

For example, the Supreme Court relied on structural principles concerning separation of powers to reverse the President's seizure of steel mills,¹⁰⁴ to invalidate the President's use of a line-item executive veto,¹⁰⁵ and to strike down a legislative veto implemented by a single chamber of Congress¹⁰⁶—finding that these limitations on government authority “derive from structural inferences, rather than particular textual commands.”¹⁰⁷ Similarly, the Court used structural reasoning in the name of federalism to support constraints on the power of both federal and state governments, ruling that the states cannot tax instrumentalities of the federal government, notwithstanding the Constitution's silence on the question.¹⁰⁸ It has also held that Congress cannot compel state officials to enforce federal laws¹⁰⁹ and cannot “commandeer” state legislatures—notwithstanding the absence of an express constitutional provision barring Congress from doing so—because such limits on federal authority are necessary to “protect the sovereignty of States.”¹¹⁰

Like separation of powers and federalism, popular sovereignty is a structural principle that limits the power of both federal and state government. Although textualists frequently point to the Tenth Amendment as evidence of the Framers' commitment to *state* sovereignty,¹¹¹ the Tenth Amendment does not refer exclusively to the states; rather, it declares that “[t]he 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*.”¹¹² The Tenth Amendment's reference to

104. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure Case)*, 343 U.S. 579 (1952) (invalidating President Harry Truman's seizure of steel mills to prevent a strike during the Korean War and ruling that the President did not have the authority to seize private property without congressional authorization).

105. *Clinton v. City of New York*, 524 U.S. 417 (1998) (concluding that the president does not have the power to veto individual items in a bill without vetoing the entire bill).

106. *See INS v. Chadha*, 462 U.S. 919 (1983) (holding that Immigration and Nationality Act authorizing one house of Congress to invalidate the decision of executive branch to allow a deportable alien to remain in the United States is unconstitutional).

107. Schapiro, *supra* note 101, at 90.

108. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

109. *Printz v. United States*, 521 U.S. 898, 918, 905 (1997) (holding that the Constitution prohibits Congress from compelling state officials to enforce federal laws even though there was “no constitutional text speaking to this precise question,” but nevertheless concluding that the “essential postulate[s]” of “the structure of the Constitution” mandate such a proscription on federal power).

110. *New York v. United States*, 505 U.S. 144, 181 (1992).

111. Although every first-year law student studies the Tenth Amendment's role in federalism cases, far less attention is paid to the Amendment's express reference to the retained powers of the people and the Amendment's importance to popular sovereignty. *See* Kurt T. Lash, *The Original Meaning of an Omission: The Tenth Amendment, Popular Sovereignty, and “Expressly” Delegated Power*, 83 NOTRE DAME L. REV. 1889, 1954 (2008); Reese, *supra* note 46, at 2053–54.

112. U.S. CONST. amend. X (emphasis added); *see also* Amar, *supra* note 14, at 1492 (“Strictly speaking, the Tenth Amendment affirms the sovereignty of the People, not the sovereignty of state governments: It resoundingly affirms the structural conclusion that governments have no sovereignty to violate the Constitution and get away with it.”).

the retained rights of the people was not mere surplusage.¹¹³ As Akhil Amar explains, the idea that “true sovereignty in our system lies only in the People of the United States . . . pervade[s] the Constitution and inform[s] its structure of federalism.”¹¹⁴ Indeed, it is the very basis of the Framers’ claim to democratic legitimacy.¹¹⁵

Even committed originalists rely on structural principles when interpreting the Constitution.¹¹⁶ The Supreme Court’s recent federalism and separation of powers cases are particularly telling in this regard. As John Manning notes, the “Rehnquist and Roberts Courts have repeatedly invalidated statutory programs, but not because those programs violated some particular constitutional provision.”¹¹⁷ Instead, Manning points to the Court’s “new structuralism,” which “rests on freestanding principles of federalism and separation of powers [and] is not ultimately tied to the understood meaning of any particular constitutional text.”¹¹⁸ This method of structural inference, he goes on to explain, “first shifts the Constitution’s level of generality upward by distilling from diverse clauses an abstract shared value—such as property, privacy, federalism, nationalism, or countless others—and then applies that value to resolve issues that sit outside the particular clauses that limit and define the value.”¹¹⁹

Charles Black applied this structural approach to the issue of freedom of speech in his influential series of lectures, *Structure and Relationship in Constitutional Law*, where he argued that protection for speech against state interference finds support from the relationship of citizens to their government that is “quite as strong” as the textual basis normally offered, which rests on the words

113. See Jay S. Bybee, *The Tenth Amendment Among the Shadows: On Reading the Constitution in Plato’s Cave*, 23 HARV. J.L. & PUB. POL’Y 551, 565 (2000) (writing that the Tenth Amendment expresses “a triangular relationship among the federal government, state governments, and the people”).

114. Amar, *supra* note 14, at 1427.

115. See, e.g., Lawrence C. Becker, *Elements of Liberal Equality: Introduction to Kirp, Hochschild, and Strauss*, 34 WM. & MARY L. REV. 89, 95 (1992) (“The familiar locution here is that the consent of the governed legitimizes government and is ultimately the only thing that legitimizes it.”); Gardner, *supra* note 27, at 203 (writing that a government “that exists or acts without the consent of the governed—is not legitimate”); Reese, *supra* note 46, at 2111 (“The place where state or federal governments most detrimentally infringe upon the people’s sovereign power is when they infringe on our very power to choose our government.”).

116. See Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 755 n.253 (2011) (commenting that originalists “often endorse structural arguments that are not clearly grounded in constitutional text”); James E. Fleming, *Securing Deliberative Autonomy*, 48 STAN. L. REV. 1, 5 (1995) (noting “even narrow originalists such as Bork and Scalia today accept the trilogy of ‘text, history, and structure’ as legitimate sources of constitutional values”); Bartrum, *supra* note 45, at 225 (“Even most constitutional originalists now concede that important pieces of our founding text are too vague to settle many legal controversies without modern judicial construction.”).

117. John F. Manning, *Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 4 (2014) (describing the Supreme Court’s “[n]ovel approaches to both statutory interpretation and structural constitutional law”).

118. *Id.* at 4, 31.

119. *Id.* at 32.

of the First Amendment and its incorporation through the Fourteenth Amendment.¹²⁰ Black arrived at this conclusion by examining the relationship between citizens and the state and federal governments, asking: “Is it conceivable that a state, entirely aside from the Fourteenth or for that matter the First Amendment, could permissibly forbid public discussion of the merits of candidates for Congress, or of issues which have been raised in the congressional campaign . . . ?”¹²¹ According to Black, the answer is obvious: “I cannot see how anyone could think our national government could run, or was by anybody at any time ever expected to run, on any less openness of public communication than that.”¹²² From this “hard core” of protection for speech on matters of federal lawmaking, Black expands outward to a general right of communication that “eventuate[s] in the conclusion that most serious public discussion of political issues is really a part, at least in one aspect, of the process of national government, and hence ought to be invulnerable to state attack.”¹²³

The structural role an informed public plays in facilitating democratic participation has long been a touchstone for the Supreme Court.¹²⁴ The Court’s recognition of a right of access to criminal proceedings, for example, was driven in large part by the structural role the First Amendment’s protections play in supporting self-government.¹²⁵ Justice Brennan highlighted this linkage in his concurrence in *Richmond Newspapers, Inc. v. Virginia*, writing that “the First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a *structural* role to play in securing and fostering our republican system of self-government.”¹²⁶ Brennan explained why this is so:

Implicit in this structural role is not only “the principle that debate on public issues should be uninhibited, robust, and wide-open,” but also the antecedent assumption that valuable public debate—as well as other civic behavior—must be informed. The structural model links the First Amendment to that process of communication necessary for a democracy to survive, and thus entails solicitude not only for

120. BLACK, *supra* note 99, at 39.

121. *Id.* at 42.

122. *Id.* at 42–43. Robert Bork makes a similar point when he writes that the Constitution establishes a representative democracy, “a form of government that would be meaningless without freedom to discuss government and its policies.” Bork, *supra* note 57, at 23.

123. BLACK, *supra* note 99, at 44–45.

124. See *supra* notes 91–94 and accompanying text.

125. See *Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596, 604 (1982) (remarking that a First Amendment right of access to criminal trials “serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government”); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1989) (“We hold that the right to attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to attend such trials . . . important aspects of freedom of speech and ‘of the press could be eviscerated.’”).

