The First Amendment and the Public's "Right to Know"

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Introduction

The public's "right to know" has become an increasingly popular political ideal in America. The symbolic and practical value of this right for both the public and the press gained significance and acquired a new, albeit not fully comprehended, meaning from the wake of the Cold War secrecy, and more recently from Watergate.[1] Sensitive to the growing political passions and pressures for "governmental openness," Congress enacted major legislation designed to further the public's "right to know," granting access to government documents, records and meetings.[2] In the last decade, however, a majority of the Burger Court has proved particularly unsympathetic to claims that the First Amendment either specifically guarantees a "right to know"[3] or grants the

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1. *See, e.g.*, H. RANDOM, CAN AMERICAN DEMOCRACY SURVIVE THE COLD WAR? (1963); F. ROURKE, SECRECY & PUBLICITY: DILEMMAS OF DEMOCRACY (1961); D. WISE, THE POLITICS OF LYING (1973); HOUSE COMM. ON GOVERNMENT OPERATIONS AND SENATE COMM. ON THE JUDICIARY, 94TH CONG., 1ST SESS., FREEDOM OF INFORMATION ACT AND AMENDMENTS OF 1974 (P.L. 93-502) SOURCE BOOK: LEGISLATIVE HISTORY, TEXTS AND DOCUMENTS (Joint Comm. Print 1975).

2. *See* Freedom of Information Act, 5 U.S.C. § 552 (1975); Government in the Sunshine Act, 5 U.S.C. § 552b (1976); Federal Advisory Committee Act, 5 U.S.C. app. 1 at 697 (1973).

3. *See, e.g.*, Gannett Co. v. DePasquale, 99 S. Ct. 2898 (1979); Houchins v. KQED, Inc., 438 U.S. 1, 35 (1978) (Stevens, J., dissenting); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 785 (1976) (Rehnquist, J., dissenting); Buckley v. Valeo, 424 U.S. 1, 237-38 (1976) (Burger, C.J., concurring in part and dissenting in part); United States v. Richardson, 418 U.S. 166, 235 (1974) (Brennan, J., dissenting); Hamling v. United States, 418 U.S. 87, 141 (1974) (Brennan, J., dissenting); Saxbe v. Washington Post Co., 417 U.S. 843, 857 (1974) (Powell, J., dissenting); Pell v. Procunier, 417 U.S. 817, 840-41 (1974) (Douglas, J., dissenting); Miller v. California, 413 U.S. 15, 44 (1973) (Douglas, J., dissenting); Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 165 (1973) (Douglas, J., concurring); Branzburg v. Hayes, 408 U.S. 665, 684-85 (1972); Gravel v. United States, 408 U.S. 606, 643 (1972) (Douglas, J., dissenting); New York Times Co. v. United States, 403 U.S. 713, 749 (1971) (Burger, C.J., dissenting). *But see*

press special privileges in order to inform the public.[4] The Burger Court's First Amendment rulings have consequently been assailed as establishing "a dangerous pattern"[5] that "for all practical purposes [constitutes a] war against the press,"[6] and as diminishing the constitutional significance of the public's "right to know."

Criticism of the Burger Court's treatment of the First Amendment is perhaps a measure of both the fascination with and confusion over the nature and scope of the public's "right to know." Although the Constitution does not expressly guarantee the public a "right to know," an increasing number of constitutional scholars argue that the public's "right to know" is implicitly guaranteed by the First Amendment and by the general principles of a constitutional democracy.[7] Unfortu-

Friedman v. Rogers, 440 U.S. 1, 11-12, 18-19 (1979); Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978); Nixon v. Warner Communications, Inc., 435 U.S. 589, 596, 600-01 (1978).

4. *See, e.g.*, Gannett Co. v. DePasquale, 99 S. Ct. 2898 (1979) (the press has no independent right under the First or Sixth Amendment to challenge closure of pre-trial hearings); Herbert v. Lando, 441 U.S. 153 (1979) (First Amendment does not bar a libel plaintiff's inquiry into the thoughts and processes of members of the press in order to establish "actual malice"); FCC v. Pacifica Foundation, 438 U.S. 726 (1978) (upheld FCC ban on indecent language on radio and television broadcasts); Houchins v. KQED, Inc., 438 U.S. 1 (1978) (press and public have no absolute First Amendment right of access to jails for interviews with prisoners); FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775 (1978) (rejected claims that FCC rules on cross-ownership of broadcast media by newspapers invaded the First Amendment rights of newspapers); Zurcher v. Stanford Daily, 436 U.S. 547 (1978) (refused to exempt newsrooms from third-party searches under a valid warrant); Saxbe v. Washington Post Co., 417 U.S. 843 (1974); Pell v. Procunier, 417 U.S. 817 (1974); Branzburg v. Hayes, 408 U.S. 665 (1972) (rejected asserted reporters' privilege against disclosure of news sources before grand juries). In the last two terms, the Supreme Court also refused to hear several important cases challenging lower courts' denial of reporters' claims to a First Amendment privilege against disclosure of their sources and the information gathered in preparing their stories. The Court also declined to review two "gag orders" that prohibited all parties involved in a criminal trial from making any statements outside the courtroom about the trial proceedings. *See* Society of Professional Journalists v. Martin, 556 F.2d 706 (4th Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978); *In re* Farber, 78 N.J. 259, 394 A.2d 330, *cert. denied*, 439 U.S. 997 (1978); Hubbard Broadcasting, Inc. v. Ammerman, 91 N.M. 250, 572 P.2d 1258, *cert. denied*, 436 U.S. 906 (1978); Leach v. Sawicki, No. 77-368 (Ohio, June 3, 1977), *cert. denied*, 434 U.S. 1014 (1978).

5. Alpern & Camper, *The Court and the Press*, NEWSWEEK, June 26, 1978, at 12.

6. Kwitny, *A Judicial War on the Press?*, Wall St. J., Aug. 23, 1978, at 12. *See also High Court No Friend of the Media*, BROADCASTING, July 10, 1978, at 22-23; *Leading Media Figures Attack Police Raid Ruling*, NEWS MEDIA & THE LAW, July 1978, at 4; Denniston, *Without a Champion*, QUILL, Sept. 1978, at 23.

7. *See* H. CROSS, THE PEOPLE'S RIGHT TO KNOW (1953); R. LISTON, THE RIGHT TO KNOW: CENSORSHIP IN AMERICA (1974); W. MARNELL, THE RIGHT TO KNOW: THE MEDIA AND THE PUBLIC GOOD (1973); J. WIGGINS, FREEDOM OR SECRECY 3 (1956); Brant, *The Constitution and the Right to Know*, MASS MEDIA AND THE LAW 73 (1970); Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U.L.Q. 1; Hennings, *Constitutional Law: The People's Right to Know*, 45 A.B.A.J. 667 (1959); Horton, *The Public's Right to Know*, 3 N.C.

nately, the growing literature often sheds more heat than light, with scholars often declining to define either the nature or the scope of the right. The constitutional basis for a "right to know" is presumed. Scholars urge that the Supreme Court shape the contours of that right by elaborating upon the First Amendment rights to disseminate,[8] receive, gather, or obtain access to information,[9] or by more fully articu-

CENT. L. REV. 123 (1972); Ivester, *The Constitutional Right to Know*, 4 HASTINGS CONST. L.Q. 109 (1977); Kutner, *Freedom of Information: Due Process of the Right to Know*, 18 CATH. LAW. 50 (1972); Parks, *The Open Government Principle: Applying the Right to Know Under the Constitution*, 26 GEO. WASH. L. REV. 1 (1957); Wiggins, *Government Operations and The Public's Right to Know*, 19 FED. BAR J. 62 (1959); Wiggins, *The Role of the Press in Safeguarding the People's Right to Know Government Business*, 40 MARQ. L. REV. 74 (1956); Wright, *Defamation, Privacy, and the Public's Right to Know: A National Problem and a New Approach*, 46 TEX. L. REV. 630 (1968); Yankwich, *Legal Implications of, and Barriers to, the Right to Know*, 40 MARQ. L. REV. 3 (1956); Note, *The Public's Right to Know: Pell v. Procunier and Saxbe v. Washington Post Co.*, 2 HASTINGS CONST. L.Q. 829 (1975); *The People's Right to Know*, 8 TRIAL 12-16, 18-33 (1972).

Some commentators have cautioned against the recognition and development of a "right to know." *See* Gellhorn, *The Right to Know: First Amendment Overbreadth?* 1976 WASH. U.L.Q. 25; Goodale, *Legal Pitfalls In the Right to Know*, 1976 WASH. U.L.Q. 29; Henkin, *The Right to Know and the Duty to Withhold: The Case of the Pentagon Papers*, 120 U. PA. L. REV. 271 (1971); Van Alstyne, *The Hazards to the Press of Claiming a 'Preferred Position*, 28 HASTINGS L.J. 761, 769 (1977). *See also* Stewart, *"Or of the Press,"* 26 HASTINGS L.J. 631 (1975), where Justice Stewart asserted: "The public's interest in knowing about its government is indirect. The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act." *Id.* at 636.

8. Until the mid-1960's, First Amendment litigation involved principally the freedom of expression and dissemination of information. *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (libel is protected); Roth v. United States, 354 U.S. 476 (1957) (obscene materials are not protected); Marsh v. Alabama, 326 U.S. 501 (1946) (right to distribute information); Valentine v. Chrestensen, 316 U.S. 52 (1942) (commercial speech is not protected); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) ("fighting words" are not protected); Near v. Minnesota, 283 U.S. 697 (1931) (freedom to publish without prior restraint). The Supreme Court also extended First Amendment protection to various modes of disseminating information. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976) (commercial advertisements); Greenbelt Coop. Publishing Ass'n v. Bresler, 398 U.S. 6, 11 (1970) (newspapers); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (radio); Time, Inc. v. Hill, 385 U.S. 374, 388-389 (1967) (magazines); Estes v. Texas, 381 U.S. 532 (1965) (television) (dicta); New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964) (non-commercial advertisements); Roth v. United States, 354 U.S. 476, 488 (1957) (books) (dicta); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952) (motion pictures); Thornhill v. Alabama, 310 U.S. 88 (1940) (signs); Schneider v. State, 308 U.S. 147 (1939) (leaflets); Lovell v. City of Griffin, 303 U.S. 444 (1938) (pamphlets).

9. A First Amendment "right to receive" information was recognized in Kleindienst v. Mandel, 408 U.S. 753, 762, 775 (1972); Stanley v. Georgia, 394 U.S. 557, 564 (1969); Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967); Griswold v. Connecticut, 381 U.S. 479, 484 (1965); Shelton v. Tucker, 364 U.S. 479, 487 (1960); Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957); Marsh v. Alabama, 326 U.S. 501, 505 (1946); Thomas v. Collins, 323 U.S. 516, 534 (1945); Martin v. City of Struthers, 319 U.S. 141, 143, 149 (1943). The Court, however, has also acknowledged a correlative right not to receive information. *See* FCC v. Pacifica Foundation, 438 U.S. 726 (1978) (right not to be exposed to indecent language on

lating the First Amendment's limitations on prior restraints.[10]

Notably, Professor Thomas I. Emerson, a prominent First Amendment scholar, claims that "[t]he Supreme Court has recognized in a number of cases that the first amendment embodies a constitutional guarantee of the right to know."[11] He is quick to observe, however, that the Court "has never clarified the right or pressed it toward its logical borders."[12] Indeed, Emerson considers the judicial history of First Amendment analysis fundamentally deficient in that the amendment has been construed principally to safeguard the liberties of individuals and of the press to communicate.[13] Consequently, the First Amendment imposes no requirement that the government act affirmatively either to inform citizens of or to grant them access to policy-making institutions and processes. In other words, the First Amendment, as judicially construed, guarantees individuals' freedom from restraints on their communications, but not the liberty to demand and

radio and television broadcasts); Rowan v. United States Post Office Dept., 397 U.S. 728, 738-39 (1970) (right to stop mailings of obscene materials to one's home); Breard v. City of Alexandria, 341 U.S. 622, 641-45 (1951) (right not to listen to door-to-door salesmen); Kovacs v. Cooper, 336 U.S. 77, 87-89 (1949) (right not to listen to the "loud and raucous noise" of sound trucks).

The Court has discussed the right of the public and the press to gather information and secure access to facilities or materials in the preparation of communications in a number of cases. *See* Gannett Co. v. DePasquale, 99 S. Ct. 2898 (1979); Herbert v. Lando, 441 U.S. 153 (1979); Houchins v. KQED, Inc., 438 U.S. 1 (1978); Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978); Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978); Saxbe v. Washington Post Co., 417 U.S. 843, 856-64 (1974) (Powell, J., dissenting); Pell v. Procunier, 417 U.S. 817, 840 (1974) (Douglas, J., dissenting); Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 184 (1973) (Brennan, J., dissenting); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969); Estes v. Texas, 381 U.S. 532, 541-42 (1965); Zemel v. Rusk, 381 U.S. 1, 16-17 (1965).

10. *See* Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977); Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 558 (1975); New York Times Co. v. United States, 403 U.S. 713 (1971); Organization for a Better Austin v. Keefe, 402 U.S. 415, 418-20 (1971); Carroll v. President of Princess Anne, 393 U.S. 175, 181 (1968); Mills v. Alabama, 384 U.S. 214 (1966); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963); Grosjean v. American Press Co., 297 U.S. 233, 244 (1936); Near v. Minnesota, 283 U.S. 697 (1931); Patterson v. Colorado, 205 U.S. 454, 462 (1907).

11. Emerson, *Colonial Intentions and Current Realities of the First Amendment*, 125 U. PA. L. REV. 737, 755 (1977) [hereinafter cited as *Colonial Intentions*]. *See also* Emerson, *supra* note 7; T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 94-95, 152, 463-65, 613-14, 649-50, 671-72 (1970).

12. *Colonial Intentions, supra* note 11, at 755.

13. *Id. See also* Ivester, *supra* note 7, at 110; Note, *The Public's Right of Access to Government Information Under the First Amendment*, 51 CHI.-KENT L. REV. 164, 177 (1974); Note, *The Rights of the Public and the Press to Gather Information*, 87 HARV. L. REV. 1505, 1506-09 (1974).

obtain information from governmental and non-governmental sources.[14]

For Emerson, the delineation of a First Amendment "right to know" presents no major theoretical or practical problems in constitutional interpretation. The "right to know" simply "focuses on the affirmative aspects of the first amendment and the system of freedom of expression."[15] Emerson asserts that

> [i]n a number of areas the development of a constitutional right to know would play a significant role in the system of freedom of expression. In some situations the government attempts to interfere directly with the right to know, as when it imposes sanctions on reading or receiving certain materials. Here the right to know should be afforded full protection. In other situations the speaker, who is normally the party most likely to seek vindication of the right to free expression, may not be in a position to assert that right, and the listener or reader may find it necessary to defend the right of expression by invoking the constitutional right to know. From a procedural point of view the right to know may give standing to the recipients or potential recipients of the communication. The principles of the right to know may be applicable when the government exercises a monopoly over an area of expression, as in the field of elementary education, or attempts to allocate scarce facilities, as in the case of radio and television licensing. The most significant application of the right to know, however, lies in its potential role in increasing the amount of information available to citizenry from the government. . . . Government secrecy is essentially in conflict with the underlying premises of the first amendment.[16]

Accordingly, for Emerson, much would be gained and little lost by the recognition of a First Amendment "penumbra"[17] embodying a right to know. Over the years, the Supreme Court has recognized other penumbral rights as being constitutionally guaranteed.[18] The due proc-

14. The distinction between these two kinds of freedoms is discussed in MacCallum, *Negative and Positive Freedom*, in CONTEMPORARY POLITICAL THEORY 107 (1970). As for the Supreme Court's construction of the First Amendment, see the text accompanying notes 123-41 & 209-73 *infra*.

15. Emerson, *supra* note 7, at 2.

16. T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 755-56 (1970).

17. Justice Douglas, in Griswold v. Connecticut, 381 U.S. 479, 484 (1965), stated that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."

18. For criticism of the Court's acknowledgment of penumbral rights, see generally Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 222 (1973). Commentators have criticized the Court's acknowledgment of a "liberty of contract," McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34; the "right of privacy," Ely, *The Wages of Crying Wolf*, 82 YALE L.J. 920 (1973); and the doctrine of "executive privilege," R. BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH (1974).

ess clause of the Fourteenth Amendment[19] was construed, in the early twentieth century, to safeguard the "liberty of contract"[20] and, more recently, a "right of privacy"[21] and a "right to travel."[22] The First Amendment also has been interpreted as safeguarding such penumbral rights as the "right to receive information,"[23] the "right of association"[24] and "associational privacy."[25] Hence, Emerson urges the acknowledgment and development of the public's constitutional "right to know" by refining and embellishing other previously recognized First Amendment penumbral rights, just as the Supreme Court has delineated a constitutional right of privacy by elaborating on prior judicial recognition of rights protected under the First, Fourth and Fifth Amendments.[26] Thus, like other scholars,[27] Emerson urges the recognition and development of a "right to know" as a composite constitutional right derived from other First Amendment penumbral rights[28]—the right to receive and gather information, for example, and the right of access to government facilities and materials in order to inform the public about the practices of government institutions.[29]

Because he considers the "right to know" to be politically beneficial and justifiable in terms of the underlying principles of the First Amendment, Emerson perhaps underestimates the potential costs to both the Supreme Court and the American republic of proclaiming a constitutional "right to know." At the turn of the century, the Court was widely criticized for acting like a "super-legislature" in striking

19. The Fourteenth Amendment provides, in part, that "No state shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV.

20. *See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905).

21. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965).

22. *See* Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974); Dunn v. Blumstein, 405 U.S. 330 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969); United States v. Guest, 383 U.S. 745 (1966); Kent v. Dulles, 357 U.S. 116 (1958).

23. *See* note 9 *supra*.

24. *See, e.g.*, Terry v. Adams, 345 U.S. 461 (1953) (political associations); Niemotko v. Maryland, 340 U.S. 268 (1951) (religious associations); Smith v. Allwright, 321 U.S. 649 (1944) (political associations); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (religious associations).

25. *See* NAACP v. Alabama, 357 U.S. 449, 462 (1958).

26. For a discussion of the developing constitutional law of privacy, see D. O'BRIEN, PRIVACY, LAW, AND PUBLIC POLICY 35-230 (1979).

27. *See, e.g.*, J. WIGGINS, FREEDOM OR SECRECY 3 (1956).

28. *See* Emerson, *supra* notes 7 & 11.

29. *See* notes 9 & 10 *supra*. The Supreme Court's treatment of claims to First Amendment-penumbra rights and the relation of these claims to the public's "right to know" is examined by the author in O'Brien, *Reassessing the First Amendment and the Public's "Right to Know" in Constitutional Adjudication*, 25 VILL. L. REV. — (1980).

down progressive economic legislation as an infringement upon individuals' "liberty of contract" under the Fourteenth Amendment.[30] The dangers of infidelity to the parchment guarantees of the Constitution appeared once again with the proclamation, in *Griswold v. Connecticut*,[31] of a constitutional right to privacy. Dissenting in *Griswold*, Justice Black cautioned: "One of the most effective ways of diluting or expanding a constitutionally guaranteed right is to substitute for the crucial word or words of a constitutional guarantee another word or words, more or less flexible and more or less restricted in meaning."[32]

As was judicial development of a constitutional right to privacy, recognition and elaboration of a "right to know" would be tantamount to constitutional common law.[33] Such developments in constitutional interpretation are nevertheless viewed by Emerson as progressive[34] and defensible from the twin perspectives of realism[35] and instrumentalism[36] which have dominated American jurisprudence since the turn of the century.[37] The costs of the Court's enforcement of penumbral rights, however, bear not only upon judicial craftsmanship and the potential for unprincipled and extra-constitutional decision making, but also upon the basic structure of American constitutional democracy. As Justice Black warned, "unbounded judicial authority would make of this Court's members a day-to-day constitutional convention."[38]

Elevation of the public's "right to know" to a constitutional status therefore raises fundamental issues about the nature and limits of constitutional interpretation and about the role of judicial review in a con-

30. *See generally* McCloskey, *supra* note 18.

31. 381 U.S. 479 (1965).

32. *Id.* at 509 (Black, J., dissenting). *See also* Roe v. Wade, 410 U.S. 113, 172-73 (Rehnquist, J., dissenting).

33. *See generally* Wellington, *supra* note 18; Berger, *The Scope of Judicial Review: An Ongoing Debate*, 6 HASTINGS CONST. L.Q. 527 (1979) (responding remarks by Raoul Berger to a symposium on his book GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977)). For a debate of the propriety of constitutional common law and subconstitutional rulemaking under the Fourth and Fifth Amendments, see Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 84 HARV. L. REV. 1 (1975); Schrock & Welsh, *Reconsidering the Constitutional Common Law*, 91 HARV. L. REV. 1117 (1978). For criticisms of the constitutional common law argument for recognizing an independent First Amendment "right to know," see O'Brien, *supra* note 29.

34. *See* EMERSON, *supra* note 11, at 560.

35. *See, e.g.*, Linde, *Judges, Critics and the Realist Tradition*, 82 YALE L.J. 227 (1972).

36. *See, e.g.*, Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661 (1960).

37. *See, e.g.*, W. RUMBLE, AMERICAN LEGAL REALISM (1968); G. WHITE, PATTERNS OF AMERICAN LEGAL THOUGHT 97-192 (1978).

38. Griswold v. Connecticut, 381 U.S. 479, 520 (1965) (Black, J., dissenting).

stitutional democracy.[39] It is not necessary here to rehearse the debates over the permissible scope of judicial creativity in constitutional interpretation and in the exercise of judicial review. Instead, controversies over the public's "right to know" may best be addressed by attending to the foundations for and the prerequisites of the Supreme Court's delineation of a "right to know."

Notwithstanding the views of Emerson and other scholars, a directly enforceable constitutional "right to know" appears to be rooted neither in historical precedents nor in recent First Amendment decisions. Far from being salutary, further elaboration by the Supreme Court of a First Amendment "right to know" would seem ill-founded and even pernicious. In defining a constitutional "right to know," the Court would exercise extra-constitutional decision-making authority. Moreover, a "right to know" would, in certain fundamental respects, appear to be inconsistent with the First Amendment and the Founding Fathers' understanding of the need for a delicate balance between egalitarian demands for an informed populace, on the one hand, and efficient decision-making by government officials on the other. Implementation of Emerson's suggestions might also have undesirable effects on explicit First Amendment freedoms. Therefore, after examining the constitutional foundations for and the nature of the political ideal of the public's "right to know," this article will conclude that in denying arguments for a constitutional "right to know," the Supreme Court has properly permitted the state legislatures and Congress to determine, as matters of public policy, the legitimacy of the public's interest in obtaining access to government facilities and materials. Indeed, the Burger Court's recent treatment of claims of the public's "right to know" under the First Amendment is an occasion for celebration, not condemnation.

I. Popular Information and the Political Ideal of the Public's "Right to Know"

The novelty and dilemma of claiming that a "right to know" might be constitutionally implied, disposes scholars to gather evidence "that the founding fathers intended to guarantee the right to know per se, that is, that the First Amendment was specifically intended to extend to the people a directly enforceable right to know about governmental af-

39. *See* Choper, *The Supreme Court and the Political Branches: Democratic Theory and Practice*, 122 U. PA. L. REV. 810 (1974); Glazer, *Towards an Imperial Judiciary?*, 41 PUB. INTEREST 104 (1975); Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193 (1952).

fairs."[40] Yet, lexical and psycho-historical difficulties in determining the framers' intent on any matter[41] suggest the more qualified claim that

> there is persuasive evidence, in light of widespread awareness [during the founding period] of the basic need for 'popular information, or the means of acquiring it,' that the freedom of speech and press clauses were intended at least as instrumental means of securing and protecting the right to know. In other words, assuming the framers had no intent to create a directly enforceable right to know, they expected that the guarantee of freedom of speech and press would effectively secure the right of the people to know about their government.[42]

The evidence marshalled to establish a constitutional "right to know" nevertheless proves to be less than supportive.[43] One often cited testimonial is James Madison's eloquent statement: "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."[44] Madison made this statement, however, not in the defense of First Amendment freedoms; rather, he made it in a letter applauding the liberal appropriations by Kentucky for a system of public education. Madison, like Thomas Jefferson,[45] believed "that a well-instructed people alone can be permanently a free people."[46] Indeed, there is no evidence that Madison, or any other members of the Constitutional Convention or First Congress, supported the view that "the

40. Ivester, *supra* note 7, at 119.

41. *See* C. MILLER, THE SUPREME COURT AND THE USES OF HISTORY 149-88 (1972).

42. Ivester, *supra* note 7, at 119 (citations omitted).

43. *See, e.g.*, EPA v. Mink, 410 U.S. 73, 110 (1973) (Douglas, J., dissenting); Branzburg v. Hayes, 408 U.S. 665, 723 (1972) (Douglas, J., dissenting); Brant, *supra* note 7, at 8; Emerson, *supra* note 7, at 754-55; Ivester, *supra* note 7, at 119; Levi, *Confidentiality and Democratic Government*, 30 REC. N.Y. CITY B.A. 323, 326-27 (1975). A Senate Report on the Freedom of Information Act, *supra* note 2, interpreted Madison's statement as providing a "theory of an informed electorate." S. REP. No. 813, 89th Cong., 1st Sess. 3 (1965).

44. Letter from James Madison to W.T. Barry (Aug. 4, 1822), *reprinted in* 9 THE WRITINGS OF JAMES MADISON 103 (G. Hunt ed. 1910).

45. Thomas Jefferson wrote: "My own opinion is that government should by all means in their power deal out the material information to the public in order that it may be reflected back on themselves in the various forms in which public ingenuity may throw it." 19 WRITINGS OF THOMAS JEFFERSON 121 (A. Lipscomb & A. Bergh eds. 1903). In an 1820 letter to William C. Jarvis, Jefferson observed: "I know of no safe depository of the ultimate powers of the society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion."

46. THE COMPLETE MADISON 341 (S. Padover ed. 1953).

people [have] a directly enforceable right to know about governmental affairs."[47]

Emerson and other commentators have misunderstood the foundations for and the scope of the public's "right to know." They err initially by failing to distinguish the public's "right to know" as an abstract constitutional right—a bulwark, as it were, for free popular access to information—from the concrete rights embodied in the First Amendment speech and press clauses.

The distinction between abstract and concrete rights is one of degree, not of kind.[48] Still, it is useful in analyzing claims that the public has a constitutional "right to know." Professor Ronald Dworkin explains the difference between abstract and concrete rights as follows:

> An abstract right is a general political aim the statement of which does not indicate how that general aim is to be weighted or compromised in particular circumstances against other political aims. Concrete rights . . . are political aims that are more precisely defined so as to express more definitely the weight they may have against other political aims on particular occasions. . . . Abstract rights . . . provide arguments for concrete rights, but the claim of a concrete right is more definite than any claim of abstract right that supports it.[49]

Abstract rights are in a sense unconditional and unqualified, whereas concrete rights are qualified by competing moral, legal or political considerations. Abstract rights may serve either as entitlements for individuals to assert concrete rights, or simply as important arguments for the legitimacy of concrete rights as against other moral, legal or political considerations. An abstract right, however, may be moral or political and not constitutional per se.

This article will demonstrate that if the public's "right to know" is in any sense a constitutional right, it must be an abstract right justifiable in terms of both the general principles of constitutionally limited government and the specific guarantees of the First Amendment. As an abstract right, the political ideal of the public's "right to know" at once underscores and gains significance from the enumerated guarantees of freedom of speech and of the press, but does not mandate a concrete "right to know" which is directly enforceable against the government. The import of the political ideal of a "right to know," then, is

47. Ivester, *supra* note 7, at 119. *See* text accompanying note 40 *supra*.

48. *See* Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975). *See also* D. O'BRIEN, *supra* note 26, at 3-31. For a further discussion of this distinction, see the text accompanying notes 146-79 *infra*.

49. Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1070 (1975).

that it may provide powerful arguments for extending the concrete rights guaranteed by the First Amendment. By failing to recognize the distinction between abstract and concrete rights, Emerson and his colleagues miscontrue arguments in support of a public "right to know" as endorsing an affirmative right to demand access to government facilities and information. Instead, these arguments buttress the specific guarantees of freedom from restraints on speaking and publishing, and thereby indirectly serve the need for public access to information.

A preliminary examination of the founding period suggests that representative democracy was understood to require popular access to information about governmental affairs and that the public therefore is entitled to demand and obtain access to government facilities and information, at least under an abstract constitutional "right to know" if not under the concrete provisions of the First Amendment. Further analysis of the political ideal of a "right to know," however, indicates not only that an enforceable "right to know" is illegitimate, but that recognition of that right by the Supreme Court would have inauspicious consequences for the freedoms of speech and press.

II. Popular Information and the "Right to Know" in Historical Perspective

By undertaking a "functional analysis" of popular sovereignty and a "structural analysis" of constitutionally limited government,[50] proponents of a constitutional "right to know" argue that both classical and contemporary theories of democracy[51] not only require freedom of ac-

50. For example, one commentator has argued: "The first foundation of the right to know flows from a functional analysis of democratic systems of government. Self-government is possible only to the extent that the leaders of the state are responsible and responsive to the will of the people. But if the will of the people is to have validity, if the people are to function as a rational electorate, they must have adequate knowledge of what the government is doing." Ivester, *supra* note 7, at 115 (footnote omitted). *See also* C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969). Similarly, Alexander Meiklejohn has argued that the First Amendment is concerned, not with a private right, but with a public power, a governmental responsibility and, therefore, the Amendment functions to protect citizens' freedom to obtain and discuss information related to their self-government. *See* A. MEIKLEJOHN, POLITICAL FREEDOM (1965); Meiklejohn, *Freedom to Hear and to Judge*, 10 LAW. GUILD REV. 26 (1950); Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245. *See also* Bloustein, *The First Amendment and Privacy: The Supreme Court and the Philosopher*, 28 RUTGERS L. REV. 41 (1974); Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965). Meiklejohn's interpretation of the First Amendment is also discussed in the text accompanying notes 179-202 *infra*.

51. *See* Bathory & McWilliams, *Political Theory and the People's Right to Know*, in GOVERNMENT SECRECY IN DEMOCRACIES 3-21 (I. Galnoor ed. 1977).

cess to information, but also justify, as an inherent public right, demands for information about what government is doing and under what circumstances.[52] There is little doubt that colonists, and later members of the Continental Congress[53] and Constitutional Conventions,[54] acknowledged an intimate connection between freedom of access to information and the exigencies of a free society and a constitutionally limited government. Commentators such as Thomas Hennings, Jr., are nevertheless mistaken when they conclude that

> [b]y 1787, the year the Constitution was written, there had developed in England the concept of a right in the people to know what their Government was doing. There can be no doubt that the framers of our Constitution recognized the existence of such a right and were strongly influenced by it in writing both the original Constitution and the Bill of Rights. . . . [But] no explicit provision was made concerning the people's "right to know." The explanation for this seems to be that the right to know, like many other fundamental rights, was taken so much for granted that it was deemed unnecessary to include it.[55]

The continuity between the founders' understanding of a need for

52. Alexis de Tocqueville anticipated contemporary commentators when he observed that, "[i]n countries where the doctrine of sovereignty of the people ostensibly prevails, the censorship of the press is not only dangerous, but absurd. When the right of every citizen to a share in the government of society is acknowledged, everyone must be presumed to be able to choose between the various opinions of his contemporaries and to appreciate the different facts from which inferences may be drawn. The sovereignty of the people and the liberty of the press may therefore be regarded as correlative, just as the censorship of the press and universal suffrage are two things which are irreconcilably opposed and which cannot long be retained among the institutions of the same people." A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 1980 (1945).

53. In a letter to the inhabitants of Quebec, the Continental Congress stated: "[T]he first grand right is that of the people having a share in their own government, by their representatives chosen by themselves, and in consequences of being ruled by laws which they themselves approve, both by edicts of men, over whom they have no control. . . .

The last right we shall mention, regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of government, its ready communication of thoughts between subjects, and its consequent promotion of union among them, whereby oppressive officers are shamed or intimidated, into more honourable and just modes of conducting affairs." 1 JOURNAL OF THE CONTINENTAL CONGRESS 1774-1789 at 108 (W. Ford ed. 1937), *cited in* Near v. Minnesota, 283 U.S. 697, 717 (1931).

54. *See* 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, 52 (J. Elliot ed. 1881) [hereinafter cited as ELLIOT'S DEBATES] (statements by Messrs. Widgery, Gorham and Perly); 3 *id.* at 169, 201-02, 233, 315, 396-98, 404, 409, 459-60 (statements by Messrs. Mason, Henry, Marshall, Madison and Randolph); 4 *id.* at 72-73, 264, 284 (statements by Messrs. Pinckney, Graham, Iredell, Davie and Franklin); 5 *id.* at 408 (statements by Messrs. Madison and Wilson).

55. Hennings, *supra* note 7, at 668 (footnotes omitted).

access to information under a free government and the understanding of contemporary commentators concerning a constitutional "right to know" is merely apparent and tends to distort the founders' vision of representative government and freedom of information embodied in the Constitution. Hennings and other commentators to the contrary, the absence of an expressly guaranteed "right to know" is owing to the fact that while the availability of information to the public was deemed essential to free government, the view that the people enjoy an affirmative and enforceable right to demand access to government information was not generally accepted. The most that may be claimed is that the founders envisioned the public's "right to know" as an abstract constitutional right, at once underscoring and attaining significance from the freedoms of speech and press. In other words, the public's "right to know" is secured derivatively by safeguarding the freedoms of speech and press from governmental censorship. That the founders envisioned the public's "right to know" in this less ambitious, though no less important, way is evident both from the constitutional debates on the subject and from the constitutional and common law understanding of the freedoms of speech and press.

