has been attributed to a speech given by Kent Cooper in 1945. DAVID M. O'BRIEN, THE PUBLIC'S RIGHT-TO-KNOW: THE SUPREME COURT AND THE FIRST AMENDMENT 2 (1981). Cooper later published *The Right-to-Know* in 1956.

the part of those already enjoying power to self-privilege their bases of information. Nowhere was this more apparent than in the post-New Deal executive agencies that appeared to be gaining monopoly control over vast areas of the public enterprise. These agencies quickly became the focus of the drive to maintain openness in government and were the object of the principal legislation enacted with respect to rights of access. Despite the obvious and significant differences between the right of access to government agency information and access to judicial information, the parallels are striking. These two distinct bodies of law bear a common theory and structure, and a similar set of doctrinal issues.[398]

Earlier, this paper described how the right recognized in *Richmond Newspapers* was a concerned reaction to the emergence of adjudicative practices which attempted to foreclose certain proceedings from public scrutiny. The Supreme Court found such practices repugnant to the unenumerated, structural guarantee of a self-governing public. This mirrored the earlier pattern of the legislative development of "open government" laws. The legislative initiatives were closely bound to the revival of the Madisonian principle of self-informed self-government: "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both."[399] There are today a great number of statutes—federal, state and local—which provide for public access to government information and proceedings.[400] However, the two federal laws which dominate the field are the Freedom of Information Act (FOIA)[401] and the Government in the Sunshine Act (Sunshine Act).[402] The remarkable parallels between these two laws and the *Richmond Newspapers* doctrine are striking.

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398. Professor Emerson, after outlining the struggling case law development of a putative "right-to-know," noted: "Fortunately, a good start has already been made to achieve the same end through legislation. The Federal Freedom of Information Act adopts much of the basic pattern just outlined." Emerson, *supra* note 255, at 17.

399. Letter from James Madison to W.T. Berry (Aug. 4, 1822), *reprinted in* 9 THE WRITINGS OF JAMES MADISON 103 (Gaillard A. Hunt ed., 1910) (discussing Kentucky's adoption of a general education system).

400. The Reporters Committee for Freedom of the Press maintains an updated state-by-state guide to the open government laws, called "Tapping Officials' Secrets".

401. 5 U.S.C. § 552 (1988).

402. 5 U.S.C. § 552b (1988).

The FOIA was the first to pass. When it was signed into law on July 4, 1966, it was celebrated as a major check on institutionalized secrecy. The legislative history of the Act, which was extensive, consistently characterized the issue as one involving an insidious secrecy that threatened the very purpose and legitimacy of government.[403] A Senate report accompanying the bill framed the issue in classic, Madisonian terms:

> Today the very vastness of our Government and its myriad of agencies makes it difficult for the electorate to obtain that "popular information" of which Madison spoke. But it is only when one further considers the hundreds of departments, branches, and agencies which are not directly responsible to the people, that one begins to understand the great importance of having an information policy of full disclosure. . . . Although the theory of an informed electorate is vital to the proper operation of a democracy, there is nowhere in our present law a statute which affirmatively provides for that information.[404]

This policy commitment to an informed self-governing public was explicitly affirmed ten years later in the Sunshine Act. The opening words of the Act recognized the now settled force of the principles of self-government that were driving the proliferation of open government laws throughout the 1960s and 1970s: "It is hereby declared to be the policy of the United States that the public is entitled to the fullest practicable information regarding the decisionmaking processes of the Federal Government."[405]

The structure of these two federal laws is also quite telling. Each of them creates a broad presumptive right of access to all information within the public system of its coverage. The initial burden is not on the citizen to justify a claim of access; instead, the government bears the burden of justifying closure. Both laws then provide a categorical list of exemptions based upon a strict balancing of the need for openness with the varied legitimate needs for non-disclosure. The subject matter of their re-

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403. *See* FREEDOM OF INFORMATION ACT SOURCE BOOK: LEGISLATIVE MATERIALS, CASES, ARTICLES, S. Doc. No. 82, 93d Cong., 2d Sess. (1974) (primary source for legislative history of the FOIA).

404. CLARIFYING AND PROTECTING THE RIGHT OF THE PUBLIC TO INFORMATION AND FOR OTHER PURPOSES, S. REP. NO. 813, 89th Cong., 1st Sess. 3 (1965).