126. 448 U.S. at 587 (Brennan, J., concurring).

communication itself, but also for the indispensable conditions of meaningful communication.¹²⁷

The Supreme Court's reliance on the structural role the public plays in the American constitutional system was evident long before *Richmond Newspapers*. In 1793, the Court invoked the principle of popular sovereignty in *Chisholm v. Georgia*, where it held that the Constitution granted federal courts the power to hear disputes between private citizens and the states.¹²⁸ Georgia, showing its disdain for the federal judiciary, refused to appear and answer the plaintiff in *Chisholm*, claiming that as a sovereign state, it could not be sued by any individual. In a 4–1 decision, the Court rejected this argument, writing that although Article III of the Constitution does not expressly state that the federal courts have the power to adjudicate claims brought by individuals against a state, this power was implicit in the grant of authority the citizens of the new nation made to the federal government.¹²⁹ Relying extensively on the principle of popular sovereignty to find that the people had the capacity to vest such power in the federal judiciary, Chief Justice John Jay explained:

127. *Id.* at 587–88 (footnotes omitted) (citations omitted); *see also* William J. Brennan, Jr., Address at the Dedication of the S.I. Newhouse Center for Law and Justice in Newark, New Jersey (Oct. 17, 1979) (“[T]he First Amendment protects the structure of communications necessary for the existence of our democracy.”).

128. 2 U.S. (2 Dall.) 419, 479 (1793) (opinion of Jay, C.J.), *abrogated by* the Eleventh Amendment, *as recognized in* *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378 (1798).

129. *Id.* at 466 (opinion of Wilson, J.); *id.* 476–77 (opinion of Jay, C.J.). The reaction to the Supreme Court's decision in *Chisholm* was loud and swift. At the first meeting of Congress following the decision, members approved the Eleventh Amendment denying the federal courts jurisdiction to hear “any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State,” U.S. CONST. amend. XI, which the states quickly ratified. Although the Supreme Court recently suggested that the Eleventh Amendment “confirmed, rather than established, sovereign immunity as a constitutional principle,” *Alden v. Maine*, 527 U.S. 706, 728–29 (1999), scholars and historians point to evidence that jurists at the time of *Chisholm* felt that the Eleventh Amendment did not simply correct a misreading of the Constitution but instead altered the Constitution to divest the federal courts of jurisdiction over certain claims against the states. *See* Randy E. Barnett, *The People or the State?: Chisholm v. Georgia and Popular Sovereignty*, 93 VA. L. REV. 1729, 1745 (2007) (concluding that *Chisholm* was based upon a sound interpretation of the original Constitution); John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663, 1743–46 (2004) (concluding that the original public meaning of the Eleventh Amendment was limited to its precise terms); John V. Orth, *History and the Eleventh Amendment*, 75 NOTRE DAME L.R. 1147, 1158 (2000) (contrasting the view expressed in *Alden v. Maine* with the historical support for the conclusion that the Eleventh Amendment was intended to change the meaning of the Constitution, but ultimately concluding that “gaps in the historical record [and] the multiple and conflicting inferences that the existing evidence supports . . . conspire to render the historical discourse continuous, contentious, and inconclusive”). It may also be instructive to note that the majority in *Chisholm* included two delegates to the Constitutional Convention, Justices James Wilson and John Blair, and a co-author of *The Federalist Papers*, Chief Justice John Jay, who were well positioned to opine on the original meaning of the Constitution.

Sovereignty is the right to govern; a nation or State sovereign is the person or persons in whom that resides. In Europe, the sovereignty is generally ascribed to the Prince; here, it rests with the people; there, the sovereign actually administers the government; here, never in a single instance; our Governors are the agents of the people, and, at most, stand in the same relation to their sovereign in which regents in Europe stand to their sovereigns.¹³⁰

Justice James Wilson, widely regarded as having developed the American conception of popular sovereignty “more fully than anyone else,”¹³¹ made clear in his opinion joining the majority in *Chisholm* that sovereignty resided solely in the people and that the states held no “sovereignty” whatsoever over the people: “[L]aws derived from the pure source of equality and justice must be founded on the CONSENT of those whose obedience they require. The sovereign, when traced to his source, must be found in the man.”¹³² Based on the principle of popular sovereignty, Wilson wrote that the people had the authority to grant the federal judiciary the power to hear cases against the states—and that they had in fact done so in the Constitution.¹³³

Six years later, in perhaps the most well-known of all structural reasoning cases, Chief Justice John Marshall concluded in *Marbury v. Madison* that the Constitution granted the Supreme Court the power to invalidate acts of Congress,¹³⁴

130. *Chisholm*, 2 U.S. (2 Dall.) at 472 (opinion of Jay, C.J.).

131. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 530 (1969).

132. *Chisholm*, 2 U.S. (2 Dall.) at 458 (opinion of Wilson, J.). In the wake of *Chisholm*, some states’ rights theorists, whom Akhil Amar calls the “intellectual heirs of Anti-Federalist opponents of the Constitution,” continued to argue that sovereignty resided in the people of each state not in the people of the United States as a whole, thus giving the states sovereignty *viz.* the federal government. Amar, *supra* note 14, at 1429. According to Amar, the debate over this issue culminated in the Civil War and “ended with a reaffirmation and strengthening of the Federalist vision in the Reconstruction Amendments.” *Id.* at 1429–30. For a discussion of this debate, see *id.* at 1451–65.

133. *Chisholm*, 2 U.S. (2 Dall.) at 465–66 (opinion of Wilson, J.). For Wilson it was clear that the Constitution’s structure demonstrated that the American people formed a unified nation for national purposes, making it incongruous for any entity to claim complete immunity from federal authority, as such claims would undermine the very idea of popular sovereignty:

Whoever considers, in a combined and comprehensive view, the general texture of the Constitution, will be satisfied, that the people of the United States intended to form themselves into a nation for national purposes. . . . Is it congruous, that, with regard to such purposes, any man or body of men, any person natural or artificial, should be permitted to claim successfully an entire exemption from the jurisdiction of the national government? Would not such claims, crowned with success, be repugnant to our very existence as a nation? When so many trains of deduction, coming from different quarters, converge and unite, at last, in the same point; we may safely conclude, as the legitimate result of this Constitution, that the State of Georgia is amenable to the jurisdiction of this court.

Id.

134. 5 U.S. (1 Cranch) 137 (1803).

although the power of judicial review was nowhere stated in the Constitution.¹³⁵ The supremacy of the Constitution, Marshall explained, is evidenced by the relationship between sovereign citizens and their government:

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected. . . . The principles, therefore, so established, are deemed fundamental. And as the authority, from which they proceed, is supreme . . . they are designed to be permanent.¹³⁶

Marshall's conclusion that the people had actually granted the judicial branch the power to declare void an act of Congress was based on the structure of divided government that the Constitution created. The judicial branch—he reasoned, just like the other branches—had the obligation to follow the Constitution's directives: “[T]he particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that *courts*, as well as other departments, are bound by that instrument.”¹³⁷

The Supreme Court's use of structural reasoning continued in the decades following *Chisholm* and *Marbury*. In *McCulloch v. Maryland*, for example, the Court relied on structural reasoning when it held that the Constitution prohibits the states from taxing instrumentalities of the federal government.¹³⁸ Although the Constitution does not directly address the issue, Chief Justice Marshall concluded that the principle that a state cannot regulate a federal entity “need not be stated in terms” because “[i]t is so involved in the declaration of [federal] supremacy, so necessarily implied in it, that the expression of it could not make it more certain.”¹³⁹ To hold otherwise, Marshall reasoned, would undermine the very structure of divided and limited government the Constitution created:

There is no express provision [in the Constitution] for the case, but the claim has been sustained on a principle which so entirely pervades the Constitution, is so intermixed with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it, without rending it into shreds.¹⁴⁰

More recently, in *United States v. Nixon*, the Court invoked structural principles to fashion a right for the President to withhold information from Congress

135. See Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 32 (2000) (“*Marbury*’s argument for judicial review is from start to finish an argument about the Constitution’s structure, history, and text.”); Gillian E. Metzger, *The Constitutional Legitimacy of Freestanding Federalism*, 122 HARV. L. REV. F. 98, 104 (2009) (remarking that in *Marbury*, Marshall “derived the power of judicial review from general understandings of the judicial function and the nature of a written constitution”); Westover, *supra* note 102, at 702.

136. *Marbury*, 5 U.S. (1 Cranch) at 176.

137. *Id.* at 180.

138. 17 U.S. (4 Wheat.) 316 (1819).

139. *Id.* at 427.

140. *Id.* at 426.

and the courts.¹⁴¹ Although the Court rejected President Nixon's efforts to resist turning over documents and recordings to the special prosecutor investigating the Watergate break-in, it accepted—for the first time—the argument that a President could assert an “executive privilege” to withhold information in response to a criminal subpoena.¹⁴² While Chief Justice Warren Burger conceded that the President's refusal to disclose information had no direct textual support in the Constitution,¹⁴³ he did not see this as limiting the Court's ability to fashion a constitutionally-based privilege: “Nowhere in the Constitution . . . is there any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President's powers, it is constitutionally based.”¹⁴⁴ Writing for a unanimous Court, Burger explained that structural concerns dictated the recognition of a privilege to withhold information and that “[t]he privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.”¹⁴⁵

Like a weed growing unchecked, Presidents after Nixon have increasingly invoked the doctrine of executive privilege to resist releasing information (to the public, courts, and even Congress), resulting in the expansion of the privilege's reach and the erosion of executive branch accountability.¹⁴⁶ Ironically, on the eve of

141. 418 U.S. 683, 708 (1974).