In England, the protracted struggle over the freedoms of speech and press began during the reign of William and Mary, although the right to public parliamentary debates was not established until 1771 and 1772.[56] The libertarian impulse for the freedoms of speech, press and public access to information achieved earlier and more extensive success in the colonies[57] and, subsequently, with the Continental Congress. Article IX of the Articles of Confederation of 1781 provided:

> The congress of the united states . . . shall publish the Journal of their proceedings monthly, except such parts thereof relating to treaties, alliances or military operations, as in their

56. *See* Z. CHAFEE, THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787, 58-59 (1956); W. LECKY, A HISTORY OF ENGLAND IN THE EIGHTEENTH CENTURY 42 (1978); T. MACCAULAY, 4 THE HISTORY OF ENGLAND 248 (1856).

57. The New York Assembly in 1747, for example, resolved that "it is the undoubted right of the people of this Colony to know the proceedings of their representatives in General Assembly and that any attempt to prevent their proceedings being printed or published is a violation of the rights and liberties of the People of this Colony." F. THORPE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS (1909). *See also* 3 *id.* at 1892 (Massachusetts Constitution of 1780, Article 16); 5 *id.* at 3083-3900 (Frame of Government and Declaration of Rights, Pennsylvania Constitution of 1776). On the practice of secrecy in the colonies, see C. DUNIWAY, THE DEVELOPMENT OF FREEDOM OF PRESS IN MASSACHUSETTS 41-59 (1906). On the colonial development of the freedoms of speech and press, see L. LEVY, LEGACY OF SUPPRESSION (1960) and T. EMERSON, D. HABER & N. DORSON, 1 POLITICAL & CIVIL RIGHTS IN THE UNITED STATES 343-91 (1976).

> judgment require secrecy; and the yeas and nays of the delegates of each state, or any of them, at his or their request shall be furnished with a transcript of the said Journal, except such parts as are above excepted, to lay before the legislatures of the several states.[58]

Under the Articles, the public had no direct access to Congressional proceedings. Only their representatives could obtain materials relating to the proceedings of the Continental Congress and even the representatives only had access to those materials not deemed to require secrecy. Still, the need for public access to information was well understood and was balanced against the simultaneous need for confidentiality in negotiating foreign affairs and military operations. It is a well established historical fact that the Confederation proved incapable of responding effectively to the economic difficulties imposed by international commercial treaties, inflation and the Revolutionary War debt.[59] Yet, even when confronted with such incidences of domestic violence as Shay's Rebellion, Thomas Jefferson noted the importance of public access to information concerning the government's operations: "The way to prevent these irregular interpositions of the people, is to give them full information of their affairs thro' the channel of the public papers, and to contrive that those papers should penetrate the whole mass of the people."[60]

Jefferson also cautioned against the secrecy of the Constitutional Convention. During the summer of 1787, Jefferson, in a letter to John Adams, wrote: "I am sorry they began their deliberations by so abominable a precedent as that of tying up the tongues of their members. Nothing can justify this example but the innocence of their intentions, and ignorance of the value of public discussions."[61] Nonetheless, James Madison, who as a delegate to the Convention unofficially took voluminous notes throughout the debate, would not permit their publication during his lifetime and they were not published until four years after his death, in 1840. Irving Brant perceptively notes, "Nobody can say what sort of constitution would have emerged if the convention had been open to the public. . . . [But, had] Madison's notes been published before the states held their ratifying conventions, the Constitution would never have been adopted. The dialogue contained far too

58. 19 THE JOURNALS OF THE CONTINENTAL CONGRESS 214 (1912).

59. *See* M. FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 42-53 (1913).

60. Letter from Thomas Jefferson to Edward Carrington (Jan. 16, 1787), *reprinted in* 11 THE PAPERS OF THOMAS JEFFERSON 49 (J. Boyd ed. 1955).

61. Letter from Thomas Jefferson to John Adams (1787), *reprinted in* 12 *id.* at 69.

much that would have been seized upon by demagogues."[62]

During the federal and state conventions on the adoption of the Constitution, the issue of the public's "right to know" was confronted in connection with the publication of congressional proceedings. On August 11, 1787, Messrs. Madison and Rutledge moved the adoption of the following provision: "[T]hat each House shall keep a Journal of its proceedings, and shall publish the same from time to time; except such part of the proceedings of the Senate, when acting not in its legislative capacity, as may be judged by that House to require secrecy."[63] The proposal differed from the analogous provision in the Articles of Confederation in its reservation as to how often the proceedings would be published, as well as in its granting the House power to check the Senate's withholding of certain information relating to Senate proceedings—apparently information concerning the negotiation of treaties and military operations.

During debate on the proposal, Oliver Ellsworth argued that the clause was superfluous because "[t]he legislature will not fail to publish their proceedings from time to time."[64] James Wilson, however, thought the clause necessary and prudent: "The people have a *right to know* what their agents are doing or have done, and it should not be in the option of the legislature to conceal their proceedings. Besides, as this is a clause in the existing Confederation, the not retaining it would furnish the adversaries of the reform with a pretext by which weak and suspicious minds may be easily misled."[65] Similarly, George Mason thought the clause necessary because "it would give a just alarm to the people, to make a conclave of their legislature."[66] The convention subsequently adopted, as article I, section 5, clause 3, the following provision: "Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal."[67]

62. Brant, *supra* note 7, at 76. *See also* 5 ELLIOT'S DEBATES, *supra* note 54, at 558 (statements by Messrs. King and Wilson, suggesting that the journals of the Convention be either destroyed or deposited in government custody); 3 ELLIOT'S DEBATES, *supra* note 54, at 170 (statement by Messr. Henry, urging the veil of secrecy be removed).

63. 5 ELLIOT'S DEBATES, *supra* note 54, at 408 (Motion by Messrs. Madison and Rutledge).

64. *Id.* (statements by Messr. Ellsworth).

65. *Id.* (statements by Messr. Wilson) (emphasis added).

66. *Id.* (statements by Messr. Mason).

67. U.S. CONST., art. I, § 5, cl. 3. The Supreme Court has interpreted the clause as:

Concern over this provision and over the need for public access to information about legislative proceedings, emerged again during the debates of the state conventions on the ratification of the Constitution. In particular, during the Virginia convention, Patrick Henry impassionately warned that, "[u]nder the abominable veil of political secrecy and contrivance, your most valuable rights may be sacrificed by a most corrupt faction, without having the satisfaction of knowing who injured you. . . . [Legislative representatives] are bound by honor and conscience to act with integrity, but they are under no constitutonal restraint."[68] In his animated appeals "to take off the veil of secrecy," Henry argued:

> Give us at least a plausible apology why Congress should keep their proceedings in secret. They have the power of keeping them secret as long as they please [in article I, section 2, clause 3], for the provision for a periodical publication is too inexplicit and ambiguous to avail any thing. The expression *from time to time*, as I have more than once observed, admits of any extension. They may carry on the most wicked and pernicious of schemes under the dark veil of secrecy. The liberties of a people never were, nor ever will be, secure, when the transactions of their rulers may be concealed from them. The most iniquitous plots may be carried on against their liberty and happiness.[69]

Once again, George Mason also objected to the ambiguity of the provision: "Under this veil they may conceal any thing and every thing."[70]

But neither Patrick Henry nor George Mason advocated "divulging indiscriminately all the operations of government."[71] Patrick Henry, the ardent libertarian, acknowledged that "[s]uch transactions as relate to military operations or affairs of great consequence, the immediate promulgation of which might defeat the interests of the community, I would not wish to be published, till the end which required their secrecy should have been effected."[72] Mason further explained:

> The reason urged in favor of this ambiguous expression was, that there might be some matters which require secrecy. In matters relative to military operations and foreign negotiations, secrecy was necessary sometimes; but [I do] . . . not conceive that the receipts and expenditures of the public money ought ever to be concealed. The people . . . had *a right to know* the expendi-

"insur[ing] publicity to the proceedings of the legislature, and a correspondent responsibility of the members to their respective constituents." Field v. Clark, 143 U.S. 649, 670-71 (1892).

68. 3 ELLIOT'S DEBATES, *supra* note 54, at 316 (statements by Messr. Henry).

69. *Id.* at 169-70. *See also id.* at 315, 396-98.

70. *Id.* at 404 (statements by Messr. Mason).

71. *Id.* at 170 (statements by Messr. Henry).

72. *Id.*

tures of their money . . . .[73]

Thus, even the two most vociferous advocates of the public's "right to know" did not entertain the notion that the public's interest in access to governmental information was unconditional or unqualified. Moreover, there was no claim that individuals had a directly enforceable "right to know."

The sentiments of other delegates to the Virginia Convention were more moderate; they were, perhaps, epitomized by James Madison's observation that "[t]here never was any legislative assembly without a discretionary power of concealing important transactions, the publication of which might be detrimental to the community."[74] Madison concluded: "[B]y giving [both Houses of Congress] an opportunity of publishing [their Journals] from time to time, as might be found easy and convenient, they would be . . . sufficiently frequent. [I] thought, after all, that this provision went farther than the constitution of any state in the Union, or perhaps in the world."[75]

The delegates to the federal and state constitutional conventions recognized the need to balance the public's "right to know" against the exigencies of informed, efficient decision-making by their representatives.[76] The delegates unanimously agreed that it was both necessary and legitimate for the government to withhold from the public information concerning the negotiation of foreign affairs, treaties and military operations,[77] as well as, on particular occasions, information relating to domestic governance.[78] Early congressional practice ad-

73. *Id.* at 459 (statements by Messr. Mason) (emphasis added).

74. *Id.* at 409 (statements by Messr. Madison).

75. *Id.* at 460.

76. *See, e.g.*, 2 ELLIOT'S DEBATES, *supra* note 54, at 52 (Massachusetts delegates); 3 *id.* at 169, 201-02, 233, 315, 396-98, 404, 409, 459-60 (Virginia delegates); 4 *id.* at 72-73 (North Carolina delegates); *id.* at 264 (South Carolina delegates).

77. *See* THE FEDERALIST PAPERS, Nos. 64 (J. Jay), 70 (A. Hamilton) and 75 (A. Hamilton) (C. Rossiter ed. 1961). *See also* ELLIOT'S DEBATES, *supra* note 54, wherein the delegates also recognized the necessity of government confidentiality with respect to the provision in art. III, § 3, that "[t]he President shall from time to time give Congress Information on the State of the Union." In this connection, see 1 A COMPILATION OF MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, 194 (J. Richardson ed. 1896).

78. The Supreme Court has recognized the constitutionality of government secrecy in the areas of national security and foreign affairs and has acknowledged a conditional "executive privilege" from disclosing materials pertaining to "national security." *See* United States v. Nixon, 418 U.S. 683 (1974) (recognizing the constitutionality of the President's claim of executive privilege). *See also* Nixon v. Administrator of Gen. Serv., 433 U.S. 425, 449-50 (1977); Zemel v. Rusk, 381 U.S. 1, 16-17 (1965); United States v. Reynolds, 345 U.S. 1 (1953); Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936); Totten v. United States, 92 U.S. 105 (1875); Marbury v. Madison, 5 U.S. 137, 143-45 (1803). Confidential or

hered to the principle that representative government requires an informed citizenry but not unlimited disclosure or publication of governmental affairs. While the House of Representatives permitted the public to attend its deliberations on May 4, 1789, the Senate did not do so until 1794 and the right of the press to attend proceedings of both Houses was not secured until 1801.[79]

Thus, the public enjoys no specific constitutional "right to know," nor does Congress have an affirmative obligation either to disclose or to permit unlimited access to its materials or processes. On the contrary, materials and policy decisions that in Congress' judgment require secrecy[80] may be constitutionally withheld from the public. For instance, Congress has no affirmative obligation under the Constitution to disclose its appropriations for the intelligence operations of the Central Intelligence Agency, and the House of Representatives has consistently rejected attempts to impose such a requirement.[81]

Despite express constitutional limitations, however, some commentators and jurists maintain an expansive notion of the "right to know." In 1974, the Supreme Court considered a federal taxpayer's suit seeking a declaration that the section of the Central Intelligence Agency Act permitting the CIA to account for its expenditures "solely on the certificate of the Director"[82] was unconstitutional.[83] The Court held that the taxpayer had no standing to bring the challenge. Justice Douglas, dissenting, asserted that the public has an affirmative "right to know," as evidenced by the Constitutional Convention debates. The right both imposes a general obligation on the government to disclose such secret fundings and entitles individuals to demand access to government materials withheld from the public.[84] Justice Douglas, like Emerson and other commentators, interpreted the convention debates so broadly, however, that he significantly departed from, and thereby

classified information is covered presently by Exec. Order No. 12065, National Security Information, 3 C.F.R. 190 (1979).

79. *See* 1 ANNALS OF CONGRESS 16 (Gales & Seaton eds. 1789).

80. *See* U.S. CONST. art. I, § 5, cl. 3.

81. On July 10, 1979, the House rejected 79 to 321 an amendment to an intelligence authorization bill that would direct the President to disclose the aggregate foreign intelligence appropriation total for fiscal 1980. The proposed amendment was the first since a similar amendment was defeated in 1974. *See Access Reports* 8-9 (July 24, 1979); Comment, *The CIA's Secret Funding and the Constitution*, 84 YALE L.J. 608 (1975).

82. 50 U.S.C. § 403j(b).

83. United States v. Richardson, 418 U.S. 166 (1974).

84. *Id.* at 197-203 (1974) (Douglas, J., dissenting). On another occasion, however, Justice Douglas did acknowledge that "there may be situations and occasions in which the right to know must yield to other compelling and overriding interests." Gravel v. United States, 408 U.S. 606, 643 n.10 (1972) (Douglas, J., dissenting).

distorted, the political ideal of the public's "right to know." Edward Levi's observations are closer to the historical understanding of the public's "right to know": "The people's right to know cannot mean that every individual or interest group may compel disclosure of the papers and effects of government officials whenever they bear on public business. Under our Constitution, the people are the sovereign, but they do not govern by the random and self-selective interposition of private citizens."[85]

The principles of governmental openness and an informed citizenry were deemed politically essential to the American republic. Yet during the founding period those principles comprehended only the view that "[t]o cover with the veil of secrecy the common routine of [government] business is an abomination in the eyes of every intelligent man and every friend of his country."[86] The public's interest in openness about governmental activities was, until quite recently, thought to be adequately satisfied by the publication of congressional records, by communications from representatives in public speeches and print,[87] and, most importantly, by the freedoms of speech and press.

It is because a representative democracy requires freedom of access to information concerning governmental affairs, as well as limitations on public disclosure of such information, that the First Amendment plays such an important role in American constitutional law. As Justice Frankfurter observed: "Without a free press there can be no free society. Freedom of the press, however, is not an end in itself but a means to the end of a free society."[88] The further argument, propounded by Emerson and others, that the First Amendment justifies "explicit recognition by the courts that the constitutional right to know embraces the right of the public to obtain information from the government,"[89] runs counter to the amendment's historical background and

85. Levi, *supra* note 43, at 327. *See also* Henkin, *supra* note 7, at 273.

86. A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 77 (Seventh Annual Message of James Monroe).

87. *See* the "speech and debate clause," U.S. CONST., art. I, § 6, cl. 1: "[F]or any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place." *See also* Eastland v. United States Servicemen's Fund, 421 U.S. 491, 507 (1975); Doe v. McMillan, 412 U.S. 306, 311-14 (1973); Gravel v. United States, 408 U.S. 606 (1972); Powell v. McCormack, 398 U.S. 486, 502 (1969); United States v. Johnson, 383 U.S. 169 (1966); Tenney v. Brandhove, 341 U.S. 367, 377 (1951). Harry Kalven argues that the First Amendment was designed to ensure that every citizen is as free as his or her representatives in discussing public issues. Kalven, *The New York Times Case: A Note on 'The Central Meaning of the First Amendment,'* 1964 SUP. CT. REV. 191.

88. Pennekamp v. Florida, 328 U.S. 331, 354 (1946) (Frankfurter, J., concurring) (footnote omitted).

89. Emerson, *supra* note 7, at 14.

the constitutional law which it has spawned.

While amendments to the Constitution were being proposed during the first Congress, James Madison urged the adoption of the following provisions:

> The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable.
>
> The people shall not be restrained from peaceably assembling and consulting for their common good; nor from applying to the Legislature by petitions, or remonstrances, for redress of their grievances. . . .[90]

Madison argued, as he did later when the Sedition Act of 1798[91] was passed, that "freedom of the press and rights of conscience, those choicest privileges of the people, are unguarded in the British constitution."[92] In England, Parliament was considered to possess unlimited power to guard the people against the sovereign's unlawful acts. In America, however, the people are sovereign and their rights to free speech and press must therefore be guaranteed against both the executive and the legislature.[93] For these reasons, Madison not only rejected the application of English common law to the freedoms of speech and press,[94] but also proposed, as a constitutional amendment, that "[n]o State shall violate the equal rights of conscience, or the freedom of the press . . ."[95]

Madison, like Jefferson,[96] would thus appear to have taken the

90. 1 ANNALS OF CONGRESS, *supra* note 79, at 451.