405. Pub. L. No. 94-409, § 2, 90 Stat. 1241 (1976).

spective coverages is also quite suggestive. The FOIA provides access to agency records and the Sunshine Act accords access to agency meetings. Together they cover the same ground the *Richmond Newspapers* doctrine now covers with regard to judicial information.[406] In *Richmond Newspapers* terms, the FOIA is to judicial documents what the Sunshine Act is to judicial proceedings. Also, the doctrinal consequences of the two subject areas similarly replicate the experience of the *Richmond Newspapers* doctrine. The law governing access to papers is far more problematic than the law governing access to places.[407]

The doctrinal issues that have developed and to some extent been resolved under the open government laws also appear to anticipate issues emerging within the *Richmond Newspapers* doctrine. Judges appear to have been no less creative than agency heads in developing avoidance mechanisms to circumvent open access. For example, following passage of the Sunshine Act, the decision-making processes of many agencies were apparently recast in an effort to avoid holding a "meeting" to which public access was required.[408] This of course is not unlike the practices of judges who remove various functions from the courtroom to a bench[409] or *in camera*[410] conference in

406. One enthusiastic partisan of the press, in immediate reaction to the holding in *Richmond Newspapers*, predicted that in time "the First Amendment will be looked at as a Freedom of Information Act." James C. Goodale, Gannett *is Burned by Richmond's First Amendment "Sunshine Act,"* NAT'L L.J., Sept. 29, 1980, at 24.

407. *See* Stephen A. Klitzman, *Government in the Sunshine Act—Nuts, Bolts and Tacks: A Summary of Statutory Provisions, Judicial Interpretations and Pending Issues*, 38 FED. BAR. NEWS & J. 114 (1979) (noting the fewer number of reported cases under the Sunshine Act as opposed to the FOIA and the generally fewer-than-anticipated problems with the former).

408. The primary study of the effects of the Sunshine Act on agency meeting practices concluded that: "There are reasons to believe that there has been a shift in patterns of decision-making behavior, at least in a number of agencies, away from collegial processes toward segmented, individualized processes . . . " and "in many settings, the evidence indicates, there is an absence of meaningful meetings on fundamental questions of policy and strategy if those meetings must be in public." David M. Welborn et al., *Implementation and Effects of the Federal Government in the Sunshine Act: Final Report for the Administrative Conference of the United States, reprinted in* ADMINISTRATIVE CONFERENCE OF THE UNITED STATES: RECOMMENDATIONS AND REPORTS 199, 236, 248 (1984).

409. *Cf.* United States v. Valenti, 987 F.2d 708 (11th Cir. 1983) (discussing the courts' authority to conduct closed bench conferences to protect information in a criminal investigation).

410. *Cf.* Cable News Network (CNN) v. United States, 824 F.2d 1046 (D.C. Cir. 1987) (permitting an *in camera voir dire* in a criminal investigation to protect certain

order to avoid the public right of access to the "trial" proceeding.

For all of the foregoing reasons, the *Richmond Newspapers* right of access is better construed as a systemic rather than a particularized, ad hoc right of access. The underlying structural theory virtually compels such an interpretation, and the right so revised would gain the collateral benefit of parallel developments in the areas of modern republican theory and open government legislation.

2. The Revision Provides a More Definitive Standard for the Case Law

The proposed restatement of the *Richmond Newspapers* right of access—to render it an across-the-board right of access to judicial decisionmaking—is not only more consistent with the underlying First Amendment theory. It also provides a more definitive, bright-line standard to inform the case law. Indeed, the revised reading of the right of access is in accord with the major holdings of the established case law. It requires no significant unsettling of the existing doctrine and provides a much more sensible and readily applicable standard for trial courts.

Earlier, this paper described how the rapidly expanding case law has stretched the *Richmond Newspapers* doctrine perilously thin.[411] In order to expand the doctrine beyond the "trial," the courts were forced to stretch the doctrine to cover various trial-related "proceedings." To then expand the doctrine to include the numerous papers and documents in a case, the courts had to adopt an expansive reading of "proceeding."[412] In addition, the lower courts have often simply resorted to an alternative body of access law where the stretch of the doctrine has proven too tenuous. The result has been twofold. On the one hand, the *Richmond Newspapers* doctrine, as developed by the lower courts, is now miles beyond the analytical harbor of the Su-

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privacy interests).

411. *See supra* text accompanying note 180.