142. *Id.* at 711. Executive privilege is “the right of the President and high-level executive branch officers to withhold information from Congress, the courts, and ultimately the public.” Mark J. Rozell, *Executive Privilege and the Modern Presidents: In Nixon's Shadow*, 83 MINN. L. REV. 1069, 1069 (1999).

143. *See Nixon*, 418 U.S. at 711 (“Nowhere in the Constitution, as we have noted earlier, is there any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President's powers, it is constitutionally based.”).

144. *See id.* at 711.

145. *Id.* at 708. Without such a privilege, the Court reasoned, the President and those who assist him would be unwilling to voice “candid, objective and even blunt or harsh opinions in Presidential decisionmaking.” *Id.* In recognizing this new privilege, the Court wrote:

Whatever the nature of the privilege of confidentiality of Presidential communications in the exercise of Art. II powers, the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties. Certain powers and privileges flow from the nature of enumerated powers; the protection of the confidentiality of Presidential communications has similar constitutional underpinnings.

Id. at 705–06. Many scholars have been highly critical of the Supreme Court's acceptance of executive privilege. *See generally* RAOUL BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH (1974); Eric Lane et al., *Too Big a Canon in the President's Arsenal: Another Look at United States v. Nixon*, 17 GEO. MASON L. REV. 737 (2010).

146. *See, e.g.*, MARK J. ROZELL, EXECUTIVE PRIVILEGE: PRESIDENTIAL POWER, SECRECY, AND ACCOUNTABILITY 122 (2d ed. 2002) (“In [the Clinton administration], the president tried to use executive privilege to protect himself, his aides, and his administration from embarrassing and incriminating information. In [the Bush administration], the president tried to use executive privilege to vastly expand the scope of presidential power at the expense of Congress and open information.”); Heidi Kitrosser, *Like “Nobody Has Ever Seen Before”*:

his impeachment, Nixon acknowledged the danger that arises when the people are denied access to information about their government: “When information which properly belongs to the public is systematically withheld by those in power, the people soon become ignorant of their own affairs, distrustful of those who manage them, and—eventually—incapable of determining their own destinies.”¹⁴⁷

These cases demonstrate that the Supreme Court has long employed structural reasoning to define and limit federal power. The Court’s willingness to do so in the name of “state sovereignty”¹⁴⁸ and to protect “the effective discharge of a President’s powers”¹⁴⁹ compels the recognition of a corresponding obligation to preserve the Constitution’s commitment to popular sovereignty by ensuring that citizens have the information necessary to exercise their sovereign authority. Indeed, it would turn the idea of popular sovereignty on its head to conclude that the government can withhold the very information needed for self-government.¹⁵⁰ As

Precedent and Privilege in the Trump Era, 95 CHI.-KENT L. REV. 519, 521 (2020) [hereinafter Kitrosser, *Precedent and Privilege*] (“[A] number of factors have tended, overall, to give executive privilege a ratchet effect, expanding its reach and emboldening those who wield it over time.”). President Trump’s use of executive privilege has been especially problematic from the perspective of executive accountability, further supporting the need for a countervailing public right of access to information about the government. Heidi Kitrosser explains:

The Trump Administration has . . . combined some newly aggressive uses of the privilege with a broader campaign against accountability that seeks effectively to immunize the President from meaningful congressional oversight. As for executive privilege, President Trump has broken new ground in two main respects. First, his Administration has made regular and especially bold use of a prophylactic privilege—that is, of the mere possibility that Trump might one day wish to invoke the privilege—as a basis for refusing to disclose information. Second, combining multiple bases for non-cooperation, including testimonial immunity and a type of prophylactic privilege, Trump issued a sweeping directive to his entire Administration forbidding cooperation with any congressional requests for information relating to the recent impeachment proceedings.

Id. at 529–30 (footnotes omitted).

147. ROZELL, *supra* note 146, at 15 (quoting President Richard M. Nixon, Statement on Establishing a New System for Classification and Declassification of Government Documents Relating to National Security (Mar. 8, 1972), in PUBLIC PAPERS OF THE PRESIDENT 402 (Gov’t Printing Off. 1972)).

148. *New York v. United States*, 505 U.S. 144, 155 (1992).

149. *Nixon*, 418 U.S. at 711.

150. In a law review article that predated the *Nixon* decision by almost two decades, Wallace Parks made a similar argument:

Whatever powers the President and the Congress have to withhold information are derived, of course, from the powers entrusted to them by the Constitution. In view of the theory of popular sovereignty and of reserved powers and the fact that Members of Congress are elected by the people and the President is actually elected by the people (in accordance with actions taken by state legislatures under the constitutional delegation), it would be extraordinary if the powers granted to the

Antonin Scalia, while still a law professor, made the first of these arguments in 1982, writing that the defects of FOIA “cannot be cured as long as we are dominated by the obsession that gave them birth—that the first line of defense against an arbitrary executive is do-it-yourself oversight by the public and its surrogate, the press.”¹⁵⁹ For Scalia, government accountability is “primarily the product of the institutionalized checks and balances within our system of representative democracy.”¹⁶⁰ Scalia pointed to what he called the “major exposés” of the 1970s that revealed the malfeasance of the Nixon Administration as evidence that the public is adequately informed about the actions of government.¹⁶¹

Although Congress did play an important role in bringing the Nixon Administration to heel, it was the press that uncovered the full depth of the Watergate scandal, with investigative journalists Bob Woodward and Carl Bernstein of *The Washington Post*, among others, diligently pursuing leads and anonymous government sources that ultimately exposed a complex web of political espionage and corruption within the government.¹⁶² To suggest that Congress alone pried this information out of the executive branch ignores Nixon’s many efforts to stymie Congress and the vital role that journalists played in keeping the heat on the Administration. Indeed, Watergate is still regarded as one of the most powerful examples of the importance of a vigorous “fourth estate” in ensuring that the public is informed about the workings of government.¹⁶³

However, even if Congress deserves all of the credit for uncovering the full extent of the Watergate scandal, contemporary observers of government are far less sanguine about Congress’s ability to force the disclosure of information from a recalcitrant executive branch.¹⁶⁴ In the post-Watergate era, there has been a marked

159. Scalia, *supra* note 157, at 19.

160. *Id.*

161. *Id.*

162. See JON MARSHALL, WATERGATE’S LEGACY AND THE PRESS: THE INVESTIGATIVE IMPULSE 106 (2011); DAVID GREENBERG, NIXON’S SHADOW: THE HISTORY OF AN IMAGE 162 (2004).

163. See, e.g., Adam Cohen, *The Media That Need Citizens: The First Amendment and the Fifth Estate*, 85 S. CAL. L. REV. 1, 30 (2011) (“[T]he press’s coverage of that [Watergate] scandal is one of the great examples of the Fourth Estate exerting a checking function on government.”).

164. See, e.g., Kitrosser, *Precedent and Privilege*, *supra* note 146, at 531–32 (describing the Trump Administration’s refusal to cooperate with the House of Representatives’ requests for information during impeachment inquiries by claiming that “House committees had no legitimate legislative or oversight reasons to request information”); Papandrea, *supra* note 10, at 238 (detailing how Congress is largely unable to enforce its requests for information when the Executive refuses to cooperate and when government officials lie to the public); Molly E. Reynolds, *Improving Congressional Capacity to Address Problems and Oversee the Executive Branch*, BROOKINGS INST. 2–4 (Dec. 4, 2019), https://www.brookings.edu/wp-content/uploads/2019/12/Big-Ideas_Reynolds_Congressional_Capacity.pdf [<https://perma.cc/8P2W-BQY9>] (discussing how Congress’s efforts to conduct oversight of the executive branch have failed due to the invocation of executive privilege).

statutes permits the government to withhold embarrassing information¹⁷⁶ and to “selectively reveal[] information when it suits its purposes.”¹⁷⁷ Furthermore, because even these limited statutory rights of access are not constitutionally protected, Congress could at any time change or repeal the government’s disclosure obligations, doing away with decades of custom and caselaw supporting government transparency.

In fact, we are already seeing this play out on a smaller but more dramatic scale in the states, where a single political party often controls the executive and legislative branches, or holds a veto-proof majority in the legislature.¹⁷⁸ For example, in North Carolina, while in the midst of a contentious fight over the legislature’s redistricting maps, state legislators granted themselves the power to keep secret any document “made or received during their public service ‘in all instances.’”¹⁷⁹ And in Florida, after reporters raised questions about out-of-state

E. McCraw, *The “Freedom from Information” Act: A Look Back at Nader, FOIA, and What Went Wrong*, 126 YALE L.J.F. 232, 234 (2016) (discussing the many critiques of FOIA over the years); Pozen, *supra* note 2, at 1156 (writing that FOIA “fall[s] short of its transparency and accountability aspirations”).