91. Sedition Act of 1798, ch. 74, 1 Stat. 596 (1798). *See also* 4 ELLIOT'S DEBATES, *supra* note 54, at 569 (James Madison's report of the Virginia Resolution).

92. 1 ANNALS OF CONGRESS, *supra* note 79, at 453.

93. "The people, not the government, possess the absolute sovereignty. The legislature, no less than the executive, is under limitations of power. . . . This security of the freedom of press requires that it should be exempt, not only from previous restraint of the executive, as in Great Britain, but from legislative restraint also; and this exemption, to be effectual, must be an exemption, not only from the previous inspection of licensers, but from the subsequent penalty of laws." 4 ELLIOT'S DEBATES, *supra* note 54, at 569-70 (James Madison's report of the Virginia Resolution).

94. *Id.*

95. 1 ANNALS OF CONGRESS, *supra* note 79, at 452.

96. Thomas Jefferson wrote, "I deplore . . . the putrid state into which our newspapers have passed, and the malignity, the vulgarity, and mendacious spirit of those who write them . . . These ordures are rapidly depraving the public taste. . . . It is however an evil for which there is no remedy, our liberty depends on the freedom of the press, and that cannot be limited without being lost." Letter from Thomas Jefferson to Dr. J. Currie (1786), *reprinted in* 15 WRITINGS OF THOMAS JEFFERSON, *supra* note 45, at 214. *See also* 14 *id.* at 116; 11 *id.* at 43-44; 4 ELLIOT'S DEBATES, *supra* note 54, at 541. For a discussion of the scope and application of common law provisions for the freedoms of speech and press, see the

broadest view possible of the freedoms of speech and press. Madison considered a vigorous free press, even with its potential for abuse, essential to free government. Indeed, he went so far as to reject the imposition of sanctions for any licentiousness accompanying the exercise of the freedoms of speech and press:

> Among those principles deemed sacred in America, among those sacred rights considered as forming the bulwark of liberty, which the Government contemplates with awful reverence and would approach only with the most cautious circumspection, there is no one of which the importance is more deeply impressed on the public mind than the liberty of the press. That this *liberty* is often carried to excess; that it has sometimes degenerated into *licentiousness*, is seen and lamented, *but the remedy has not yet been discovered. Perhaps it is an evil inseparable from the good with which it is allied; perhaps it is a shoot which cannot be stripped from the stalk without wounding vitally the plant from which it is torn. However desirable those measures might be which might correct without enslaving the press, they have never yet been devised in America.*[97]

Madison's understanding of the freedoms of speech and press, however, was not representative of the founding period or even of subsequent interpretations of those freedoms.[98] Since colonial experiences with censorship by the Crown fostered agreement that the rights of free speech and free press, if not Madison's "rights of conscience,"[99] should be protected, there was very little debate in the first Congress on adopting a provision for the freedoms of speech and press. In particular, those who feared the abuse of these freedoms expected the states to continue the common law restrictions on libel and other mischievous publications.

The principal concern during the congressional debates over what became the Constitution's First Amendment was whether specifically guaranteeing the freedoms of speech, press and assembly would constitutionally require representatives to give legislative effect to the published expression of popular opinion.[100] Madison settled the issue by maintaining that the guarantees no more granted the people a right to

Letter from William Cushing to John Adams (Feb. 18, 1789) and the Letter from John Adams to William Cushing (March 7, 1789), *reprinted in* FREEDOM OF PRESS FROM ZENGER TO JEFFERSON 147-53, (L. Levy ed. 1966).

97. 6 WRITINGS OF JAMES MADISON 1790-1802, 336 (G. Hunt ed. 1906).

98. *See, e.g.*, James Madison's letter to Edward Everett (August 28, 1830), *reprinted in* 9 WRITINGS OF JAMES MADISON 1790-1802 at 383 (G. Hunt ed. 1906).

99. *See id. See also* note 95 and accompanying text *supra*.

100. *See* 1 ANNALS OF CONGRESS, *supra* note 79, at 761-74 (statements by Messrs. Hartley, Page, Clymer, Sherman, Jackson, Gerry, Madison, Smith, Stone, and Livermore).

control congressional debates than they imposed upon representatives an obligation to act on their constituents' opinions or interests:

> The right of freedom of speech is secured; the liberty of the press is expressly declared to be beyond the reach of this Government; the people may therefore publicly address their representatives, may privately advise them, or declare their sentiments by petition to the whole body; in all these ways they may communicate their will. If gentlemen mean to go further, and to say that the people have a right to instruct their representatives in such a sense as that the delegates are obliged to conform to those instructions, the declaration is not true.[101]

While Madison's resolution of this issue was accepted, his proposal for expressly prohibiting the states from limiting the freedoms of speech and press was rejected in the final drafting of the First Amendment.[102] Furthermore, Congress subsequently passed the Sedition Act of 1798,[103] imposing criminal sanctions upon individuals who made "any false, scandalous writing" against the government of the United States. There were no prosecutions under the Sedition Act after 1801, when Thomas Jefferson became President,[104] and popular opinion turned against prosecutions for sedition. Still, common law principles and practices, aptly characterized by Leonard Levy as "an unbridled passion for a bridled liberty of speech,"[105] were generally accepted. For example, James Wilson, when defending the Constitution at the ratifying convention, argued: "What is meant by the liberty of the press is that there should be no antecedent restraint upon it; but every author is responsible when he attacks the security or welfare of the government, or the safety, character and property of the individual."[106]

The First Amendment was generally understood to give constitutional effect to Sir William Blackstone's all-too-definitive view of the common law of free speech and press:

> The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon

101. *Id.* at 766 (statements by Messr. Madison).

102. *Compare* Madison's proposed amendment, note 95 and accompanying text, *supra*, *with* the provisions of the First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST., amend. I.

103. Sedition Act of 1798, ch. 74, 1 Stat. 596 (1798).

104. *See* letter from Thomas Jefferson to Abigail Adams (July 22, 1804), *reprinted in* A JEFFERSON PROFILE 152-53 (S. Padover ed. 1946).

105. L. LEVY, *supra* note 57; *Cf.* Z. CHAFEE, *supra* note 56.

106. PENNSYLVANIA AND THE FEDERAL CONSTITUTION 308 (J. McMaster & F. Stone eds. 1888).

> publications, and not in freedom from censure from criminal matter when published. Every freeman has an undoubted right to lay what sentiments he phrases; but if he publishes what is improper, mischievous or illegal, he must take the consequences of his own temerity.[107]

The political ideals of free speech and press embodied in English common law and guaranteed by the First Amendment were limited and conditional.[108] The First Amendment protected only against prior restraint and censorship; it did not provide absolute immunity for what speakers or publishers might utter or print. Individuals could be punished for speech or publications that were "improper, mischievous or illegal."

In 1833, the most widely read and knowledgeable commentator on the Constitution within a generation of the founding period, Joseph Story, observed that "[t]here is a good deal of loose reasoning on the subject of liberty of the press, as if its inviolability were constitutionally such."[109] The import of Story's observation consists not only in its comprehending the meanings of free speech, press and access to information after the founding period, but also in its addressing current claims that the press enjoys special privileges in order to inform the public and vindicate the public's "right to know."[110] That the press should enjoy special privileges, Story remarked, "is too extravagant to be held by any sound constitutional lawyer."[111] Story endorsed Blackstone's interpretation of the freedoms of speech and press. Blackstone interpreted the freedoms to guarantee to individuals the right to express their views without prior restraint. Story was uncertain as to whether

107. W. BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND 151-53 (1766).

108. The Supreme Court acknowledged in Robertson v. Baldwin, 165 U.S. 275 (1897), that the First Amendment, like the other provisions of the Bill of Rights, only gave constitutional effect to traditional common law principles observing: "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 guaranties and immunities which we had inherited from our English ancestors." *Id.* at 281.

109. J. STORY, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 735 (1833).

110. *See* Barrow, *The Fairness Doctrine: A Double Standard for Electronic and Print Media*, 26 HASTINGS L.J. 659 (1975); Bezanson, *The New Free Press Guarantee*, 63 VA. L. REV. 731 (1977). *See also* Abrams, *The Press is Different: Reflections on Justice Stewart and the Autonomous Press*, 7 HOFSTRA L. REV. 563 (1979); Blanchard, *The Institutional Press and Its First Amendment Privileges*, 1978 SUP. CT. REV. 225; Nimmer, *Is Freedom of the Press a Redundancy: What Does It Add to Freedom of Speech?*, 26 HASTINGS L.J. 639 (1975); Sack, *Reflections on the Wrong Question: Special Constitutional Privilege for the Institutional Press*, 7 HOFSTRA L. REV. 629 (1979); Stewart, *"Or of the Press,"* 26 HASTINGS L.J. 631 (1975); Val Alstyne, *supra* note 7.

111. STORY, *supra* note 109, at 736.

the First Amendment prohibited Congress from "punishing the licentiousness of the press," but he did not doubt that the states could prosecute individuals for libelous and "other mischievous publications."[112]

By the late nineteenth century, another authority on the Constitution, Thomas Cooley, acknowledged that the press had assumed an increasingly important role in society as a result of technological innovations.[113] Cooley agreed with Madison[114] that "[r]epression of full and free discussion is dangerous in any government resting upon the will of the people."[115] Unlike Story, Cooley considered as constitutionally significant the difference between discussions or criticisms of the affairs of private citizens, on the one hand, and those of public officials or candidates for political office, on the other.[116] Like Story, however, he nonetheless construed the First Amendment against the background of common law principles and practices. The First Amendment, he thought, guarantees "a right to freely utter and publish whatever the citizen may please, and to be protected against any responsibility for so doing, except so far as such publications, from their blasphemy, obscenity, or scandalous character, may be a public offense, or as by their falsehood and malice they may injuriously affect the standing, reputation, or pecuniary interests of individuals."[117] Cooley also rejected the claim that the press enjoys special privileges: "When the authorities are examined, it appears that they have generally held the proprietors of public journals to the same rigid responsibility with all other persons who publish what is injurious. If what they give as news proves untrue as well as damaging to individuals, malice in the publication is presumed."[118] While appreciating the fact that the "public demand and expect accounts of every important meeting, . . . and of all the events which have a bearing upon trade and business, or upon political affairs,"[119] Cooley expressly denied that the press enjoys special privileges to obtain and publish confidential information concerning governmental proceedings, whether they be *ex parte* proceedings, preliminary examinations, trials, or legislative proceedings.[120]

112. *Id.* at 735-36.

113. T. COOLEY, 2 A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 886 (1927) [hereinafter cited as 2 T. COOLEY].

114. *See* text accompanying notes 90-97 *supra*.

115. 2 T. COOLEY, *supra* note 113, at 901.

116. *Id.* at 940.

117. *Id.* at 886.

118. *Id.* at 937.

119. *Id.* at 939.

120. *Id.* at 931-36.

Historically, public access to governmental information and the political ideal of the public's "right to know" about governmental affairs were understood to be concomitantly, or rather derivatively, protected by the freedoms of speech and press from prior governmental restraints. The crucial role that the First Amendment assumes in American democracy arises precisely because the electorate must be able to inform its representatives concerning issues of public moment, as well as to be informed by critical appraisals of official activity and the operations of government.[121] Although the First Amendment was designed to prohibit censorship of "information and communication among the people which is indispensable to the just exercise of their electoral rights,"[122] there exists no historical basis for the further conclusion that the amendment was designed to guarantee to individuals or the press a right to demand access to government facilities or materials in order that they may publish what they deem important to an informed public.

III. The Supreme Court and the Political Ideal of the "Right to Know"

The Supreme Court has been generally receptive to the public's "right to know," at least as an abstract constitutional right, if not as a concrete right guaranteed by the First Amendment.[123] In recognizing that "speech concerning public affairs . . . is the essence of self-government,"[124] the Court has acknowledged the need for freedom of access to information concerning governmental affairs, and indeed, the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[125] Accordingly, the Court has found that "Founders . . . felt that a free press would advance 'truth, science, morality, and arts in general' as well as responsible government."[126]

Consistent with the understanding that the First Amendment "rests on the assumption that the widest possible dissemination of in-

121. *See* 4 ELLIOT'S DEBATES, *supra* note 54, at 528-80 (statements by Messrs. Madison and Jefferson).

122. *Id.* at 574 (statement by Messr. Madison).

123. *See* text accompanying notes 48-50 *supra* and notes 203-73 *infra*.

124. Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964). *See also* United States v. Cruikshank, 92 U.S. 542, 552 (1876).

125. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

126. Curtis Publishing Co. v. Butts, 388 U.S. 130, 147 (1967) (quoting JOURNAL OF THE CONTINENTAL CONGRESS, *supra* note 53.) *See also* Rosenbloom v. Metromedia, 403 U.S. 29, 78 (1971) (Marshall, J., dissenting); Time, Inc. v. Hill, 385 U.S. 374 (1967).

formation from diverse and antagonistic sources is essential to the welfare of the public,"[127] the Court has construed the freedoms of speech and press as co-equal and interdependent means for the expression and dissemination of information concerning governmental affairs. In *Time, Inc. v. Hill*,[128] for example, the Court observed: "Those guarantees [of free speech and press] are not for the benefit of the press so much as for the benefit of all of us."[129] Indeed, the Supreme Court has consistently acknowledged that the freedoms of both speech and press are "essential to the securing of an informed and educated public opinion with respect to matter which is of public concern."[130] In *Thornhill v. Alabama*,[131] the Court summarized the historical basis for and the essential role of the First Amendment guarantees in securing access to governmental information and the public's "right to know":

> The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. The exigencies of the colonial period and the efforts to secure freedom from oppressive administration developed a broadened conception of these liberties as adequate to supply the public need for information and education with respect to the significant issues of the times. . . . Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.[132]

Precisely because the public's "right to know" exists as an abstract right within the background of the First Amendment, "any system of prior restraints of expression . . . [bears] a heavy presumption against its constitutional validity."[133] The Court acknowledged the existence of this right by construing the free speech and press guarantees as safe-

127. Associated Press v. United States, 326 U.S. 1, 20 (1945). *See also* Stromberg v. California, 283 U.S. 359, 369 (1931); Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis & Holmes, JJ., concurring).

128. 385 U.S. 374 (1967).

129. *Id.* at 389.

130. Thornhill v. Alabama, 310 U.S. 88, 104 (1940). *See also id.* at 95, 102, 127-29; Senn v. Tile Layers Protective Union, 301 U.S. 468, 478 (1937).

131. 310 U.S. 88 (1940).

132. *Id.* at 101-02 (footnotes omitted). *See also* Grosjean v. American Press, 297 U.S. 233, 243-47 (1936).

133. New York Times Co. v. United States, 403 U.S. 713, 714 (1971). *See also* Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241, 259 (1974) (White, J., concurring); Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 193 (1973) (Brennan, J., dissenting); Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963); Near v. Minnesota, 283 U.S. 697 (1931).

guarding "the paramount public interest in a free flow of information to the people concerning public officials,"[134] and thereby "assur[ing] the maintenance of our political system and an open society."[135]

Constitutional history and the Supreme Court's construction of the First Amendment's crucial role in securing public access to governmental information confirm that the public's "right to know" may be understood as an important abstract constitutional right. Emerson and others are mistaken, however, when they further argue that the Constitution establishes a concrete "right to know" and, concomitantly, creates special privileges for the press to secure confidential information and vindicate the public's "right to know."[136]

To be sure, the Court has acknowledged not only that "news gathering is not without its First Amendment protections,"[137] and that "without some protection for seeking out the news, freedom of the press could be eviscerated,"[138] but also that "[t]he Constitution specifically selected the press . . . to play an important role in the discussion of public affairs."[139] Therefore, "[i]n seeking out the news the press . . . acts as an agent of the public at large."[140] In a landmark decision invalidating a state license tax on newspapers, the Court concluded that "an untrammeled press [is] a vital source of public information. A free press stands as one of the great interpreters between the government and the people."[141]

Still, a majority of the Supreme Court has consistently rejected the press' claims for special privileges and refused to recognize a directly enforceable public "right to know" under the First Amendment. The free speech and free press guarantees are co-equal and coterminous, since neither guarantee is absolute or unconditional, and neither may properly be viewed as implying special privileges for individuals or the press.[142] The Court has long maintained that a First Amendment "right is not an absolute one, and the State in the exercise of its police

134. Garrison v. Louisiana, 379 U.S. 64, 77 (1964).

135. Time, Inc. v. Hill, 385 U.S. 374, 389 (1967).

136. The Court has stated that "[f]reedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way." Murdock v. Pennsylvania, 319 U.S. 105, 111 (1943).