412. *See, e.g., In re* Gunn, 855 F.2d 569, 573 (8th Cir. 1988) ("[E]ven though a search warrant is not part of the criminal trial itself, like voir dire, a search warrant is certainly an integral part of a criminal prosecution.").

preme Court cases. On the other hand, the law of access has become a crazyquilt of constitutional, common, statutory, and local laws without a clear or dominant thread.

The central fault with the *Richmond Newspapers* doctrine at present is that the essential "functional utility" test fails to explain or inform the case law. As one scholarly commentator has noted:

> Although offered as part of [Justice Brennan's] effort to restrain the "theoretically endless" stretch of the right-to-gather information, the inquiry into whether access to a particular governmental process is important in terms of the process fails to focus First Amendment analysis. . . . Moreover, at least as elaborated by Justice Brennan, the principle that would limit access to cases where it is deemed important in terms of the process to which it is sought does not provide meaningful guidance concerning the most significant and controlling question of how to discern whether access is important. . . .[413]

The lower courts have thus far managed well enough without a more definitive standard. This is not uncommon for a new doctrine in the formative stages of growth. However, the need to reduce and rationalize the new law will assume increasing importance and the cases themselves will become more difficult. Therefore, the measure of decision must become easier.

The revised standard reduces itself to a single question: Is the information in question relevant to the court's official exercise of judicial authority? If so, the presumption of a right of access applies. The presumption applies to all information that comes within the purview of the court, regardless of whether it occurs in the form of a proceeding, document or any other medium. The information presented to the public official is public information. The form the information takes is irrelevant. However, some information may be privileged from public access if the party seeking closure demonstrates the "compelling"[414] or "overriding"[415] interest required to overcome, or out-balance, the First Amendment interest in access.

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413. BeVier, *supra* note 6, at 337.
414. *See* Globe Newspaper Co. v. Superior Ct., 457 U.S. 596, 607 (1982).
415. Press-Enterprise v. Superior Court, 478 U.S. 1 (1986).

The revised right is also consistent with the doctrine of *Seattle Times Co. v. Rhinehart*[416] which held that documents exchanged between the parties as a matter of discovery, *but not submitted to the court*, are not public information. There is, in other words, a distinction between the litigation process and the adjudicative process. This distinction is particularly significant on the civil side of litigation. Information obtained as a matter of investigation or exchanged as a matter of discovery does not fall within the right of access. It is only when that information is brought to the attention of the court in relation to an exercise of judicial authority that the information becomes public and thereby subject to public access.[417]

The revised right of access does not require any reconciliation with the cases prior to *Richmond Newspapers*. Those cases, with the exception of *Gannett Newspapers*, did not involve *judicial* information and therefore fall outside the revised right.[418] However, the common law right of access addressed in *Nixon v. Warner Communications, Inc.*[419] *would* be affected by the revised right. To the extent that judicial records fall within the scope of the revised constitutional right of access, as undoubtedly most of them would, the *Nixon* standard of access would be superseded.

The test under the revised right of access to judicial information bears a direct parallel to the standard of access under the Sunshine Act. The policy of open government in the Sunshine Act is premised on the same theory of self-government that underlies the right of access in *Richmond Newspapers*. The purpose of the Act is to bring the "whole decision-making process"[420] of the Administrative Branch into public view. The debate under the Act over the extent to which the agency process must be open to the public has centered around an attempt to distinguish between various agency functions. Functions that

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416. 467 U.S. 20 (1984).

417. *See In re* Krynicki, 983 F.2d 74, 75 (7th Cir. 1992) ("Secrecy persists only if the court does not use the information to reach a decision on the merits.").

418. The revised reading of the right would, however, affect the issue of whether the First Amendment right of access applies to executions. *See supra* note 149. If an execution was deemed to be a non-judicial proceeding, then the right would not apply.

419. 435 U.S. 589 (1978) (holding that judicial records and exhibits are subject to a lesser standard of access).

420. S. REP. NO. 354, 94th Cong., 1st Sess. 18 (1975).

represent the "inquiry" stage of agency action are distinguished from those functions that involve "deliberative" action.[421] This distinction appears tailor-made for the Judicial Branch as well. According to the traditional division of labor within our adversarial system of adjudication, the lawyers representing the parties conduct what is essentially the non-deliberative inquiry stage and the judge has primary responsibility for the actual adjudication. Therefore, all information obtained or exchanged by the lawyers, by whatever process, does not at that point fall within the deliberative/adjudicative process. On the other hand, almost all information related to an official matter before the court, which comes to the attention of the judge, presumably bears on the deliberative process of the court and is thereby subject to the public right of access. Therefore, regardless of the informational process in question (discovery, deposition, plea-bargaining, settlement, warrant, etc.), when the judge becomes engaged in a deliberative capacity, the information brought to the attention of the court must likewise be accessible to the public.[422]