176. See, e.g., Steven Helle, *The News-Gathering/Publication Dichotomy and Government Expression*, 1982 DUKE L.J. 1, 54 (1982) (“Public officials, at times, have deliberately attempted to shirk their responsibilities by circumventing application of open-meetings or open-records statutes.”); Huq & Ginsburg, *supra* note 75, at 155 (“[T]he Constitution imposes little constraint on the selective disclosure (or nondisclosure) of information by the state in ways that can shunt public debate away from questions that would embarrass or undermine political leaders.”).

177. Papandrea, *supra* note 10, at 230; see also David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condone Unlawful Disclosures of Information*, 127 HARV. L. REV. 512, 515 (2013) (noting that the government’s toleration of leaks “is a rational, power-enhancing strategy”).

178. See Christina Koningisor, *Secrecy Creep*, 169 U. PA. L. REV. 1751, 1806–07 (2021) (footnotes omitted) (“Governors have consolidated their power and authority in recent years, state legislative oversight is notoriously weak, and state executive and legislative branches tend to be controlled by the same party. . . . These features make it difficult for both the public and the competing branches to exercise their oversight functions and bring harmful government secrets to light.”); Bill Kramer, *There Are More States Under One-Party Control Than at Any Other Time in Modern History*, MULTISTATE (May 9, 2023), <https://www.multistate.us/insider/2023/5/9/there-are-more-states-under-one-party-control-than-at-any-other-time-in-modern-history> [<https://perma.cc/4EDV-5P7J>] (“Before the 2022 elections, 13 states had ‘divided governments’ where a single political party did not control both the governorship and both chambers of the legislature. But after the election, that number dropped to only 11 states with the remaining 39 states under single-party ‘trifecta’ control.”); cf. Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2321 (2006) (“When the political branches are controlled by the same party, loyalty, discipline and self-interest generally preclude interbranch checking.”).

179. See Brooks Fuller, *A Devastating Blow to Government Accountability in NC*, THE NEWS & OBSERVER (Sept. 28, 2023, 1:23 PM), <https://www.newsobserver.com/opinion/article279773234.html> [<https://perma.cc/M5G7-X6YT>]; Colin Campbell, *NC Lawmakers Exempt Themselves from Public Records Laws While Democrats Blast ‘Secret Police’ Powers*, WUNC (Oct. 5, 2023, 4:44 PM), <https://www.wunc.org/politics/2023-10-05/nc->

travel by Governor Ron DeSantis in his bid for the Republican presidential nomination, the state legislature—at DeSantis’s request—made a change to its public records laws, retroactively exempting the governor’s travel records.¹⁸⁰ Unfortunately, North Carolina and Florida are far from outliers in weakening their state open government laws.¹⁸¹ As David Cuillier, director of the Brechner Freedom of Information Project, recently commented, transparency at the state level is “deteriorating terribly.”¹⁸²

Many critics of a constitutional right of access also argue that judges are unsuited to weigh the need for secrecy against the public’s right to be informed.¹⁸³ Mark Fenster, for instance, writes that courts “may simply not be the optimal institution, or even the appropriate institution, for adjudicating informational disputes,” citing limitations like their lack of expertise in national security and law enforcement matters, their reluctance to engage in interbranch conflicts, and their tendency to defer to the Executive out of habit.¹⁸⁴ This, Fenster concludes, has rendered the courts a “weak enforcer” of transparency laws.¹⁸⁵

While Fenster raises valid concerns about the judiciary’s performance in enforcing existing open government laws, the assertion that only the political branches can properly assess transparency’s costs and benefits disregards the significant work judges already do in evaluating constitutional claims that require a weighing of competing rights and interests. Moreover, determining whether the government’s justification for withholding information overrides the public’s

lawmakers-exempt-public-records-laws-democrats-secret-police-powers [https://perma.cc/4YC4-SKDZ].

180. See Lewis Kamb, *DeSantis Is Squeezing the Sunshine out of Florida’s Public Records Law, Critics Say*, NBC NEWS (July 4, 2023, 6:00 AM), <https://www.nbcnews.com/news/us-news/desantis-florida-public-records-transparency-rcna91364> [https://perma.cc/N2WB-VWJF]; Nick Corasaniti, *Florida Bill Would Shield DeSantis’s Travel Records*, N.Y. TIMES (Mar. 24, 2023), <https://www.nytimes.com/2023/03/24/us/politics/desantis-travel-records-florida-republicans.html> [https://perma.cc/2Z68-HXTG].

181. See, e.g., Cat Reid, *Shading Sunshine: The Proliferation of Exemptions to State Open Record Laws*, 73 DUKE L.J. 425, 429 (2023); Bill Kopsky, *The Effort to Roll Back State Government Transparency Is an Attack on Your Rights*, ARK. TIMES (Sept. 11, 2023, 2:53 PM), <https://arktimes.com/arkansas-blog/2023/09/11/the-legislatures-effort-to-roll-back-government-transparency-is-an-attack-on-your-rights> [https://perma.cc/PP23-A9MT]; Dusty Christensen, *Under the Golden Dome: Where Lawmakers Stand on Public Records Law*, DAILY HAMPSHIRE GAZETTE (Mar. 17, 2019), <https://web.archive.org/web/20220120022919/https://www.gazettenet.com/For-Sunshine-Week-local-lawmakers-react-to-state-s-public-records-law-24109432> [https://perma.cc/6EQY-TM65].

182. Katherine Barrett & Richard Greene, *Access to Public Records Is ‘Deteriorating Terribly’*, ROUTE FIFTY (Oct. 31, 2023), <https://www.route-fifty.com/management/2023/10/access-public-records-deteriorating-terribly/391652/> [https://perma.cc/72XR-UCJL]; see also Reid, *supra* note 181, at 428 (“Florida is emblematic of a nationwide trend of state legislatures eroding access to public information.”).

183. See *supra* note 158.

184. Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 939 (2006).

185. *Id.*

interest in access is precisely the type of analysis judges already perform when adjudicating public access claims to court proceedings and records.¹⁸⁶

The claim that the courts should not make policy decisions about scarce resources¹⁸⁷ also overlooks the crucial interbranch dialogue between courts and legislators.¹⁸⁸ Congress can and should create legislation to implement the public's right of access, and the executive branch can and should issue rules to fulfill its transparency obligations.¹⁸⁹ The Supreme Court often "engages nonjudicial officials in a shared elaboration of constitutional rights."¹⁹⁰ For example, Congress passed the Civil Rights Act to enforce rights granted in the Fourteenth Amendment,¹⁹¹ and many federal agencies have promulgated rules to implement the Act.¹⁹² Over time, a similar body of statutory law, agency rules, and judicial decisions will develop in a dynamic interbranch dialogue that defines and implements a right to know about the government.

B. The Framers Did Not Envision an Inert Electorate

Critics of a right to know about the government also assert that the Framers never intended for individuals to play an ongoing role in their governance. They argue that the United States is a republic, not a direct democracy, and therefore public access to the work of government is unnecessary because the public's only

186. See *infra* notes 273–77 and accompanying text.

187. See, e.g., Frederick Schauer, *Positive Rights, Negative Rights, and the Right to Know*, in *TROUBLING TRANSPARENCY: THE HISTORY AND FUTURE OF FREEDOM OF INFORMATION* 34, 41 (David E. Pozen & Michael Schudson eds., 2018) ("The compliance costs of FOIA are considerable, and . . . in a world of limited resources, the allocation of those resources in a democracy ought to be made by a representative body able to evaluate the benefits that those costs bring compared to potential alternative uses of the same resources."); Samaha, *supra* note 51, at 953–54 ("Another part of the incompetence argument is doubt that courts will be able to see and accommodate all significant interests at stake in access claims.").

188. See James J. Brudney & Ethan J. Leib, *Statutory Interpretation as "Interbranch Dialogue"?*, 66 *UCLA L. REV.* 346, 348–51 (2019) (writing that interbranch dialog "should be viewed as part of the legal process tradition of institutional humility and deliberation in the production of law").

189. See *infra* Section III.C.

190. Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue*, 42 *WM. & MARY L. REV.* 1575, 1582 (2001) (writing that the Court "does so through the use of doctrines that focus on whether nonjudicial actors have taken an appropriately close and sensitive look at policy judgments that threaten important constitutional values").

191. See, e.g., Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634; Civil Rights Act of 1960, Pub. L. No. 86-449, 74 Stat. 86. As Robert Post and Reva Siegel explain, "[t]he Court's equal protection jurisprudence has emerged from a partnership between the Court and the nation, with Congress as one representative of the nation." Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 *YALE L.J.* 441, 521 (2000).