137. Branzburg v. Hayes, 408 U.S. 665, 707 (1972).

138. *Id.* at 681.

139. Mills v. Alabama, 384 U.S. 214, 219 (1966).

140. Saxbe v. Washington Post Co., 417 U.S. 843, 863 (1974) (Powell, J., dissenting). *See also* First Nat'l Bank v. Bellotti, 435 U.S. 765, 776-78 (1978).

141. Grosjean v. American Press Co., 297 U.S. 233, 250 (1936).

142. *See* Lange, *The Speech and Press Clauses*, 23 U.C.L.A. L. REV. 77 (1975); Lewis, *A Preferred Position for Journalism?*, 7 HOFSTRA L. REV. 595 (1979). *But see* note 110 *supra*.

power may punish the abuse of this freedom."[143] Thus, consistent with common law principles and the founders' understanding of the First Amendment, the Court has held that some types of speech are not constitutionally protected:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting words.' . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.[144]

The Court has also repeatedly sustained the validity of reasonable "time, place, and manner" regulations applied in an evenhanded manner[145] and thereby recognized that an individual "has no right to force his message upon an audience incapable of declining to receive it."[146]

Before further examining the Supreme Court's treatment of claims of a "right to know" under the First Amendment and of related special privileges for the press, a brief discussion of the political ideal of the public's "right to know" may illuminate some of the conceptual and constitutional dilemmas involved in demarcating an express or concrete "right to know." Emerson and others to the contrary, an examination of the political ideal of the "right to know" indicates that the Court's acknowledgment of an abstract "right to know" does not require that a directly enforceable "right to know" also be recognized. Furthermore, there are compelling reasons why the Court should refrain from transforming the political ideal of the public's "right to

143. Stromberg v. California, 283 U.S. 359, 368 (1931). *See also* Associated Press v. United States, 326 U.S. 1, 20 (1945); Murdock v. Pennsylvania, 319 U.S. 105, 122 (1943) (Reed, J., dissenting); Bridges v. California, 314 U.S. 252, 283 (1941) (Frankfurter, J., dissenting); Thornhill v. Alabama, 310 U.S. 88, 105 (1940); Whitney v. California, 274 U.S. 357, 371 (1927).

144. Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942). *See also* Lewis v. New Orleans, 415 U.S. 130, 132 (1974) (libel and fighting words); Miller v. California, 413 U.S. 15, 26 (1973) (obscenity); Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (inciting imminent lawless action); Roth v. United States, 354 U.S. 476 (1957) (obscenity); Cantwell v. Connecticut, 310 U.S. 296, 309 (1940) (personal abuse).

145. *See, e.g.*, Pell v. Procunier, 417 U.S. 817, 826 (1974); Grayned v. City of Rockford, 408 U.S. 104, 115 (1972); Police Dep't v. Mosley, 408 U.S. 92, 98 (1972); Cox v. Louisiana, 379 U.S. 536, 554-55 (1965); Poulos v. New Hampshire, 345 U.S. 395, 398 (1953); Schneider v. State, 308 U.S. 147, 160 (1939).

146. Lehman v. City of Shaker Heights, 418 U.S. 298, 307 (1974) (Douglas, J., concurring). *See also* FCC v. Pacifica Foundation, 438 U.S. 726 (1978); Rowan v. Post Office Dep't, 397 U.S. 728, 736 (1970); Public Util. Comm'n v. Pollak, 343 U.S. 451, 469 (1952); Martin v. Struthers, 319 U.S. 141, 146-48 (1943).

know" into an affirmative constitutional right under the First Amendment. Contemporary demands for the delimitation of a constitutional "right to know" derive partly from endeavors to expand upon Alexander Meiklejohn's interpretation of the First Amendment.[147] It will be argued below, however, that Meiklejohn's interpretation fundamentally traverses historical understandings of the Constitution and the Bill of Rights, and that his interpretation does not necessarily require, although it does invite, the recognition of a directly enforceable "right to know."

The suggestion that the public has a specific and enforceable "right to know," and not merely an abstract right supporting freedom of access to information concerning governmental affairs, raises conceptual difficulties independent of, although interrelated with, problems of constitutional interpretation. In contrast to concrete rights, abstract rights are unconditional; thus, specific cases may not be decided under them, although such rights may offer powerful arguments for extending the scope of recognized concrete rights.[148] When passing upon First Amendment claims, the Supreme Court—as did the authors of the First Amendment[149]—frequently acknowledges the need for freedom of access to information and treats the public's "right to know" as an abstract constitutional right.[150] Accordingly, the political ideal of the "right to know" is invoked to underscore the importance of safeguarding the specific rights guaranteed by the First Amendment. Thus, Walter Gellhorn's observation, that "the 'right to know' principle is itself so broad and vaguely phrased that it cannot decide cases,"[151] correctly criticizes Emerson for insisting upon the existence of a concrete constitutional "right to know," but fails to appreciate how a broad principle or abstract right may provide powerful arguments for protection of the freedoms of speech and press.

An insistence on the delineation of an enforceable "right to know" raises a plethora of difficult questions. What does the public have a right to know? To what extent and on what occasions does the public enjoy a constitutional right of access? To what kinds of government facilities and information does it enjoy freedom of access? Further, what, if any, correlative obligations are imposed upon government officials to disclose or withhold information from the public? These ques-

147. Meiklejohn, *supra* note 50.
148. *See* notes 48-50 and accompanying text *supra*.
149. *See* notes 60-104 and accompanying text *supra*.
150. *See* notes 123-41 and accompanying text *supra*. *See also* O'Brien, *supra* note 29.
151. Gellhorn, *supra* note 7, at 26.

tions demand detailed arguments demonstrating that the public's "right to know" is not simply an abstract constitutional right, but that it has particular merits and definable contours as a directly enforceable right to be weighed against other moral, legal and political considerations.

Emerson and other commentators generally concede that the "right to know" is permissibly limited in such areas as national security, diplomatic negotiations and collective bargaining.[152] Emerson also maintains that the "right of privacy" limits the public's "right to know," as do regulations that protect individuals from having information or materials forced upon them.[153] Emerson's suggestion that a constitutional "right of privacy" may limit the public's "right to know" reveals the conceptual muddle engendered by an infatuation with translating the political ideal of the public's "right to know" into a directly enforceable right. The bill of rights was designed to protect individuals against unwarranted governmental intrusions and other abuses of governmental power.[154] For example, the Fourth Amendment's prohibition against unreasonable searches and seizures applies only to searches and seizures by the government, not to those by private individuals.[155] Accordingly, a directly enforceable constitutional "right to know" would cover only governmental facilities or materials and would not entail public access to private homes or personal effects. The confusion in Emerson's argument, that the constitutional "right of privacy" would limit the public's "right to know," illustrates the difficulties in demarcating the scope of penumbral rights.

Apart from the observation that a directly enforceable "right to know" would apply only to governmental facilities or materials and that determining the scope of the right would require the balancing of competing interests in freedom of access to governmental information

152. *See* Emerson, *supra* note 7, at 17-20; Ivester, *supra* note 7, at 145-57.

153. *See* Emerson, *supra* note 7 at 19-23. The Supreme Court upheld, for example, "time, place and manner" regulations against First Amendment claims because no member of the public "has [a] right to force his message upon an audience incapable of declining to receive it." Lehman v. City of Shaker Heights, 418 U.S. 298, 307 (1974) (Douglas, J., concurring). *See also* FCC v. Pacifica Foundation, 438 U.S. 726 (1978); Rowan v. Post Office Dep't, 397 U.S. 728, 736 (1970); Public Util. Comm'n v. Pollak, 343 U.S. 451, 469 (1952); Martin v. City of Struthers, 319 U.S. 141, 146-48 (1943).

154. The Supreme Court has stated that the Bill of Rights was designed to "withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

155. *See* Burdeau v. McDowell, 256 U.S. 465, 475 (1921). *See also* Buckley v. Valeo, 424 U.S. 1, 237-41 (1976) (Burger, C.J., concurring). In his concurring opinion in *Buckley*, Chief Justice Burger asserted that "[t]he public right to know ought not be absolute when its exercise reveals private political convictions." *Id.* at 237.

and in governmental confidentiality, there is no need here to analyze the potential scope of a constitutionally defined "right to know."[156] Rather, even a cursory examination of the issues and dilemmas involved in so ambitious an undertaking ought sufficiently to admonish scholars and the Supreme Court against further attempts to articulate an enforceable "right to know" under the First Amendment.

The claim that the public enjoys a directly enforceable "right to know" can be upheld only after it is first determined who "the public" is, what the public has a right to know, and why it has such a right. Emerson, among others, fails to appreciate that in a pluralistic society, denomination of "the public," albeit symbolically appealing, is a misleading reification.[157] Yet, even an analysis of different publics' "right to know" about governmental affairs presupposes a discussion of the basis for claiming the "right to know." As the Court observed in *Gannett Co. v. DePasquale*,[158] "interest alone does not create a constitutional right."[159] Nor does the fact that certain members of the public might want access to government facilities or materials appear particularly relevant. Thus, Joseph Tussman argues that "[w]e cannot demand answers to our questions. . . . We are entitled to know by virtue of some functional status; the right to know is tied to the need to know."[160] The "right to know" should be linked to an individual's or the public's *need* to know about vital governmental affairs and operations, but this need should be shown more specifically than under a general claim that a representative democracy requires an informed citizenry.[161]

An individual's need to know may entitle him to assert a "right to know" when governmental disclosure is vital to his self-governance. That is, an individual's need to know may prove sufficiently meritorious when coupled with a personal or proprietary interest in claiming a

156. The Supreme Court's treatment of the public's "right to know" under the First Amendment is examined in Section III at notes 209-73 *infra*.

157. Emerson does acknowledge the problem. He maintains that "basically the genius of the American system of freedom of expression . . . seem[s] to call for principles which locate the right to know in various social groupings—economic, cultural, religious, and the like." Emerson, *supra* note 7, at 9. *See generally* A. BENTLEY, THE PROCESS OF GOVERNMENT (1908); R. DAHL, A PREFACE TO DEMOCRATIC THEORY (1956); D. TRUMAN, THE GOVERNMENTAL PROCESS (1951).

158. 99 S. Ct. 2898 (1979).

159. *Id.* at 2913.

160. J. TUSSMAN, GOVERNMENT AND THE MIND 118 (1977).

161. The understanding during the founding period of the connection between freedom of access to governmental information and the demands of representative government is discussed in the text accompanying notes 50-122 *supra*.

right to governmental information.[162] Like other commentators, however, Emerson overlooks perhaps the most significant occasion for applying the "right to know": when individuals are confronted by the government with criminal or administrative sanctions.[163] As Justice Jackson observed, dissenting from a decision permitting the exclusion of an alien without a hearing or even disclosure of the basis for the exclusion, "The most scrupulous observance of due process, including the *right to know* a charge, to be confronted with the accuser, to cross-examine informers and to produce evidence in one's behalf, is especially necessary when the occasion of detention is fear of future misconduct, rather than crimes committed."[164] In fact, the Court initially acknowledged a "right to know" not as an emanation of the First Amendment, but as implicit within the nature of adversary proceedings and administrative investigations and the concomitant requirements of due process.[165] Justice Douglas, for example, asserted that "[t]he *right to know* the claims asserted against one and to contest them—to be heard—to conduct a cross-examination—these are all implicit in our concept of 'a full and fair hearing' before any administrative agency. . . ."[166]

An individual's claim to a "right to know" is legitimate within adversary proceedings for two reasons: first, because the accusatorial relationship that pertains between the individual and the government presupposes a "fair state-individual balance";[167] and, second, because

162. In other words, in some instances the need to know may provide an individual with standing as a traditional "Hohfeldian plaintiff." *See* W. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED TO JUDICIAL REASONING (1919).

163. *See* D. FELLMAN, THE DEFENDANT'S RIGHTS TODAY 71-83 (1976).

164. Shaughnessy v. United States, 345 U.S. 206, 225 (1953) (Jackson, J., dissenting) (emphasis added).

165. *See, e.g.*, Shenker v. Baltimore & Ohio R.R., 374 U.S. 1, 5 (1963); Beck v. Washington, 369 U.S. 541, 580 (1962) (Douglas, J., dissenting); Maryland v. Baltimore Radio Show, 338 U.S. 912, 920 (1950); United States v. UMW, 330 U.S. 258, 370-74 (1947) (Rutledge, J., dissenting); Davis v. United States, 328 U.S. 582, 611 (1946) (Frankfurter, J., dissenting); Bowles v. United States, 319 U.S. 33, 37 (1943) (*per curiam*) (Jackson, J., dissenting); Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 446 (1911); United States v. Cruikshank, 92 U.S. 542, 559 (1876). *See also In re* Ruffalo, 390 U.S. 544 (1968); Smith v. Illinois, 390 U.S. 129, 130-31 (1968); International Longshoremen's Ass'n v. Philadelphia Marine Trade Ass'n, 389 U.S. 64, 71 (1967).

166. Hannah v. Larche, 363 U.S. 420, 502 (1960) (Douglas, J., dissenting) (emphasis added). *See also* Greene v. McElory, 360 U.S. 474, 496-97 (1959); Morgan v. United States, 304 U.S. 1, 18 (1938).

167. Miranda v. Arizona, 384 U.S. 436, 460 (1966). *See generally* Fortas, *The Fifth Amendment: Nemo Tenetur Prodere Seipsum*, 25 CLEVELAND B.A.J. 95, 98-99 (1954); O'Brien, *The Fifth Amendment: Fox Hunters, Old Women, Hermits, and the Burger Court*, 54 NOTRE DAME LAW. 26, 35-41 (1978).

the individual asserts a personal and proprietary interest in a particular kind of information, namely, the nature of and basis for a criminal charge. An individual's claim to a "right to know" in other contexts, however, may not be equally meritorious. An individual's claim to a "right to know" about CIA funding, agents or secret operations, for example, is simply not as compelling as his or her claim to government information in order to present an adequate defense against a criminal prosecution. Furthermore, without a standing requirement that individuals demonstrate a personal or proprietary interest in obtaining access to government facilities or materials, claims to a "right to know" might well prove to be open-ended and unacceptable. In *Zemel v. Rusk*,[168] the Court pointed out the dangers and absurdities of broadly construing the "right to know":

> There are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow. For example, the prohibition of unauthorized entry into the White House diminishes the citizen's opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right. The right to speak and publish does not carry with it the unrestrained right to gather information.[169]

The legitimacy of an individual's claim to a "right to know" depends on the merits of his or her demonstration of the need to know, not merely the desire to know, relative to other legal and political considerations for withholding government information.

Emerson and other commentators, however, are not so much concerned with an individual's "right to know" as with the public's "right to know" and with the acknowledgment of privileges for the press to obtain and publish materials that would inform the public. In addition to the difficulty of identifying "the public" and its interests,[170] problems arise in connection with the press claiming special privileges or the "right to know" in order to inform the public. In a report for the Commission on Freedom of the Press, William Hocking noted the paradox that "[w]e say recklessly that [readers] have 'a right to know'; yet it is a right which they are helpless to claim, for they do not know that they

168. 381 U.S. 1 (1965).

169. *Id.* at 16-17.

170. *See* note 157 and accompanying text *supra*. On the problems with determining the public's interests in news and information, see Comment, *The Right of Privacy: Normative-Descriptive Confusion in the Defense of Newsworthiness*, 30 U. CHI. L. REV. 722 (1963); Note, *Privacy in the First Amendment*, 82 YALE L.J. 1462 (1973).

have the right to know what as yet they do not know."[171]

The problem with press claims for special privileges, in order to serve the public's "right to know," is actually twofold. In the first place, the press cannot show that the public needs to know, or even perhaps that it wants to know, about some particular item or issue. Indeed, the press and other mass media have lately been criticized for their actual or potential manipulation of public opinion.[172] At best, the press may claim that by publishing certain information it informs the public and thereby vindicates the political ideal of the "right to know" as an abstract constitutional right. Thus, Emerson argues, "the right to know serves much the same function in our society as the right to communicate. . . . It is a significant method for seeking the truth, or at least for seeking the better answer. It is necessary for collective decision-making in a democratic society."[173] Nonetheless, even the claim that the press should have special access to materials so that it may inform the public is not without difficulties. An individual's need to hear about vital issues neither entitles the press to obtain access to everything pertinent to the issues, nor guarantees that an individual informed about such matters will therefore be a knowledgeable participant in the democratic process.