The revised focus of the right also clarifies the access to which the public is entitled. Specifically, the public is entitled to information bearing upon the operation of the judicial system. The right cannot adequately be understood or applied as a right to particular proceedings or documents. Actual physical access to a proceeding or document may be essential or meaningless. For instance, if the information sought concerns the manner in which the trial court handles the courtroom confrontation and cross-examination of the minor victim of sexual abuse, a verbatim transcript of the proceeding will likely deny access to critical information within the contemplation of the right. However, where a transcript does provide the information

421. *See* David A. Barrett, Note, *Facilitating Government Decision Making: Distinguishing Between Meetings and Nonmeetings Under the Federal Sunshine Act*, 66 TEX. L. REV. 1195 (1988).

422. However, this analysis does not preclude an exception for deliberative information created *by* the judge. This would be in the nature of a "judicial work-product" exception to disclosure. One state court, dealing with a claim of access to a judge's trial notes, pursuant to a state public records law, recognized such an exception. *See* State *ex rel.* Steffen v. Kraft, 619 N.E.2d 688 (Ohio 1993) (following the pattern established in the FOIA case law dealing with claims to public employees' personal notes); *see, e.g.*, Sibille v. Federal Reserve Bank, 770 F. Supp. 134 (S.D.N.Y. 1991); British Airports Auth. v. Civil Aeronautics Bd., 531 F. Supp. 408 (D.D.C. 1982).

necessary to a critical appraisal of the proceeding, immediate physical access to the proceeding may be unnecessary.

Likewise, actual physical presence in the courtroom may be inadequate if much of the critical deliberation takes place at bench or *in camera* conferences. Similarly, physical presence at a trial often does not provide meaningful access to the critical evidence in the case, even though it is admitted in open court. For instance, it is not uncommon in contemporary criminal trials for the most critical evidence in the case to be in the form of audiotapes played to the jurors through individual headsets. Some courts, following *Nixon v. Warner Communications, Inc.*, have held that the First Amendment applies only to access to the proceeding itself. As such, access to the tape exhibits is outside the scope of the First Amendment right. Accordingly, access to the tapes may be readily denied for less than compelling reasons.[423] This approach tends to exalt form over substance and may substantially defeat the purpose of the right. The focus of the right must always be on the information, not the package, to which the public is entitled.[424]

3. The Revision Facilitates a Principled Expansion of the Right

The development of the *Richmond Newspapers* right of access was not driven by the unfolding logic of traditional First Amendment doctrine. Indeed, as this article has earlier attempted to demonstrate, the new right of access emerged in response to external pressure for greater openness than that provided under traditional First Amendment principles. This outside pressure to eliminate the numerous pockets of secrecy that remain within the judicial system is likely to continue.[425] The second generation of issues, beyond the simple attachment of various proceedings and documents, will involve far more challenging and difficult matters. To be sure, there is already

423. *See supra* text accompanying note 188.

424. *See, e.g.*, Matthew Bunker et al., *Access to Government-Held Information in the Computer Age: Applying Legal Doctrine to Emerging Technology*, 20 FLA. ST. U. L. REV. 543 (1993).

425. "In recent years, of course, the political pressures toward openness which citizens have put upon their representatives have proved increasingly irresistible." BeVier, *supra* note 20, at 509.

evidence that the courts are reluctant to face some of these issues. The proposed revision to the right of access will greatly enhance the ability of the courts to address and resolve these issues of increasing public concern.

It is certainly beyond the scope of this article to address in any detail these various issues-in-waiting. However, it is worthwhile to identify some of them, if only to underscore the centripetal force of the new doctrine of access. The revised right of access has potential application to the following: judicially sealed settlement agreements;[426] judicial protective orders to seal discovery materials;[427] the exclusion of cameras from the courtroom;[428] confidential filings and proceedings of judicial review boards;[429] confidential filings and proceedings of attorney disciplinary panels;[430] anonymous juries;[431] and anony-

426. *See* John J. Watkins, Expanding the Public's Right-to-Know: Access to Settlement Records Under the First Amendment, Discussion Paper D-7, December, 1990, Kennedy School of Government, Harvard University, at 6-9; Laleh Ispahani, *The Soul of Discretion: The Use and Abuse of Confidential Settlements*, 6 GEO. J. LEGAL ETHICS 111 (1992); Anne Bechamps, Note, *Sealed Out-of-Court Settlements: When Does the Public Have a Right-to-Know?*, 66 NOTRE DAME L. REV. 117 (1990); Elsa Walsh & Benjamin Weiser, *Public Courts, Private Justice*, WASH. POST, Oct. 23-26, 1988; Benjamin Weiser, *Forging a Covenant of Silence*, WASH. POST, Mar. 13, 1989, at A1.

427. Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427 (1991); Richard P. Campbell, *The Protective Order in Products Liability Litigation: Safeguard or Misnomer?*, 31 B.C. L. REV. 771 (1990); Note, Access to Pretrial Documents Under the First Amendment, 84 COLUM. L. REV. 1813 (1984); Brian T. Fitzgerald, *Sealed v. Sealed: A Public Court System Going Secretly Private*, 6 J.L. & POL. 381 (1990).

428. Richard H. Frank, *Cameras in the Courtroom: A First Amendment Right of Access*, 9 COMM. ENT. L.J. 749 (1987).

429. *See* Note, *A First Amendment Right of Access to Judicial Disciplinary Proceedings*, 132 U. PA. L. REV. 1163 (1984); Brian R. Pitney, Note, *Unlocking the Chamber Doors: Limiting Confidentiality in Proceedings Before the Virginia Judicial Inquiry and Review Commission*, 26 U. RICH. L. REV. 367 (1992).

430. An ABA study commission recommended an end to such secrecy and reported:

> The Commission is convinced that secrecy in discipline proceedings continues to be the greatest single source of public distrust of lawyer disciplinary systems. Because it engenders such distrust, secrecy does great harm to the reputation of the profession. The public's expectation of government and especially of judicial proceedings is that they will be open to the public, on the public record, and that the public and media will be able to freely comment on the proceedings. The public does not accept the profession's claims that lawyers' reputations are so fragile that they must be shielded from false complaints by special secret proceedings. The irony that lawyers are protected by secret proceedings while earning their livelihoods in an open system of justice is not lost on the public. On the contrary it is a source of great antipathy toward the profession.

mous victims.[432] Whenever issues of significant underlying public concern begin to surface in the American courtroom, the demand for greater public awareness quickly follows. DeTocqueville, no doubt, would not have been surprised.

V. CONCLUSION

The argument in favor of recognizing a constitutional right of access to judicial information has one compelling advantage: there is no compelling argument against it. The Supreme Court realized this immediately following its notoriously unpopular holding in *Gannett Newspapers*. Within a year, the Court had radically reversed its position, and in *Richmond Newspapers* held that the First Amendment indeed affirmatively compels the Judiciary to maintain an open courthouse. The key to this doctrinal transformation was the rediscovery of a republican principle of actively informed self-government. Affirmative access, rather than a mere absence of prior restraint, became the bellwether of the real state of freedom of our self-governing discourse.

Since *Richmond Newspapers,* the lower courts have found little resistance to the rapid extension of the new right of access to cover most proceedings and documents within the courthouse. But the demand for access is increasingly, and compellingly, being heard beyond the narrow confines of pro-

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The ABA, at its mid-year meeting in February, 1992, rejected the Commission's initial recommendation for a sunshine provision.

431. *See* Marc O. Litt, *"Citizen-Soldiers" or Anonymous Justice: Reconciling the Sixth Amendment Right of the Accused, the First Amendment Right of the Media and the Privacy Right of Jurors*, 25 COLUM. J.L. & SOC. PROBS. 371 (1992); Robert L. Raskopf, *A First Amendment Right of Access to Juror's Identity: Towards a Fuller Understanding of the Jury's Deliberative Process*, 17 PEPP. L. REV. 357 (1990).

432. *See* Deborah W. Denno, *Perspectives on Disclosing Rape Victims' Names*, 61 FORDHAM L. REV. 1113 (1993); Carey Haughwout, *Prohibiting Rape Victim Identification in the Media: Is it Constitutional?*, 23 U. TOL. L. REV. 735 (1992); Sarah H. Hutt, Note, *In Praise of Public Access: Why the Government Should Disclose the Identities of Alleged Crime Victims*, 41 DUKE L.J. 368 (1991).

ceedings and documents. The doctrine of access must be redressed not only to rationalize the existing case law but also to meet the challenge of these increasing claims for a more open government.