192. See, e.g., 42 C.F.R. § 59.209 (Department of Health and Human Services implementation of Title VI of the Civil Rights Act of 1964); 49 C.F.R. § 303.1 (Department of Transportation's implementation).

role is to periodically elect representatives to whom they grant the power to determine government policy.¹⁹³

One of the most influential proponents of this idea is Lillian BeVier. BeVier argues that “[s]ince the Constitution does not establish a direct democracy, the inference of a right to know cannot find its constitutional source in the view of popular sovereignty which contemplates direct citizen participation in the making and administration of laws.”¹⁹⁴ In an influential article in the *California Law Review* in 1980, BeVier challenged Alexander Meiklejohn’s conception of democratic citizenship, writing that Meiklejohn was wrong to read the Constitution to mean that “public issues shall be decided by universal suffrage.”¹⁹⁵ BeVier maintained that the Constitution “envisions . . . a system in which the citizens do not directly . . . make or implement public decisions,” but instead merely retain the authority to choose the direction of governmental policy through the election of their representatives.¹⁹⁶ Given this “attenuated role for citizens,” she argued there is no reason they need to be well informed about the actions of government, and the question of access to government information is simply a matter for the people’s representatives to decide.¹⁹⁷

Although the Constitution does provide that the people elect representatives to act on their behalf,¹⁹⁸ this delegation of power did not diminish the Framers’ commitment to self-government.¹⁹⁹ As the historian Horst Dippel notes, “Nobody doubted [in the eighteenth century] that under constitutional government the people retained the ultimate right of sovereignty”²⁰⁰ By granting decision-making authority to elected officials, the people have not given up their

193. See, e.g., Edward H. Levi, *Confidentiality and Democratic Government*, 30 REC. ASS’N B. CITY N.Y. 323, 327–28 (1975) (“[N]either the concept of democracy nor the First Amendment confer on each citizen an unbridled power to demand access to all the information within the government’s possession. . . . [O]urs is a representative democracy.”); BeVier, *The Search for a Constitutional Principle*, *supra* note 157, at 506 (“Since the Constitution does not establish a direct democracy, the inference of a right to know cannot find its constitutional source in the view of popular sovereignty which contemplates direct citizen participation in the making and administration of laws.”); Edward L. Rubin, *Getting Past Democracy*, 149 U. PA. L. REV. 711, 729 (2001) (“[T]he voters do not govern, but only exercise an uncertain, secondary control over the government’s administrative apparatus.”).

194. BeVier, *The Search for a Constitutional Principle*, *supra* note 157, at 506.

195. *Id.* at 505 (quoting ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 27 (1948) (internal quotation marks omitted)).

196. See *id.* at 505–06.

197. *Id.* at 505–08.

198. See U.S. CONST. art. I, § 2, cl. 1; *id.* art. II, § 1, cls. 1–3.

199. See, e.g., Michael Sant’Ambrogio, *Standing in the Shadow of Popular Sovereignty*, 95 B.U. L. REV. 1869, 1891 (2015) (“[T]he Framers were committed to the idea that the sovereignty of the American republic would be lodged with the people rather than in the government. . . . The entire system was predicated on the assumption that no part of government could claim to act as the sovereign, and the government itself might be divided in its views.”).

200. Horst Dippel, *The Changing Idea of Popular Sovereignty in Early American Constitutionalism: Breaking Away from European Patterns*, 16 J. EARLY REPUBLIC 21, 31 (1996).

sovereignty.²⁰¹ This principle underpins all democratic political theory, whether it involves direct citizen participation or the representative model adopted by the Constitution, which vests limited power in elected officials.²⁰² Alexander Hamilton made this point plain when he declared at the New York Ratifying Convention, “Here, sir, the people govern; here, they act by their immediate representatives.”²⁰³ Hamilton’s words remain etched above an entrance to the U.S. House of Representatives in the Capitol,²⁰⁴ a building Thomas Jefferson described as “dedicated to the sovereignty of the people.”²⁰⁵

Some might counter that if elected officials fail to provide sufficient information to the public, the people can simply vote them out of office. However, this ignores the significant informational asymmetry between the people and their representatives—and the possibility that government officials might not be truthful or might otherwise attempt to mislead the public.²⁰⁶ Without a right to know, voters are left vulnerable to manipulation, with no way to force the disclosure of the information they need to confirm that their elected officials are telling the truth and to hold them accountable for their actions.²⁰⁷ In fact, without information from the

201. See Sanford Levinson, *Popular Sovereignty and the United States Constitution: Tensions in the Ackermanian Program*, 123 YALE L.J. 2644, 2647 (2014) (“[I]t does not violate the logic of ‘popular sovereignty’ for that sovereign to authorize some small group of individuals, perhaps even a king, to make actual decisions in the name of the res publica.”); Amar, *supra* note 14, at 1436 (“As sovereign, the People need not wield day-to-day power themselves, but could act through agents on whom they conferred limited powers. . . . So long as the People at all times retained the ability to revoke or modify their delegations, such agency relationships were in no sense a surrender or division of ultimate sovereignty.”).

202. See Ralph Gregory Elliot, *The Private Lives of Public Servants: What Is the Public Entitled to Know?*, 27 CONN. L. REV. 821, 827 (1995) (“[A]ll government is founded on the informed consent of the governed; . . . whenever the people are asked to consent to anything—either directly, as in an election, or indirectly, through the acts of those to whom the people have allocated the particular right to act in their name—they and those acting for them are entitled to all data necessary to inform their consent.”); Levinson, *supra* note 201, at 2647 (“[I]t does not violate the logic of ‘popular sovereignty’ for that sovereign to authorize some small group of individuals. . . . This, of course, is the basis of all ‘democratic’ political theory, whether it takes the form of ‘direct’ choice by the populace or the ‘representative democracy’ most notably defended by James Madison.”).

203. Alexander Hamilton, Remarks at the New York Ratifying Convention (June 27, 1788), in *SELECTED WRITINGS AND SPEECHES OF ALEXANDER HAMILTON* 228, 229 (Morton J. Frisch ed., 1985).

204. See *Quotations and Inscription in the Capitol Complex*, ARCHITECT OF THE CAPITOL, http://www.aoc.gov/cc/cc_quotations.cfm [<https://perma.cc/SF8D-RZ3G>] (last visited Jan. 12, 2025).

205. Letter from Thomas Jefferson to Benjamin Latrobe (1812), in *THE JEFFERSONIAN CYCLOPEDIA* 48, 48 (John P. Foley ed., 1900).

206. For examples of such behavior, see *supra* Section I.C.

207. Jeremy Bentham noted this self-evident truth in 1837:

To conceal from the public the conduct of its representatives, is to add inconsistency to prevarication: it is to tell the constituents, “You are to elect or reject such or such of your deputies without knowing why—you

government, voters cannot even understand what issues the nation is facing so that they can make informed decisions in selecting their representatives in the first place. As Martin Redish points out, “If the electoral decisions made by the voters are to be based on anything more than emotive hunches, they need a free flow of information that will inform them not only about the candidates but also about the day-to-day issues of government.”²⁰⁸

Furthermore, the assertion that a right to know is unnecessary because the public’s role is limited only to voicing their disapproval at the ballot box ignores the principal–agent relationship at the heart of the Constitution’s implementation of representative democracy.²⁰⁹ The Constitution did not just create a representative democracy and leave it at that. The Constitution coupled representative democracy with a robust system of checks and balances intended to preserve popular sovereignty and to limit the ability of government officials to engage in tyrannical behavior.²¹⁰ Indeed, James Madison and Alexander Hamilton repeatedly assured a skeptical public that even in a representative democracy, the Constitution’s carefully constructed system of checks and balances would ensure that “ultimate authority . . . reside[d] in the people alone.”²¹¹

Guaranteeing the people a role in the selection of their representatives helps to safeguard popular sovereignty, but the Framers were under no illusion that merely adopting a republican form of government would restrain government power. James Madison once observed that “[i]f angels were to govern men, neither external nor internal controls on government would be necessary.”²¹² His response, like many of his contemporaries, was to grant the nation’s new government only limited powers, spread across multiple branches, and shared with the states *and the people* such that government at all levels would remain accountable to the people.²¹³ In the end,

are forbidden the use of reason—you are to be guided in the exercise of your greatest powers only by hazard or caprice.”

JEREMY BENTHAM, AN ESSAY ON POLITICAL TACTICS (1837), *reprinted in* 2 THE WORKS OF JEREMY BENTHAM 299, 312 (John Bowring ed., Russell & Russell 1962).