Peter Bathory and Wilson Carey McWilliams eloquently expose the fallacies inherent in press claims of a right to inform the public:

> The case for democracy does not require that the citizen be familiar with all the bits and pieces of expert knowledge. He cannot be, in any case, and we do him individually and the people collectively no credit if we believe that the political claims of democracy can be maintained only by telling lies that exaggerate the ability of the citizen. . . . Vindicating the "public's right to know" does not require that all specialized, private, and relatively inaccessible information be "made public." It demands, rather, that the public have access to those facts necessary for public judgment about public things, and, more important, that it have the *greatest possible opportunity to learn and master the art of political judgment*.[174]

Bathory and McWilliams apprehend that a directly enforceable "right to know" is not only often incompatible with informed and efficient

171. W. HOCKING, FREEDOM OF THE PRESS: A FRAMEWORK OF PRINCIPLE 170-71 (1947).

172. *See generally* J. BARRON, FREEDOM OF THE PRESS FOR WHOM? (1973); Comment, *Freedom to Hear: A Political Justification of the First Amendment*, 46 WASH. L. REV. 311 (1971).

173. Emerson, *supra* note 7, at 2.

174. Bathory & McWilliams, *supra* note 51, at 8 (emphasis added).

government decision-making, but is also misleading, conceited and baneful. "There is more than a semantic difference," they note, "between an 'informed public' and a 'public informed,' for an 'informed public' has presumably heard and learned what a 'public informed' was merely told [by the press]."[175] Likewise, Madison and Jefferson understood that the republic depended upon freedom of access to governmental information, not as secured by an enumerated "right to know," but rather as secured by the freedoms of speech and press and as reinforced by public education and citizen participation in the affairs of governance.[176]

Press claims for special privileges, in order to inform the public, may also have perilous consequences for the exercise of freedom of the press. An abstract or unqualified public "right to know" simply underscores the import of free speech and press; claims to a specific and directly enforceable "right to know," however, are necessarily qualified by other legal or political considerations.[177] Consequently, the courts must determine what the public does or does not have a "right to know" and a determination of the latter may involve restricting speech and press. At least one member of the press, James Goodale, warns against Emerson's insistence on elaborating an enforceable "right to know" independent of the freedoms of speech and press: "[T]he problem with the right to know is that it invariably involves prior restraint. Since the right is not self-executing, a court must decide what the public is permitted to know or not to know."[178] In other words, elaboration of a directly enforceable "right to know" might prove pernicious precisely because courts must balance an individual's or the public's need to know against the government's demands for limited access, confidentiality and freedom from interruptions in the conduct of official operations. This potential for prior restraint which attends a court's determination of what the public is entitled to know also suggests deleterious political consequences of acknowledging a public "right to know." Judicial delimitation of what the public has a "right to know" would be substituted for evaluations by the legislature and the executive of what the public legitimately needs to know. Thus, courts, having fashioned a "right to know," would inevitably be required to assume the role of a super-legislature in determining the wisdom, need

175. *Id.* at 4.

176. *See* notes 45-47 and accompanying text *supra*.

177. *See* notes 48-49 and accompanying text *supra*.

178. Goodale, *supra* note 7, at 33. James Goodale is Executive Vice President of the New York Times Company. *See also* Van Alstyne, *supra* note 7, at 769.

and propriety of permitting public access to legislative and executive materials or policy-making information.

In addition to these inherent difficulties and potential deleterious consequences of acknowledging an enforceable "right to know," there remain serious constitutional problems with the claim that the First Amendment was specifically designed to guarantee to the public a "right to know." Commentators frequently embrace Alexander Meiklejohn's interpretation of the First Amendment in support of the recognition of a constitutional "right to know."[179] Emerson, however, unlike most commentators, does recognize that the First Amendment may no more be made the touchstone for the "right to know," than may Meiklejohn's interpretation be uncritically accepted.[180] Yet, Meiklejohn's critics and admirers alike often misunderstand his thesis and its significance for comprehending the political ideal of a public "right to know" about governmental affairs.[181] A brief recital of the principal tenets of Meiklejohn's thesis is in order here, since any misun-

179. *See* Bertelsman, *The First Amendment and Protection of Reputation and Privacy*, 56 KY. L.J. 718, 748-49 (1968); Bloustein, *supra* note 50; Brennan, *supra* note 50; Ivester, *supra* note 7; Meiklejohn, *supra* note 50; Comment, *The Public's Right of Access to Government Information under the First Amendment*, 51 CHI.-KENT L. REV. 164, 176-79 (1974); Comment, WASH. L. REV., *supra* note 172, at 322, 331.

180. *See* T. EMERSON, SYSTEM OF FREEDOM OF EXPRESSION (1970). Professor Emerson succinctly summarizes the four functions served by "[t]he system of freedom of expression in a democratic society": (1) a means of insuring individual self-fulfillment essential to the dignity of man; (2) an essential process for advancing knowledge or discovering truth; (3) a means for participation in decision-making by all members of society in forming the common judgment and (4) a method of achieving a more adaptive and hence a more stable community while maintaining the precarious balance between healthy cleavage and necessary consensus. *Id.* at 6-7. Meiklejohn emphatically rejects the first two roles. His understanding of the First Amendment is discussed in notes 182-202 and accompanying text *infra*.

181. For example, both Justices Douglas and Brennan, admirers of Meiklejohn and advocates of a broad construction of the First Amendment, in recognition of a directly enforceable public "right to know," misunderstood the philosopher's thesis. Justice Douglas, dissenting in Branzburg v. Hayes, 408 U.S. 665 (1972), claimed that "[t]he press has a preferred position in our constitutional scheme, not to enable it to make money, not to set newsmen apart as a favored class, but to bring fulfillment to the public's right to know. The right to know is crucial to the governing powers of the people, to paraphrase Alexander Meiklejohn. Knowledge is essential to informed decisions." *Id.* at 721 (Douglas, J., dissenting). Meiklejohn, however, made a radical and rigid distinction between the constitutional foundation of the right to speak in the Fifth Amendment—a right of the governed—and that of the people's power to hear and debate—or, if you will, a "right" of the governors—guaranteed by the First Amendment. Meiklejohn, *supra* note 50, at 254-55. Similarly, Justice Brennan suggested that Meiklejohn would have embraced the "actual malice" test for libel actions which was articulated in New York Times, Co. v. Sullivan, 376 U.S. 254 (1964). Brennan, *supra* note 50, at 17-18. However, Meiklejohn would have rejected at least one part of the Court's "actual malice" test, namely, that malice may be established by showing publication with "reckless disregard for the truth." Meiklejohn's thesis is discussed in notes 182-202 and accompanying text *infra*.

derstanding derives from misconceiving the premises of his interpretation of the First Amendment.

Meiklejohn maintains that "the First Amendment is an absolute,"[182] but he neither shares Justice Black's absolutism[183] nor remains absolute about his own version of "absolutism."[184] For Meiklejohn, the First Amendment is an absolute because "[i]t is concerned, not with a private right, but with a public power, a governmental responsibility."[185] The First Amendment does not guarantee rights to individuals, but rather embodies a basic principle of popular sovereignty. The First Amendment, like the Preamble to the Constitution,[186] Article I, Section 2 of the Constitution[187] and the Tenth Amendment,[188] recognizes the authority and power of citizens to enjoy self-government and therefore protects "the 'governing powers' of the people from abridgment by the

182. Meiklejohn, *supra* note 50, at 245.

183. Justice Black believed "without deviation, without exception, without any ifs, buts, or whereases, that freedom of speech means that government shall not do anything to people, or, in the words of the Magna Carta, move against people, either for the views they have or the views they express or the words they speak or write." H. BLACK, A CONSTITUTIONAL FAITH 45 (1969). Justice Black's interpretation was only absolute with respect to speech because he, like Meiklejohn, maintained that the government could regulate conduct. Whereas Black held defamatory publications to be absolutely privileged, Meiklejohn believed that the First Amendment only prohibits prosecutions for seditious libel and therefore, would have permitted defamation actions based on publications having no relation to citizens' governing powers. On Justice Black's interpretation of the First Amendment, see, e.g., Stanley v. Georgia, 394 U.S. 557, 558 (1969) (Black, J., concurring); Ginzburg v. United States, 383 U.S. 463, 476 (1966) (Black, J., dissenting); Barenblatt v. United States, 360 U.S. 109, 141-42 (1959) (Black, J., concurring); Roth v. United States, 354 U.S. 476, 508 (1957) (Douglas & Black, JJ., dissenting); Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949).

184. Meiklejohn initiated his inquiry by stating, "We are looking for a principle which is not in conflict with any other provision of the Constitution, a principle which, as it now stands, is 'absolute' in the sense of being 'not open to exceptions,' but a principle which also is subject to interpretation, to change, or to abolition, as the necessities of a precarious world may require." Meiklejohn, *supra* note 50, at 253. He qualified his "absolutist" position by accepting time, place and manner restrictions on public debate, as well as by permitting prosecutions for speech which is not essentially part of citizens' governing powers, e.g., prosecutions for distribution of pornography, invasion of privacy or private libel.

185. Meiklejohn, *supra* note 50, at 255.

186. The principle of self-government is proclaimed in the Preamble to the Constitution, which states in part: "We the People of the United States . . . do ordain and establish this Constitution for the United States of America." U.S. CONST. *preamble.*

187. Article I, Section 2, Clause 1, guarantees the electoral powers of citizens by providing: "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States." U.S. CONST. art. I, § 2, cl. 1.

188. Meiklejohn interpreted the Tenth Amendment as recognizing the reserved powers of a sovereign people dedicated to self-government. Meiklejohn, *supra* note 50, at 254. The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

agencies which are established as their servants."[189] By contrast, the Second through Ninth Amendments recognize that individuals are also governed by "the agencies which are established as [the people's] servants," and hence "limit the powers of the subordinate agencies in order that due regard shall be paid to the private 'rights of the governed.' "[190] Thus, in Meiklejohn's view, the First Amendment establishes not a right of individuals, but a regulatory principle. That is, the amendment was not designed to guarantee individual self-expression[191] or, as Meiklejohn said, an "unlimited license to talk."[192] Instead, the amendment prohibits restrictions on speech and press so that citizens may freely engage in the deliberation over and debate of public issues that are essential to their electoral powers and self-government. As Meiklejohn concluded: "The First Amendment does not protect a 'freedom to speak.' It protects the freedom of those activities of thought and communication by which we 'govern.' "[193]

Because the First Amendment is construed as a regulatory principle, Meiklejohn's interpretation has considerable appeal for proponents of a constitutionally enforceable public "right to know" about governmental affairs.[194] Yet, Meiklejohn's analysis expressly denies that the First Amendment confers a right to either individuals or groups. Moreover, he never suggested that the amendment grants any affirmative or absolute right of access to government facilities or materials. Instead, the amendment absolutely prohibits the government from restricting the freedom of citizens to communicate information which is essential to their self-governance. Furthermore, the First Amendment is an absolute only in the sense that it absolutely guarantees the public's freedom of self-government. The amendment is not unconditional or unqualified, since citizens' freedom and governmental regulation are not antithetical. On the contrary, freedom and restraint are both constituents of self-government. As Meiklejohn stated: "A citizen may be told when and where and in what manner he may or may not speak, write, assemble, and so on. On the other hand, he may not be told what he shall or shall not believe. In that realm each citizen is sovereign."[195]

189. Meiklejohn, *supra* note 50, at 254.

190. *Id.*

191. By contrast, see Emerson's interpretation of the First Amendment, discussed in his articles cited in *supra* notes 7, 11 & 180.

192. *See* Meiklejohn, *supra* note 50, at 249-50.

193. *Id.* at 255.

194. *See, e.g.*, Bertelsman, *supra* note 179; Bloustein, *supra* note 50; Brennan, *supra* notes 50 and 181; Ivester, *supra* note 7, at 119; Note, YALE L.J., *supra* note 170; Comment, CHI.-KENT REV., *supra* note 179; Comment, WASH. L. REV., *supra* note 179.

195. Meiklejohn, *supra* note 50, at 257.

Thus, Meiklejohn embraced the Supreme Court's upholding of laws regulating the "time, place, and manner" of public assembly and of expression of opinions concerning the operation of government.[196] Time, place and manner regulations, of course, frequently restrict individual or public access to government facilities, although an individual or a segment of the public may deem such access important as helping to inform public opinion and, hence, as aiding the governing powers of citizens.[197] Nonetheless, Meiklejohn maintained that " '[t]o interpret the First Amendment as forbidding such regulation is to so misconceive its meaning as to reduce it to nonsense.' "[198] Just as Congress or the states may constitutionally regulate the time, place and manner of individual or public expression, so too may they regulate, under Meiklejohn's analysis, individual or public access to government facilities or materials.

Meiklejohn's interpretation of the First Amendment, therefore, provides considerably less support for the delineation of a constitutional "right to know" than his admirers contend. Meiklejohn's interpretation does, however, illuminate the political ideal of the public's "right to know" as an abstract constitutional right. The freedoms of speech and press help to protect the availability of crucial information and promote debate concerning the operations of government; these freedoms thus remain essential to an informed public. Still, 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. In this respect, Meiklejohn's interpretation is fundamentally antithetical to the understanding that prevailed during the congressional debates over the First Amendment,[199] as well as to the Court's and commentators' interpretations of the amendment.[200] Like Meiklejohn, contemporary proponents of an enforceable constitutional "right to know" are demanding a radical shift in First Amendment litigation.[201] They nonetheless should heed Justice Brennan's warning against reading too much of Meiklejohn's interpretation into Supreme Court rulings on the First Amendment: "[R]adical shifts in judicial doctrine are rare."[202]

196. *See* note 145 *supra*.
197. *See* notes 145 & 166-69 and accompanying text *supra*.
198. Meiklejohn, *supra* note 50, at 252.
199. *See* notes 50-108 and accompanying text *supra*.
200. *See, e.g.*, notes 109-20 & 123-41 and accompanying text *supra*.
201. *See* notes 12-15 & 27-29 and accompanying text *supra*.
202. Brennan, *supra* note 50, at 10.

IV. The Burger Court, the First Amendment and the Public's "Right to Know"

In an address at Yale Law School, Justice Stewart noted: "The public's interest in knowing about its government is protected by the guarantee of a Free Press but the protection is indirect. The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act."[203] The public's "right to know," being merely a political ideal, is properly viewed as only an abstract constitutional right. The preceding discussion has sought to demonstrate that essays aimed at transforming this political ideal into a right directly enforceable against the government, distort the historical background of the First Amendment[204] and may even impact perniciously on the private exercise of expressly guaranteed rights.[205]

That an affirmative constitutional "right to know" is neither well founded historically nor free of inauspicious consequences, might suffice to discourage delineation of a First Amendment "right to know." Nevertheless, Emerson, like other commentators who are not opposed to the use of constitutional common law,[206] justifies the delineation of an independent constitutional "right to know" by asserting: "The Supreme Court has recognized in a number of cases that the first amendment embodies a constitutional guarantee of the right to know."[207] Thus, it is necessary to consider whether the Supreme Court has indeed legitimated, under the First Amendment, an affirmative "right to know."[208]

Because they distort constitutional developments, Emerson's proclamations on the "status of an emerging constitutional right"[209] are not only exaggerated, but misleading as well, particularly for lawyers defending the media or challenging governmental regulations. Whereas Emerson maintains that the "Court has sometimes ignored, or failed to give weight to the guarantee [of the public's "right to know"],"[210] the Supreme Court's rulings actually offer little evidence for concluding that a "right to know" is enforceable as an emerging constitutional right. Furthermore, when examined from an historical perspective, the

203. Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 636 (1975).

204. *See* notes 91-122 and accompanying text *supra*.

205. *See* notes 177-79 and accompanying text *supra*.

206. *See* note 33 and accompanying text *supra*.

207. *Colonial Intentions, supra* note 11, at 755.

208. A more elaborate discussion of the Supreme Court's treatment of claims to a constitutional "right to know" appears in O'Brien, *supra* note 29.

209. Emerson, *supra* note 7, at 23. *See also* notes 11-16 and accompanying text *supra*.

210. Emerson, *supra* note 7, at 3.

Burger Court's recent treatment of claims to a "right to know" appears not as a retrenchment in First Amendment developments, but instead as a rebuttal to Emerson and others who would have the Court articulate an enforceable constitutional "right to know."

Since 1943, members of the Supreme Court have acknowledged a "right to know" in twenty-four cases.[211] Of these cases, nine involved governmental withholding of information pertaining to criminal and administrative proceedings or operations.[212] The remaining fifteen cases dealt with First Amendment claims by individuals or the press for the right to disseminate information,[213] to receive materials from or obtain access to government facilities,[214] or to maintain the confidentiality of sources in order to inform the public about allegedly vital events.[215] Eleven of these cases were decided after 1970, a fact which suggests the increasing appeal of claims for a public "right to know."

Despite these efforts by numerous litigants, however, a majority of the Court has never recognized an enforceable "right to know" under the First Amendment. Pluralities of the Court have indicated the significance of the public's "right to know" as an abstract right within the

211. The author utilized Westlaw's computerized records of Supreme Court decisions to determine the actual status of the "emerging constitutional right to know." Six cases in which the phrase "right to know" was found were eliminated because either the Court simply cited the transcript of a lower court, without discussion, or the usage was not relevant to the discussion here. For example, in Hoffa v. United States, 385 U.S. 293 (1966), the Court noted that the defendant "has the right to know [possessions] will be secure from an unreasonable search or an unreasonable seizure." *Id.* at 301. The other cases eliminated are: Department of Air Force v. Rose, 425 U.S. 352 (1976); Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972); Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971); *In re* Ruffalo, 390 U.S. 544 (1968); Smith v. Illinois, 390 U.S. 129 (1968); International Longshoremen's Ass'n v. Pennsylvania Marine Trade Ass'n, 389 U.S. 64 (1967); Rosenblatt v. Baer, 383 U.S. 75 (1966).

212. *See* United States v. Richardson, 418 U.S. 166, 197-203 (1974) (Douglas, J., dissenting); Gravel v. United States, 408 U.S. 606, 643 n.10 (1972) (Douglas, J., dissenting); Shenker v. Baltimore & Ohio R.R., 374 U.S. 1, 5 (1963); Hannah v. Larche, 363 U.S. 420 (1960) (Douglas, J., dissenting); Shaughnessy v. United States, 345 U.S. 206, 225 (1953) (Jackson, J., dissenting); United States v. UMW, 330 U.S. 358, 370-74 (1947) (Rutledge, J., dissenting); Davis v. United States, 328 U.S. 582, 611 (1946) (Frankfurter, J., dissenting); Bowles v. United States, 319 U.S. 33, 37 (1943) (*per curiam*) (Jackson, J., dissenting).

213. *See* Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978); Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976); Hamling v. United States, 418 U.S. 87 (1974); Miller v. California, 413 U.S. 15 (1973); Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973); New York Times Co. v. United States, 403 U.S. 713 (1971); Mills v. Alabama, 384 U.S. 214 (1966); Estes v. Texas, 381 U.S. 532 (1965); Zemel v. Rusk, 381 U.S. 1 (1965); Maryland v. Baltimore Radio Show, 338 U.S. 912, 920 (1950).

214. *See* Houchins v. KQED, Inc., 438 U.S. 1 (1978); Saxbe v. Washington Post Co., 417 U.S. 843 (1974); Pell v. Procunier, 417 U.S. 817 (1974).

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

context of First Amendment guarantees.[216] Still, majorities have specifically rejected news reporters' claims under the First Amendment for special privileges to maintain the confidentiality of sources[217] and to obtain access to prisons so as to inform the public about prison conditions.[218] Furthermore, the Court recently rejected the claim that the First Amendment gives the press an affirmative right of access to pretrial proceedings, and held that, under the Sixth Amendment, the public and the press have no independent standing to challenge the closure of such proceedings.[219]

That the public or the press is entitled to an affirmative, enforceable "right to know" has been endorsed only by dissenting justices. Indeed, in the fifteen cases since 1949 where claims to a First Amendment "right to know" were raised, approval of a limited but constitutionally enforceable "right to know" was given by five justices authoring or concurring in dissenting opinions: Justice Douglas six times,[220] Justice

216. *See* notes 10 & 123-41 and accompanying text *supra*. *See also* Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976). In *Nixon*, Justice Powell, for the majority, observed: "Since the press serves as the information-gathering agent of the public, it could not be prevented from reporting what it had learned and what the public was entitled to know." *Id.* at 609. In this connection, also see *id.* at 609-10.

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

218. *See* Houchins v. KQED, Inc., 438 U.S. 1 (1978); Saxbe v. Washington Post Co., 417 U.S. 843 (1974); Pell v. Procunier, 417 U.S. 817 (1974).

219. Gannett Co. v. DePasquale, 99 S. Ct. 2898 (1979). For a complete discussion of this case, see 7 HASTINGS CONST. L.Q. — (1980).

220. *See* Hamling v. United States, 418 U.S. 87, 141 (1974) (Douglas & Brennan, JJ., dissenting); Pell v. Procunier, 417 U.S. 817 (1974) (Douglas, J., dissenting); Miller v. California, 413 U.S. 15, 44 (1973) (Douglas, J., dissenting); Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 165 (1973) (Douglas, J., dissenting); Branzburg v. Hayes, 408 U.S. 665, 721 (1972) (Douglas, J., dissenting); Zemel v. Rusk, 381 U.S. 1, 24 (1965) (Douglas, J., dissenting). Justice Douglas was perhaps the most intrepid advocate of a constitutional "right to know" under the First Amendment. In Zemel v. Rusk, 381 U.S. 1 (1965), dissenting from the majority's upholding of the government's prohibition against granting of passports to citizens desiring to travel to Cuba, he observed: "The right to know, to converse with others, to consult with them, to observe social, physical, political and other phenomena abroad as well as at home gives meaning and substance to freedom of expression and freedom of the press. Without those contacts First Amendment rights suffer." *Id.* at 24 (Douglas, J., dissenting). Justice Douglas maintained that the "right to know" was peripheral to the First Amendment enumerated guarantees: "The right to know is the corollary of the right to speak or publish." Miller v. California, 413 U.S. 15, 44 (1973) (Douglas, J., dissenting). *See also* Hamling v. United States, 418 U.S. 87, 141 (1974) (Douglas, J., dissenting). Justice Douglas' conception of the "right to know" embraced not only protection for individuals to receive whatever materials or information they desired, but also the extension of special privileges to the press so that it could inform the public. Thus, dissenting in Branzburg v. Hayes, 408 U.S. 665 (1972), he argued: "The press has a preferred position in our constitutional scheme, . . . [because the press] bring[s] fulfillment to the public's right to know." *Id.* at 721 (Douglas, J., dissenting). During his last years on the bench,

Brennan three times,[221] Justice Powell twice,[222] Justice Marshall twice[223] and Justice Stevens once.[224] By contrast, in dissenting opin-

Justice Douglas, quarrelling with the majority of the Burger Court, elaborated on his *Branzburg* position and warned: "The right of the people to know has been greatly undermined by our decisions requiring, under pain of contempt, a reporter to disclose the sources of the information he comes across in investigative reporting." Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 165 (1973) (Douglas, J., dissenting). Precisely because he viewed the political ideal of the public's "right to know" as entailing a directly enforceable right, Douglas objected to regulations which restricted public and press access to government facilities. Hence, in Pell v. Procunier, 417 U.S. 817 (1974), he argued that the ban on prison access was "an unconstitutional infringement on the public's right to know protected by the free press guarantee of the First Amendment." *Id.* at 841 (Douglas, J., dissenting).

221. *See* Hamling v. United States, 418 U.S. 87, 141 (1974) (Douglas and Brennan, JJ., dissenting); Saxbe v. Washington Post Co., 417 U.S. 843, 850 (1974) (Powell and Brennan, JJ., dissenting); Pell v. Procunier, 417 U.S. 817, 836 (1974) (Douglas and Brennan, JJ., dissenting). Justice Brennan shares Justice Douglas' interpretation, discussed in note 220 *supra*, of the contours of the First Amendment and the constitutional legitimacy of the public's "right to know" under the amendment. His position, however, is grounded on his understanding, if not entirely faithful interpretation, of Meiklejohn's thesis on the First Amendment. *See* Meiklejohn and Brennan, *supra* note 50. *See also* note 181 *supra*. Justice Brennan concurred in Justice Powell's dissenting opinion in Saxbe v. Washington Post Co., 417 U.S. 843, 850 (1974) (Powell and Brennan, JJ., dissenting), and Justice Douglas' dissenting opinion in Pell v. Procunier, 417 U.S. 817, 836 (1974) (Douglas and Brennan, JJ., dissenting).

222. *See* Gannett Co. v. DePasquale, 99 S. Ct. 2898, 2915 (1979) (Powell, J., concurring); Saxbe v. Washington Post Co., 417 U.S. 843, 873 (1974) (Powell, J., dissenting). Justice Powell neither shares the broad interpretation of the First Amendment advocated by Justices Douglas and Brennan (*see* notes 181, 220 & 221 *supra*), nor would he give as extensive scope to the public's "right to know." For instance, he would not grant the press special privileges in order to fulfill the public's "right to know." However, he has indicated that he is not entirely opposed to the constitutional legitimacy of a "right to know" and apparently thinks that governmental policies must give reasonable consideration to the public's interest in knowing. *See* Gannett Co. v. DePasquale, 99 S. Ct. 2898, 2914-17 (1979) (Powell, J., concurring); Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978); Saxbe v. Washington Post Co., 417 U.S. 843, 873 (1974) (Powell, J., joined by Brennan & Marshall, JJ., dissenting). For a further discussion of Justice Powell's concurring opinion in *Gannett*, see notes 261-66 and accompanying text *infra*.

223. *See* Saxbe v. Washington Post Co., 417 U.S. 843, 850 (1974) (Powell, J., dissenting, joined by Brennan & Marshall, JJ.); Pell v. Procunier, 417 U.S. 817, 836 (1974) (Douglas, J., dissenting, joined by Brennan & Marshall, JJ.); Rosenbloom v. Metromedia, 403 U.S. 29, 78 (1971) (Marshall, J., dissenting). Justice Marshall apparently shares the interpretation of the First Amendment and the public's "right to know" advanced by Justices Douglas and Brennan and discussed in notes 220 & 221 *supra*. He concurred with Justices Douglas and Powell in their dissents in *Pell* and *Saxbe*, but departed with Justice Powell in Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978) and Gannett Co. v. DePasquale, 99 S. Ct. 2898 (1979). Justice Marshall did not participate in Houchins v. KQED, Inc., 438 U.S. 1 (1978), but he likely would have joined Justice Brennan in the dissenting opinion written by Justice Stevens. *Id.* at 2607 (Stevens, J., dissenting).

224. *See* Houchins v. KQED, Inc., 438 U.S. 1, 19 (1978) (Stevens, J., dissenting). *See also* text accompanying notes 241-43 *infra*. Although he apparently believes that the public's "right to know" has constitutional legitimacy under the First Amendment, Justice Ste-

ions, Chief Justice Burger twice[225] and Justice Rehnquist once[226] have specifically rejected the notion that the public has a directly enforceable and unqualified "right to know."

Therefore, the "status of an emerging constitutional right"[227] appears determinable only from dicta and dissenting opinions. A brief discussion of two recent cases will illustrate the Court's treatment of claims by individuals and the press for access to information so as to inform the public and will further underscore the Court's rejection of claims to a directly enforceable "right to know" under the First Amendment.[228]

In 1978, the Court in *Houchins v. KQED, Inc.*[229] rejected, for the

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vens does not share the broad construction of the amendment advocated by Justices Brennan and Marshall. For an understanding of Justice Stevens' interpretation of the First Amendment, see his opinion for the majority in FCC v. Pacifica Foundation, 434 U.S. 1008 (1978). Justice Stevens' position on the amendment and the public's "right to know" appears to be closest to that of Justice Powell. *See* notes 261-75 and accompanying text *infra*.

225. *See* Buckley v. Valeo, 424 U.S. 1, 235 (1976) (Burger, C.J., concurring in part and dissenting in part); New York Times Co. v. United States, 403 U.S. 711, 749 (1971) (Burger, C.J., dissenting). Chief Justice Burger has endeavored to adhere to the historical basis for and background of the First Amendment. Moreover, recognition of an enforceable constitutional "right to know" is at odds with his deference to congressional and state powers to regulate expression and punish some forms of expression. *See, e.g.*, Miller v. California, 413 U.S. 15 (1973). Chief Justice Burger, however, has entertained the notion that the public's "right to know" has some constitutional legitimacy as an abstract or background right of the Constitution. His principal concern is that a "right to know" is not absolute or directly enforceable. Dissenting in New York Times Co. v. United States, 403 U.S. 713 (1971), he observed: "The newspapers make a derivative claim under the First Amendment; they denominate this right as the public 'right to know'; by implication . . . the right is asserted as absolute . . . . The First Amendment right itself is not an absolute." *Id.* at 749 (Burger, C.J., dissenting). Again, in his concurring and dissenting opinion in Buckley v. Valeo, 424 U.S. 1 (1976), he addressed the political ideal of the public's "right to know" in order to underscore that "[t]he public right ought not be absolute when its exercise reveals private political convictions." *Id.* at 237 (Burger, C.J., concurring in part and dissenting in part). In this connection, see also *id.* at 236-41.

226. *See* State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 785 (1976) (Rehnquist, J., dissenting). Among the present members of the Supreme Court, Justice Rehnquist appears to be the least sympathetic to the political ideal of the public's "right to know" and its constitutional legitimacy. Dissenting from the Court's holding that the First Amendment offers some protection for commercial speech and, in particular, for advertisements listing the prices of prescription drugs, Rehnquist candidly observed: "I cannot distinguish between the public's right to know the price of drugs and its right to know the price of title searches or physical examinations or other professional services for which standardized fees are charged." *Id.* at 785 (Rehnquist, J., dissenting). *See also* Gannett Co. v. DePasquale, 99 S. Ct. 2898, 2917 (1979) (Rehnquist, J., concurring). For a further discussion of Justice Rehnquist's concurring opinion in *Gannett*, see notes 266-71 *infra*.

227. Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U.L.Q. 1, 23.

228. For a more extensive discussion of the "right to receive" and "right of access" cases, see O'Brien, *supra* note 29.

229. 438 U.S. 1 (1978).

third time in four years, media claims for access to prison facilities. KQED, a San Francisco broadcasting station, challenged as a denial of First Amendment rights the Alameda County Jail's refusal of access to a portion of the jail where, reportedly owing to the conditions of the jail, a prisoner had committed suicide. KQED asked the Court to distinguish its rulings in *Pell v. Procunier*[230] and *Saxbe v. Washington Post Co.*,[231] on the basis that the denial of access by the Alameda Jail was total. In these cases, bare majorities had held that the prohibition of personal interviews between reporters and individually designated inmates in federal and state prisons does not abridge freedom of the press because such regulations do not deny the press access to sources of information available to members of the general public.[232] The federal and state prisons involved in *Pell* and *Saxbe* gave public tours; additionally, the state prison permitted the press, but not the general public, to interview inmates selected at random.

The Court in *Pell* and *Saxbe* reaffirmed its previous holdings that "the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally."[233] In *Houchins*, the Court again held that the First Amendment does not mandate a right of access to information or materials within the control of the government. Chief Justice Burger, who authored the plurality opinion,[234] took pains to reject the claim that, because the press has a right to gather information[235] and because of the importance of an informed public and the crucial role which the press plays in providing information to the public,[236] the press is entitled to special privileges. He concluded that

> [KQED's] argument is flawed, not only because it lacks precedential support and is contrary to statements in this Court's opinions, but also because it invites the Court to involve itself in what is clearly a legislative task which the Constitution has left to the political processes. Whether the government should open penal institutions in the manner sought by [KQED] is a question of policy which a legislative body might appropriately resolve one way or the other.[237]

230. 417 U.S. 817 (1974).

231. 417 U.S. 843 (1974).

232. Pell v. Procunier, 417 U.S. at 833-34.

233. Branzburg v. Hayes, 408 U.S. 665, 684 (1972), *quoted with approval in* Pell v. Procunier, 417 U.S. 817, 833 (1974).

234. Chief Justice Burger's opinion was joined by Justices White and Rehnquist.

235. *See* Houchins v. KQED, Inc., 438 U.S. 1, 8-16 (1978).

236. *Id. See also* notes 123-41 and accompanying text *supra*.

237. *Id.* at 12.

Chief Justice Burger thus recognized that the public's "right to know" is a political ideal which does not require recognition of a directly enforceable right and that the Court has not historically endorsed such a right.[238] He further noted that the Court's delineation of an affirmative "right to know," or right of access to governmental facilities, would improperly expand the Court's supervisory role in reviewing the policies of legislatures and government institutions.[239]

In contrast, the dissenting justices[240] thought that the basic "question is whether [the Alameda County Jail's] policies, which cut off the flow of information at its source, abridged the public's right to be informed about [the jail's] conditions."[241] Justice Stevens, the author of the dissenting opinion, argued that the press should be permitted some special privileges—but not unlimited access to government facilities or materials—because without some protection, "the process of self-governance contemplated by the Framers would be stripped of its substance."[242] Justice Stevens therefore rehearsed Justice Powell's dissenting opinion in *Saxbe*, wherein Justice Powell observed:

> This constitutionally established role of the news media [in informing the public] is directly implicated here. For good reasons, unrestrained public access is not permitted. The people must therefore depend on the press for information concerning public institutions. The Bureau's absolute prohibition of prisoner-press interviews negates the ability of the press to discharge that function and thereby substantially impairs the right of the people to a free flow of information and ideas on the conduct of their Government. The underlying right is the right of the public generally. The press is the necessary representative of the public's interest in this context and the instrumentality which effects the public's right.[243]

Ostensibly, what divides Chief Justice Burger and Justices Rehnquist, Blackmun, White and Stewart, on the one hand, and Justices Stevens, Powell, Brennan and Marshall, on the other hand, is that the latter are willing to allow the press special privileges so as to inform the public of vital issues and current events. Accordingly, only the latter are willing to fashion a limited "right to know" based on dicta concerning the First Amendment's protection of the right to receive materi-

238. *See* notes 123-70 and accompanying text *supra*.