208. See Redish, *supra* note 57, at 596–97.

209. See *supra* notes 78–85 and accompanying text.

210. See *supra* notes 28–66 and accompanying text.

211. THE FEDERALIST NO. 46, *supra* note 28, at 243 (James Madison); *see also, e.g.*, THE FEDERALIST NO. 22, *supra* note 28, at 112 (Alexander Hamilton) (“The fabric of American empire ought to rest on the solid basis of THE CONSENT OF THE PEOPLE. The streams of national power ought to flow immediately from that pure original fountain of all legitimate authority.”).

212. THE FEDERALIST NO. 51, *supra* note 28, at 269 (James Madison); *see also id.* (“In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.”).

213. *Id.* at 269–72 (“A dependence on the people is, no doubt, the primary control on the government”); *see also* THE FEDERALIST NO. 84, *supra* note 28, at 445 (Alexander Hamilton) (“Here, in strictness, the people surrender nothing; and as they retain every thing they have no need of particular reservations. ‘WE, THE PEOPLE of the United States, to secure the blessings of liberty to ourselves and our posterity, do *ordain* and *establish* this constitution for the United States of America.’”); David J. Barron & Martin S. Lederman, *The Commander*

Madison reasoned, “A dependence on the people is, no doubt, the primary control on the government.”²¹⁴

The secrecy surrounding the Constitutional Convention (“Convention”) is often cited as evidence that the Framers were averse to the idea that the public should have a right to information from the government.²¹⁵ Relying on this single event to define the Framers’ views on government transparency, however, overlooks important context. The delegates to the Convention were tasked with creating a new government, not with engaging in actual governance.²¹⁶ To this end, the Convention’s secrecy was viewed as necessary to ensure open debate among the delegates and to provide opportunities for compromise in designing a constitutional system of government that could transcend factionalism.²¹⁷ The Convention was thus a “special case” and “of little force as a precedent” for rejecting a right to know about the government.²¹⁸

The records from the Convention also reveal that not all the delegates were comfortable with the Convention’s rule of secrecy.²¹⁹ Many complained about their inability to seek guidance from their constituents and tried to have the rule modified or rescinded.²²⁰ James Madison, though initially supporting closed sessions, later

in Chief at the Lowest Ebb—A Constitutional History, 121 HARV. L. REV. 941, 1100 (2008) (“It has long been a central tenet of the American idea—of the basic national story we tell ourselves as early as grade school—that our government is defined by separated and blended powers, with checks and balances that promote public reasoning and debate, preserve democratic self-governance, and protect against concentrations of power in a single figure.”); J. Harvie Wilkinson III, *Our Structural Constitution*, 104 COLUM. L. REV. 1687, 1688 (2004) (“[O]ur Madisonian tradition teaches that structural provisions not only confer collective rights upon popular majorities, but safeguard individual liberty by diffusing power.”).

214. THE FEDERALIST NO. 51, *supra* note 28, at 269 (James Madison).

215. See, e.g., Martin E. Halstuk, *Policy of Secrecy—Pattern of Deception: What Federalist Leaders Thought About a Public Right to Know, 1794-98*, 7 COMM’N. L. & POL’Y 51, 53, 58–59 (2002); Paul Haridakis, *Citizen Access and Government Secrecy*, 25 ST. LOUIS U. PUB. L. REV. 3, 6 (2006); BeVier, *The Search for a Constitutional Principle*, *supra* note 157, at 501 n.78.

216. See DANIEL N. HOFFMAN, *GOVERNMENTAL SECRECY AND THE FOUNDING FATHERS* 22 (1981) (concluding that the Convention was “an extralegal act” and that the “framers held themselves answerable not to the written law or the existing governmental structures but to a higher law, to the people, and to the judgment of history”).

217. See *id.* at 20–24 (“In the ratification debates the Constitution was effectively promoted as a grand design, rather than a patchwork of compromises. This could scarcely have been done if each provision was identified with the demands of a particular faction; the debate would then have tended to focus on the concessions made by each side, rather than the merits of the plan as a whole.”).

218. *Id.* at 23.

219. See Kitrosser, *Secrecy and Separated Powers*, *supra* note 48, at 521 (“The rule of secrecy was the source of some controversy and debate both within and beyond the convention walls.”).

220. See, e.g., James Madison, *Journal in Convention* (July 16, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 15, 18 (Max Farrand, ed., 1911) (noting that William Paterson and Edmund Randolph proposed that “the rule of secrecy ought to be rescinded”); Luther Martin, Attorney General of Maryland, *The Genuine Information*

expressed regret, acknowledging that public participation could have strengthened the Constitution's public acceptance.²²¹ Other Framers also questioned the Convention's secrecy. Thomas Jefferson, who was in Paris seeking to rally French support for the new nation, admonished the delegates for their secrecy: "I am sorry that 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."²²²

But even if their imposition of secrecy during the Convention reflected skepticism about a right to know about the government, the delegates did not offer the Convention's procedures as a model for the new government. On the contrary, what came out of the Convention was a document that sought to safeguard popular sovereignty by instituting a system of checks and balances to ensure that ultimate authority would remain in the hands of the people. As discussed in Part I, the Framers frequently extolled the importance of an informed public in their implementation of a limited and accountable government, and they repeatedly declared that even under the new Federal Constitution, the people would remain the true sovereigns.²²³ In fact, the Framers' very claim to legitimacy rested on the principle of informed consent of the governed.²²⁴

Moreover, we find further support for a right to know in the delegates' debate over Article I, Section 5 of the Constitution, which requires that "[e]ach 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."²²⁵ During the Convention, Oliver Ellsworth of Connecticut stated that he felt such a requirement was unnecessary: "As the clause is objectionable in so many shapes, it may as well be struck out altogether. The legislature will not fail to publish their proceedings

Relative to the Proceedings of the General Convention, held at Philadelphia, in 1787, Address before the Maryland Legislature (Dec. 28, 1787), *in* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra*, at 172, 173–74, 190–91 (recounting various proposals to modify the Convention's secrecy); JOHN P. KAMINSKI, SECRECY AND THE CONSTITUTIONAL CONVENTION 12–13 (2005) ("Maryland state attorney general Luther Martin, a delegate to the Convention, also lamented that the secrecy rule deprived the delegates of the 'opportunity of gaining information by a Correspondence with others.'").

221. See Letter from James Madison to William C. Rives (Mar. 12, 1833), *in* 9 THE WRITINGS OF JAMES MADISON, *supra* note 4, at 511, 513–14; R. KETCHAM, JAMES MADISON: A BIOGRAPHY 505 (1971); KATLYN MARIE CARTER, DEMOCRACY IN DARKNESS: SECRECY AND TRANSPARENCY IN THE AGE OF REVOLUTIONS 191 (2023) ("Though [Madison] had supported closing the doors during the Federal Convention . . . , his alarm at Hamilton's proposed economic measures led him to re-evaluate how political representation was working in practice. He suggested that maybe the new government was not bound closely enough to public opinion . . .").

222. Letter from Thomas Jefferson to John Adams (Aug. 30, 1787), *in* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 220, at 76.

223. See, e.g., THE FEDERALIST NO. 46, *supra* note 28, at 243 (James Madison) (writing that "the ultimate authority, wherever the derivative may be found, resides in the people alone").

224. See *supra* notes 76–84 and accompanying text.

225. U.S. CONST. art. I, § 5, cl. 3.

from time to time. The people will call for it, if it should be improperly omitted.”²²⁶ In recounting the debate, David Ivester commented that “[w]hat is striking about Ellsworth’s remarks is the ease with which he presumes the people have it within their power and ability to monitor and check government secrecy even without an express constitutional provision.”²²⁷ Ivester goes on to note that “James Wilson of Pennsylvania shared Ellsworth’s high regard for the people but not Ellsworth’s cool confidence in the people’s ability to check secrecy without the aid of a constitutional provision.”²²⁸ Quoting from a paraphrase of Wilson’s response, Ivester wrote, “Mr. Wilson thought the expunging of the clause would be very improper. *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.”²²⁹ According to Ivester, “Here, in the most explicit language, one of the most influential members of the Constitutional Convention of 1787 declared before that Convention that the people have a right to know.”²³⁰

While it is true that in the early years of the republic, government officials did keep many aspects of the new government secret,²³¹ the idea that government owes the public a minimum level of transparency was widely embraced by the founding generation.²³² We see this in the transparency provisions in the

226. 5 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 68, at 408.

227. Ivester, *supra* note 7, at 132.

228. *Id.*

229. *Id.* (quoting 5 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 68, at 408).

230. *Id.* at 132–33. Ivester goes on to note:

Others, such as Patrick Henry, saw too little protection against secrecy in this clause because it failed to specify how often the journals were to be published or under what circumstances parts of the journal could be kept secret. Wilson, however, evidently focusing on the provision’s affirmative command to publish the journals, saw it as primarily supportive of the people’s right to know; hence his objection to expunging the clause. The Convention voted to retain the clause.

Id. at 132 n.96.

231. See, e.g., HOFFMAN, *supra* note 216, at 76–83. Of course, the government at that time was tiny by modern standards.

232. See Sun & Jones, *supra* note 27, at 890 n.16 (concluding that “founding-era statements of the virtues of governmental transparency are plentiful” (citing Martin E. Halstuk, *Policy of Secrecy—Pattern of Deception: What Federalist Leaders Thought About a Public Right to Know, 1794–98*, 7 COMM’N L. & POL’Y 51, 53 (2002))); Halstuk & Cramer, *supra* note 51, at 3–7 (“The Framers were well-read in the works of political theorists from the age of the Enlightenment until their own time, particularly [Locke and Montesquieu] both of whom were early advocates of a governmental structure in which citizens have the right to know what their leaders are doing. An examination of the writings of the Framers and the structure of the Constitution reveals that these two thinkers had a profound influence on the Framers’ notion of what ‘freedom’ means . . . and how unrestricted political discussions and access to knowledge support that freedom.”).

Constitution itself,²³³ in the statements made in the debate over the Constitution's drafting and ratification,²³⁴ and in the vehement opposition to the Alien and Sedition Acts of 1798, which many viewed as infringements on the people's sovereign authority.²³⁵ For example, in opposing the Alien and Sedition Acts, Representative Albert Gallatin of Pennsylvania argued that "if you thus deprive the people of the means of obtaining information of their [government officials'] conduct, you in fact render their right of electing nugatory."²³⁶ Speaking for the Commonwealth of Virginia in condemning the Alien and Sedition Acts, Madison captured the prevailing view on the importance of an informed public when he wrote that "the right of freely examining public charters and measures, and of free communication thereon, is the only effective guardian of every other right."²³⁷

As a final point, the argument that citizens should simply "obey the law and perhaps, in periodic elections, . . . confirm the choice of leaders whose election gives them the power to enact into law whatever policies they see fit"²³⁸ calls into

233. See U.S. CONST. art. I, § 5, cl. 3 ("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."); *id.* art. II, § 3 (requiring that the President "shall from time to time give to the Congress Information of the State of the Union"). For appointments and treaties, the President's success hinges on providing sufficient information to win Senate consent; likewise, his legislative agenda requires convincing both houses of Congress to adopt it. See *id.* art. II, § 2, cl. 2; *id.* art. II, § 3. As Seth Kreimer notes, "[t]hese, too, are mandates consistent with a wide range of transparency." Kreimer, *supra* note 8, at 1145.

234. See, e.g., John Marshall, Speech at the Convention of the Commonwealth of Virginia (June 10, 1788), in 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 68, at 222, 233 (cautioning that a government ought to maintain secrecy only "when it would be fatal and pernicious to publish the schemes of government").

235. See, e.g., 8 ANNALS OF CONG. 2140 (1798) (statement of Rep. John Nicholas) ("If [the Alien and Sedition Acts of 1798 is] passed into a law, the people will be deprived of that information on public measures, which they have a right to receive, and which is the life and support of a free Government."); *id.* at 2110 (statement of Rep. Albert Gallatin) ("[I]f you thus deprive the people of the means of obtaining information of their [government officials'] conduct, you in fact render their right of electing nugatory."); 10 ANNALS OF CONG. 930–31 (1801) (statement of Rep. John Rutledge Jr.) ("In Governments like ours, where all political power is derived from the people, and whose foundations are laid in public opinion, it is essential that the people be truly informed of the proceedings, the motives, and views of their constituted authorities"); *id.* at 929 (statement of Rep. William C. C. Claiborne) ("[T]he conduct of our public men should always be investigated; that free investigation was inseparable from a representative Government, and essential to its preservation.").

236. *Id.* at 2110 (statement of Rep. Albert Gallatin).

237. Virginia Resolution (Dec. 21, 1798), in 17 THE PAPERS OF JAMES MADISON, 31 MARCH 1797–3 MARCH 1801 AND SUPPLEMENT 22 JANUARY 1778–9 AUGUST 1795, at 185, 185–91 (David B. Mattern et al. eds., Charlottesville, Univ. Press of Va. 1991) (condemning the passage of the Alien and Sedition Acts of 1798). Concern for the right to know about government is evidenced in the early state constitutions and conventions as well. See Ivester, *supra* note 7, at 128–30 (collecting historical sources).

238. Barry Sullivan, *Methods and Materials in Constitutional Law: Some Thoughts on Access to Government Information as a Problem for Constitutional Theory and Socio-Legal Studies*, 13 EUR. J.L. REFORM 4, 9 (2011) (quoting ROGER COTTERRELL, LAW'S COMMUNITY: LEGAL THEORY IN SOCIOLOGICAL PERSPECTIVE 149 (1995)).

question the very idea of *public* oversight that lies at the heart of the Constitution's commitment to popular sovereignty and self-government. Many Federalists made this elitist argument in the 1790s,²³⁹ but it did not win the day; in fact, the First Amendment was in part a repudiation of this view.²⁴⁰ Today, one would be hard-pressed to find anyone who believes that American democracy is predicated on a passive and subordinate citizenry.²⁴¹ Moreover, the idea that citizens should simply defer to their elected representatives was not even widely shared during the founding period.²⁴² In an op-ed reflecting the view of many of his countrymen, Henry Kammerer wrote in 1793 that “every citizen should be capable of judging the conduct of rulers, and the tendency of laws,” particularly given the “disposition in the human mind to tyrannize when cloathed [sic] with power.”²⁴³

No doubt many Framers were skeptical that a large portion of the electorate could understand the workings of government. Concern about whether people can be trusted to govern themselves is not new.²⁴⁴ In response to a question regarding what sort of government the delegates to the Convention had created, Benjamin Franklin famously answered, “A republic, if you can keep it.”²⁴⁵ Thomas Jefferson also seems to have had some concern about the ability of his fellow citizens to understand the work of government, but this did not diminish his support for self-government: “[The people] may be led astray for a moment, but will soon correct

239. See, e.g., Ashutosh Bhagwat, *The Democratic First Amendment*, 110 Nw. U. L. REV. 1097, 1121 (2016) (remarking that Federalists, led by John Adams, asserted that in a representative democracy citizens should elect representatives based on their abilities, “but then leave deliberation over public issues to those representatives”).

240. See Ardia, *Beyond the Marketplace of Ideas*, *supra* note 30, at 306–07 (describing how competing visions of citizenship and American democracy played out in the debate over the First Amendment).

241. See Bhagwat, *supra* note 239, at 1123; Sullivan, *supra* note 170, at 6 (concluding that “Madison’s view could command widespread adherence today.”).

242. See James P. Martin, *When Repression is Democratic and Constitutional: The Federalist Theory of Representation and the Sedition Act of 1798*, 66 U. CHI. L. REV. 117, 121 (1999) (noting that Federalist theories of citizenship “were already seriously eroding at the time the Sedition Act was passed and were thoroughly disowned in the early nineteenth century”).

243. Henry Kammerer, *Friends and Fellow Citizens*, NAT’L GAZETTE, Apr. 13, 1793, *reprinted in* THE DEMOCRATIC-REPUBLICAN SOCIETIES, 1790–1800: A DOCUMENTARY SOURCEBOOK OF CONSTITUTIONS, DECLARATIONS, ADDRESSES, RESOLUTIONS, AND TOASTS 53, 53–55 (Philip S. Foner ed., 1976).

244. See, e.g., Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159, 1167 (2003); Gary M. Lucas, Jr. & Slavisa Tasic, *Behavioral Public Choice and the Law*, 118 W. VA. L. REV. 199, 205–15 (2015); Derek E. Bambauer, *Shopping Badly: Cognitive Biases, Communications, and the Fallacy of the Marketplace of Ideas*, 77 U. COLO. L. REV. 649, 696 (2006).

245. There are competing versions of the setting where Franklin made this statement. See Richard R. Beeman, *Perspectives on the Constitution: A Republic, If You Can Keep It*, NAT’L CONST. CTR., <https://constitutioncenter.org/learn/educational-resources/historical-documents/perspectives-on-the-constitution-a-republic-if-you-can-keep-it> [<https://perma.cc/XG9M-CNGK>] (last visited Jan. 8, 2025) (describing the question as having come from a group of citizens); see also *Respectfully Quoted: Benjamin Franklin (1706–90)*, BARTLEBY, <https://www.bartleby.com/73/1593.html> [<https://perma.cc/L96D-SP5B>] (last visited Jan. 8, 2025) (stating that the question came from a single person).

themselves. The people are the only censors of their governors: and even their errors will tend to keep these to the true principles of their institution.”²⁴⁶

But even if it is true that most people lack the capacity to understand the complex information germane to public policy debates, the response cannot be to forsake informing and educating them. To do so would be to abandon the core principle of self-government that animates our constitutional system. Thomas Emerson makes this point when he writes that criticism of the public’s ability to effectively engage in political expression questions the viability of democracy itself:

The proponents of freedom of political expression often addressed themselves to the question whether the people were competent to perform the functions entrusted to them, whether they could acquire sufficient information or possessed sufficient capacity for judgment. The men of the eighteenth century, with their implicit faith in the power of reason and the perfectibility of man, entertained few doubts on this score. Political theorists of the nineteenth and twentieth centuries have been more cautious. And there was some disagreement as to whether the right of political expression could safely be extended to societies which had not reached a certain point in the development of education and culture. But these problems were actually questions concerning the viability of democracy itself. And once a society was committed to democratic procedures, or rather in the process of committing itself, it necessarily embraced the principle of open political discussion.²⁴⁷

As every student of American civics knows, by adopting a democratic form of government, the Constitution has already committed us to democratic procedures and thus embraced the principle of informed political discussion.