239. *See* notes 146-78 and accompanying text *supra*.

240. Justice Stevens, who authored the dissenting opinion, was joined by Justices Brennan and Powell.

241. 438 U.S. 1, 34 (1978) (Stevens, J., dissenting).

242. *Id.* at 32.

243. 417 U.S. at 864 (1974) (Powell, J., dissenting).

als[244] and, even more generally, concerning the import of free and unrestricted dissemination of information to the body politic.[245] They are also willing to assume the task of line-drawing in determining the reasonableness of policies restricting public access to government facilities or materials and in deciding what the public has or has not a "right to know."

Fundamentally, however, the Justices are also divided over the question of whether claims to a directly enforceable "right to know" have constitutional legitimacy and salutary consequences which justify the granting of special privileges to the press and involving the courts more deeply in policies regulating public and press access to governmental materials and facilities. Whereas Justice Stevens' group would find a limited but enforceable "right to know" constitutionally defensible and auspicious, Chief Justice Burger and his group have held such an affirmative right not to be legitimate.

The Supreme Court nevertheless may not be as clearly divided as it appears. In *Gannett Co. v. DePasquale*,[246] the petitioner asked the Court to recognize an independent and affirmative right of access to pretrial proceedings under the First, Sixth and Fourteenth Amendments. At a pretrial hearing on the suppression of allegedly involuntary confessions and certain physical evidence, the defendants had requested that the public and the press be excluded from the hearing on the grounds that adverse pretrial publicity would jeopardize their ability to receive a fair trial. The district attorney did not oppose the motion for closure, nor did a reporter, who was employed by Gannett Company and present at the hearing. The trial judge granted the motion. The following day, the reporter requested a copy of the pretrial transcript and asserted a right to cover the proceeding. The trial judge denied the request. On appeal, the reporter successfully challenged the

244. The "right to receive" emerged from dicta in Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976) (commercial speech); Procunier v. Martinez, 416 U.S. 396 (1974) (personal correspondence of prisoners); Stanley v. Georgia, 394 U.S. 557, 564 (1969) (possession of obscenity); Griswold v. Connecticut, 381 U.S. 479, 482-83 (1965) (contraceptive information); Lamont v. Postmaster General, 381 U.S. 301, 307 (1965) (political information); Marsh v. Alabama, 326 U.S. 501, 505 (1946) (religious materials); Martin v. Struthers, 319 U.S. 141, 143, 149 (1943) (religious literature). The Court rejected claims to the right in Kleindienst v. Mandel, 408 U.S. 753, 762 (1972), and Zemel v. Rusk, 381 U.S. 1 (1965). The Court has also recognized the correlative right of an individual to refuse materials. *See* Rowan v. United States Post Office Dep't, 397 U.S 728, 738-39 (1970) (right to refuse mailings of obscene materials); Breard v. Alexandria, 341 U.S. 622, 641-45 (1951) (right not to be solicited by door-to-door salesmen in one's home); Kovacs v. Cooper, 336 U.S. 77, 87-89 (1949) (right not to listen to sound trucks).

245. *See* notes 7 & 123-41 and accompanying text *supra*.

246. 99 S. Ct. 2898 (1979).

trial judge's orders as violative of the First, Sixth and Fourteenth Amendments, but the New York Court of Appeals subsequently reversed, upholding the exclusion of the public and the press from pretrial proceedings. Gannett petitioned the Supreme Court for review, arguing that the Sixth Amendment conferred a right of access on the public and the press to attend pretrial hearings as well as trials and urging the Court to narrow its holdings in *Pell, Saxbe* and *Houchins* by recognizing a First and Fourteenth Amendment right to attend pretrial hearings. The Supreme Court heard the case during the 1978-1979 Term.

As in *Pell* and *Saxbe*, Justice Stewart wrote the opinion for a five-member majority. Justices Stevens and Powell, however, now joined Chief Justice Burger and Justice Rehnquist, the latter three justices writing concurring opinions.[247] Justices Brennan and Marshall, the staunchest supporters of an affirmative constitutional "right to know," were joined by Justices Blackmun and White in a dissenting opinion authored by Justice Blackmun.[248] The line-up of the justices apparently resulted from their giving precedence to the Sixth Amendment claim rather than the claim for a First Amendment right of access. A brief review of each of the opinions in *Gannett* nonetheless indicates the continuing divisions within the Court over the First Amendment and the public's "right to know."[249]

After summarizing the circumstances of the litigation, Justice Stewart observed that "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."[250] Yet the issue in *Gannett* was "whether members of the public have an enforceable right to a public trial that can be asserted independently of the parties in the litigation."[251] Justice Stewart differed from the dissenters in concluding that—notwithstanding common law practices, the importance of open criminal trials and authorities from William Blackstone to Thomas

247. *Id.* at 2913 (Burger, CJ., concurring); *id.* at 2914 (Powell, J., concurring); *id.* at 2917 (Rehnquist, J., concurring).

248. *Id.* at 2919 (Blackmun, J., dissenting).

249. The divisions within the Court in deciding *Gannett* itself have caused considerable confusion among lower courts. In the fourteen weeks after *Gannett* was rendered, there were seventy-five attempts to close criminal proceedings, resulting in the closure of thirty-eight pretrial proceedings and six trials. *See* Mintz, *High Court to Decide on Issue on Closing Criminal Trials*, Washington Post, Oct. 9, 1979, at A4. On October 9, 1979, the Supreme Court accepted for review a Richmond, Virginia, newspaper's challenge to the closure of a murder trial. Richmond Newspapers, Inc. v. Virginia, Docket No. 79-243.

250. 99 S. Ct. at 2905.

251. *Id.* at 2907.

Cooley[252]—the Sixth Amendment's guarantee that "the accused shall enjoy the right to a speedy and public trial"[253] did not grant the public or the press a right of access to criminal trials.[254] More importantly for the purposes here, Justice Stewart thought that any First Amendment right of access had been adequately considered in the trial judge's determination that publicity of the pretrial hearing would pose a "reasonable probability of prejudice to the defendants."[255] Justice Stewart thought it significant that the trial judge had entertained the press' objections to closure and that, in any event, the denial of access had been only temporary, not absolute, since after the defendants had pleaded guilty, the press had been permitted to obtain a copy of the suppression hearing transcript.[256] Justice Stewart thus concluded: "We need not decide in the abstract . . . whether there is any such constitutional right. For even assuming, *arguendo*, that the First and Fourteenth Amendments may guarantee such access in some situations, a question we do not decide, this putative right was given all appropriate deference by the state *nisi prius* court in the present case."[257]

Chief Justice Burger joined Justice Stewart's opinion and wrote a concurring opinion[258] to emphasize that the decision dealt with pretrial hearings and to clarify the nature of such proceedings.

Justice Powell, who also wrote a concurring opinion,[259] addressed the First Amendment issues which Justice Stewart had reserved. Justice Powell, once again[260] emphasizing "the importance of the public's having accurate information concerning the operation of its criminal

252. *See* J. BENTHAM, A TREATISE ON JUDICIAL EVIDENCE 67 (1827); BLACKSTONE, *supra* note 107, at 372-73; COOLEY, *supra* note 113 at 931-32; 1 ELLIOT'S DEBATES, *supra* note 54, at 328; STORY, *supra* note 109, at 662. While recognizing that a "trial is not a 'free trade in ideas,' " Bridges v. California, 314 U.S. 252, 283 (1941) (Frankfurter, J., dissenting), the Court has, consistent with common law practices, acknowledged that "the public has the right to be informed as to what occurs in its courts, but reporters of all media, including television, are always present if they wish to be and are plainly free to report whatever occurs in open court through their respective media." Estes v. Texas, 381 U.S. 532, 541-42 (1965). While the Court has rejected the view that the press has special privileges to cover trials, it has historically acknowledged the special role of the press in securing information for the public and, thereby, also safeguarding the defendant "against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism." Sheppard v. Maxwell, 384 U.S. 333, 350 (1966).

253. U.S. CONST. amend. VI.

254. Gannett Co. v. DePasquale, 99 S. Ct. 2898, 2911 (1979).

255. *Id.* at 2912.

256. *Id.*

257. *Id.*

258. *Id.* at 2913. (Burger, C.J., concurring).

259. *Id.* at 2914 (Powell, J., concurring).

260. *See* note 222 *supra*.

justice system," would have held "explicitly that petitioner's reporter had an interest protected by the First and Fourteenth Amendments."[261] Attempting to remain consistent with his concurring opinion in *Branzburg v. Hayes*,[262] Powell thought that some accommodation of the First Amendment rights of the public and the press should be acknowledged. He maintained that a right of access is not absolute and that "[i]t is limited both by the constitutional right of the defendants to a fair trial . . . and by the needs of government to obtain just convictions and to preserve the confidentiality of sensitive information and the identity of informants."[263] Justice Powell would recognize a "right to know" which is limited but enforceable in some circumstances. Indeed, what particularly disturbed him in *Gannett* was that the Court failed to articulate a procedure or standard by which lower courts might balance the First Amendment rights of the public and the press against the interests of the government and the criminal defendants. In joining with the majority, however, Justice Powell, along with Justice Stevens, abandoned his fellow dissenters in *Houchins, Saxbe* and *Pell*, because he found the trial judge's balancing of the public's First Amendment interests against those of the government and the defendant acceptable and because he endorsed Justice Stewart's interpretation of the Sixth Amendment as neither requiring a public trial nor granting an enforceable right of access for members of the public or the press such that the closure of pretrial hearings might be challenged.

Justice Rehnquist wrote a concurring opinion[264] to emphasize that "the public does not have *any* Sixth Amendment right of access to such proceedings"[265] and to address Justice Powell's understanding of the First Amendment issues. He emphasized that the Court's reservations on the First Amendment claims of access were more apparent than real, because "it is clear that this Court repeatedly has held that there is no First Amendment right of access in the public or the press to judicial or other governmental proceedings."[266] Justice Rehnquist's observation was not prompted by Justice Stewart's personal reservations on the First Amendment claims, but rather by the fact that Justice Stewart was undoubtedly required to express public reservations in order to win the votes of Justices Stevens and Powell, since Justices Blackmun and White dissented over the Sixth Amendment issue. Indeed, Justice

261. 99 S. Ct. at 2914 (Powell, J., concurring).
262. 408 U.S. 665, 709 (1972) (Powell, J., concurring).
263. 99 S. Ct. at 2915 (Powell, J., concurring).
264. *Id.* at 2917 (Rehnquist, J., concurring).
265. *Id.* at 2918.
266. *Id.*

Rehnquist reminds us of Justice Stewart's position by quoting from Stewart's concurring opinion in *Houchins*: "The First and Fourteenth Amendments do not guarantee the public a right of access to information generated or controlled by government, nor do they guarantee the press any basic right of access superior to that of the public generally. The Constitution does no more than assure the public and the press equal access once government has opened its doors."[267] Justice Rehnquist's opinion thus was designed to publicly castigate Justice Powell, as well as Justices Brennan, Marshall and Stevens and certain of the Court's commentators, for construing "the First Amendment [as] some sort of constitutional 'sunshine law' that requires notice, an opportunity to be heard and subsequent reasons before a government proceeding may be closed to the public and press."[268]

Justice Blackmun, author of the dissenting opinion,[269] quarreled only with the majority's understanding of the Sixth Amendment public trial guarantee. He concluded that the amendment, by "establishing the public's right of access to a criminal trial and a pretrial proceeding, also fixes the rights of the press. . . ."[270] Like Justice Stewart, he did not reach the First Amendment issue, commenting only that "[t]o the extent the Constitution protects a right of public access to the proceeding, the standards enunciated under the Sixth Amendment suffice to protect that right."[271] It is understandable that the dissenters also declined to address the First Amendment issue, because Justices Blackmun and White reject the notion that the First Amendment guarantees either a "right to know" to the public or special privileges for the press to gather and publish materials so as to inform the public. Remarkably, neither Justice Brennan nor Justice Marshall wrote separate dissenting opinions; yet, their broad interpretations of the First Amendment and the public's "right to know" appear in several earlier dissenting opinions.[272]

267. 438 U.S. at 16 (Stewart, J., concurring), *quoted in* Gannett Co. v. DePasquale, 99 S. Ct. 2898, 2918 (1979) (Rehnquist, J., concurring). Thirteen years before *Houchins*, Justice Stewart had expressed concern over the public's "right to know" in connection with criminal trials. In Estes v. Texas, 381 U.S. 532 (1965), he stated: "The suggestion that there are limits upon the public's right to know what goes on in the courts causes me deep concern." *Id.* at 614-15 (Stewart, J., dissenting). Justice Stewart's opinion for the Court in *Gannett* indicates that his concern was not very deep or that he has rethought the nature of the public's "right to know" about the proceedings of criminal trials.

268. 99 S. Ct. at 2918 (Rehnquist, J., concurring).

269. *Id.* at 2919 (Blackmun, J., dissenting, joined by Brennan, White & Marshall, JJ.).

270. *Id.* at 2939 (Blackmun, J., dissenting).

271. *Id.* at 2940.

272. *See* notes 221 & 223 *supra*.

In historical perspective, *Houchins* and *DePasquale* underscore the Supreme Court's refusal to interpret the First Amendment as guaranteeing an affirmative and enforceable "right to know." Furthermore, Emerson to the contrary, the public's "right to know" is not emerging, but is rather likely to continue to be submerged in dicta and dissenting opinions. The Burger Court promises to remain divided, although individual alignments may vary. The Chief Justice and Justices Stewart and Rehnquist will likely remain adamant in denying legitimacy to an enforceable "right to know" under the First Amendment. Justices Blackmun and White will probably continue to agree with them on this point. By contrast, Justices Brennan and Marshall will probably persist in dissenting because of their broad construction of the First Amendment and their willingness to involve the Court in reviewing policies that deny the public or the press access to government facilities or materials. While Justices Stevens and Powell would also defend the public's "right to know" under the First Amendment, they are hesitant to subject the First Amendment, or the scope of the public's "right to know," to the broad construction favored by Justice Brennan or Justice Marshall.[273] Moreover, they seem not to desire the Court's entangling itself in determinations of the reasonableness of governmental information policies. Therefore, just as they did in *Gannett*, Justices Stevens and Powell may well abandon Justices Brennan and Marshall when they determine that the government has reasonably considered the interests of an informed public in denying the public or the press access to particular facilities or materials.

Conclusion

The increasing popularity of the political ideal of a public "right to know" and the societal importance of freedom of the press do not justify the delineation of a "right to know" under the First Amendment. Emerson and other contemporary scholars to the contrary, a directly enforceable "right to know" appears neither desirable nor defensible in terms of its alleged historical basis or developments in First Amendment litigation. To comprehend the important truth of Justice Stewart's observation that "[t]he public's interest in knowing about its government is protected by the guarantee of a Free Press, but the protection is indirect,"[274] is both to appreciate the public's "right to know" as a political ideal and to understand the illegitimacy of a directly en-

273. *See* notes 222 & 224 *supra*.

274. Stewart, *"Or of the Press,"* 26 HASTINGS L.J. 631, 636 (1975).

forceable constitutional "right to know." The authors of the Constitution and the First Amendment recognized the need for a delicate balance between the public's right of access to information concerning governmental affairs and efficient representative government. Still, that balance was to be secured not by a directly enforceable "right to know," but rather by the specifically guaranteed freedoms of speech and press as well as the electoral powers of citizens. As the Supreme Court has consistently maintained, the Constitution and, in particular, the First Amendment neither contemplate an enforceable "right to know" nor justify the fashioning of such a right. Instead, Congress and the state legislatures are responsible for determining policies and practices as to governmental information. In the last decade, major legislation designed to ensure governmental openness and to vindicate the public's "right to know" has been enacted.[275] These important policy developments, however, do not legitimate claims of a constitutional "right to know." Indeed, as a majority of the Burger Court has endeavored to teach, "The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act."[276] The lessons for Emerson and others and particularly for members of the press, who would prevail upon the Court to delineate a constitutional "right to know," may well prove bitter. Yet, if recent rulings are bitter, perhaps it is because the commentators and the press have failed to apprehend and appreciate the limitations of the First Amendment as well as the Supreme Court's limited role under the Constitution.

275. *See, e.g., Symposium on the Freedom of Information Act*, 39 PUB. AD. REV. 310-32 (1979); O'Brien, *Privacy and the Right of Access: Purposes and Paradoxes of Information Control*, 30 AD. L. REV. 45, 56-62 (1978).

276. Stewart, *"Or of the Press,"* 26 HASTINGS L.J. 631, 636 (1975).