C. A Right to Know Will Not Cripple the Government

By far the most frequently cited objection to a right to know is that a constitutional right of access will cripple the government. Because of its sheer size and complexity, critics argue, the government would buckle under the weight of constant public scrutiny.²⁴⁸ Mark Fenster, for example, warns that “[g]overnment

246. Letter from Thomas Jefferson to Edward Carrington, *supra* note 65, at 252.

247. Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 883–84 (1963). As Meredith Fuchs notes, “the concept exists internationally that democratic governments are under a general obligation to make information they hold available to their citizens.” Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN. L. REV. 131, 145–46 (2006) (citing, *inter alia*, the Supreme Court of India, which stated: “Where a society has chosen to accept democracy as its creedal faith, it is elementary that the citizens ought to know what their government is doing,” (quoting *S.P. Gupta v. Union of India*, (1982) 2 SCR 365, 432 (India))).

248. See, e.g., FRANCIS FUKUYAMA, *POLITICAL ORDER AND POLITICAL DECAY: FROM THE INDUSTRIAL REVOLUTION TO THE GLOBALIZATION OF DEMOCRACY* 504 (2014) (“The obvious solution to this problem would be to roll back some of the would-be democratizing reforms, but no one dares suggest that what the country needs is a bit less participation and transparency.”); Andrew Keane Woods, *The Transparency Tax*, 71 VAND. L. REV. 1, 3–4 (2018) (“[M]aximal transparency is not optimal; beyond some point, extra

cannot operate in a manner that provides complete access to all proceedings and documents,” explaining that “[c]omplete transparency not only would create prohibitive logistical problems and expenditures . . . but more importantly, it would impede many of the government’s most important operations.”²⁴⁹

The assertion that a right to know about the government would expose every governmental action to public scrutiny vastly overstates the impact of a right to know. In fact, several states recognize a right to know under their state constitutions, and this has not made those states ungovernable.²⁵⁰ As with all other constitutional rights, a right to know would be limited in scope and subject to appropriate exceptions.²⁵¹ Moreover, the suggestion that a right to know would impose prohibitive burdens on government ignores the extensive disclosure systems the government already has established in response to FOIA and other transparency laws. These existing procedures, while far from perfect, demonstrate that managing information flow to the public can be done without crippling government operations.²⁵²

It is important to note that a constitutional right of access to any branch of the government seemed unworkable to many people prior to the Supreme Court’s recognition of a First Amendment right of access to criminal proceedings in

transparency comes at a cost.”); Ricardo Cruz Pietro, *On the Disadvantages of Transparency for Government: Reflections on Some Arguments Against Transparency as a Democratic Reform*, 36 MELB. J. POLITICS 51, 55 (2013) (“The awe that Hobbes considered indispensable for the authority of the sovereign would be lost at the sight of the all too human, fallible and prosaic task of governing. It would undermine trust and legitimacy and destroy the faith of the citizenry on the capacity of the government to manage public affairs and rule authoritatively.”); James T. O’Reilly, *FOIA and Fighting Terror: The Elusive Nexus Between Public Access and Terrorist Attack*, 64 LA. L. REV. 809, 814 (2004) (“The public’s right to know anything anytime was an attractive ideal in the past, but now it is seen as ‘So September 10th!’”).

249. Fenster, *supra* note 184, at 902.

250. Eight states provide a right of access to either government records or government meetings in their state constitutions. See ARK. CONST. art. 19, § 12 (requiring publication of receipts and expenditures of public money); CAL. CONST. art. I, § 3(b)(1) (providing right of access to “the meetings of public bodies and the writings of public officials”); ILL. CONST. art. VIII, § 1(c) (providing right of access to “reports and records of the obligation, receipt, and use of public funds”); FLA. CONST. art. 1, § 24(a)–(b) (providing right to inspect public records and attend meetings of any “collegial public body” and the legislature); LA. CONST. art. XII, § 3 (providing “right to observe the deliberations of public bodies and examine public documents”); MONT. CONST. art. II, § 9 (providing “right to examine documents or to observe the deliberations of all public bodies or agencies”); N.D. CONST. art. XI, § 5 (requiring open meetings); N.H. CONST. pt. 1, art. 8 (granting right of access to government proceedings and providing individual taxpayers standing to challenge government spending).

251. See *infra* Part III for a discussion of these ideas in greater detail.

252. Because a right to know would not be as extensive as the statutory grants of access in FOIA and other open government laws, the impacts of a right to know on government operations could be further limited. See *infra* Section III.A.

Richmond Newspapers, Inc. v. Virginia.²⁵³ At that time, many commentators were doubtful that judges could develop standards for ascertaining the scope of a constitutional right of access to the courts or a principled way to assess when the need for secrecy justifies denying public access.²⁵⁴ In *Houchins v. KQED*, Chief Justice Burger expressly invoked this skepticism in rejecting a special right of press access to a county jail, declaring that “there is no discernable basis for a constitutional duty to disclose, or for standards governing disclosure of or access to information.”²⁵⁵ Yet, a mere two years later in *Richmond Newspapers*, he dismissed this concern as “nearly inconsequential”²⁵⁶ and set out to develop standards for determining the scope of a constitutional right of access to the courts.²⁵⁷

Over the next decade, the Supreme Court expanded on its holding in *Richmond Newspapers*, concluding that the First Amendment provides a right of

253. 448 U.S. 555, 581 (1980) (concluding that the First Amendment mandates a right of public access to criminal trials). In his concurrence, Justice Stevens wrote:

This is a watershed case. Until today the Court has accorded virtually absolute protection to the dissemination of information or ideas, but never before has it squarely held that the acquisition of newsworthy matter is entitled to any constitutional protection whatsoever. . . . I agree that the First Amendment protects the public and the press from abridgment of their rights of access to information about the operation of their government, including the Judicial Branch.

Id. at 582, 584 (Stevens, J., concurring).

254. See, e.g., Brief on Behalf of the Appellees at 31–32, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (No. 79-243) (“Without some experience with trial closure orders, a constitutional standard appropriate to all concerns cannot be meaningfully developed.”); J. Skelly Wright, *Defamation, Privacy, and the Public’s Right to Know: A National Problem and a New Approach*, 46 TEX. L. REV. 630, 633 (1968) (“[T]he expansiveness of this principle is its very liability. . . . [W]e are therefore ultimately left with a definition of the public’s right to know as vague as the definition of a person’s right to privacy.”). Even after the Supreme Court embarked on defining the scope of a constitutional right of access to judicial proceedings, some scholars remained unconvinced that a right of access could be applied without eviscerating any hope of secrecy in court proceedings. See, e.g., Paul Kizel, *Richmond Newspapers, Inc. v. Virginia: A New But Uncertain “Right of Access”*, 32 SYRACUSE L. REV. 989, 1006 (1981); Lillian R. BeVier, *Like Mackerel in the Moonlight: Some Reflections on Richmond Newspapers*, 10 HOFSTRA L. REV. 311, 336–39 (1982) [hereinafter BeVier, *Some Reflections*]; Charles W. McKinnon, *Constitutional Law—First Amendment—Freedom of the Press—The Press’ Right of Access to Trials Versus the Victim’s Interest in Testifying Privately—Globe Newspaper Co. v. Superior Court*, 11 FLA. ST. U. L. REV. 487, 493–95, 500–03 (1983).

255. 438 U.S. 1, 14 (1978) (plurality opinion). Some scholars also shared this skepticism. See BeVier, *The Search for a Constitutional Principle*, *supra* note 157, at 516 (“The Constitution yields no normative standard by which the claim of access to governmental information can be evaluated.”); O’Brien, *supra* note 6, at 586 (“In defining a constitutional ‘right to know,’ the Court would exercise extra-constitutional decision-making authority.”).

256. BeVier, *Some Reflections*, *supra* note 254, at 324.

257. See *Richmond Newspapers*, 448 U.S. at 580.

access to criminal trial proceedings, jury voir dire, and preliminary hearings.²⁵⁸ In the last of these cases, *Press-Enterprise II*, the Court clarified the test for determining when a First Amendment right of access applies to a specific judicial proceeding.²⁵⁹ Describing what is now known as the “tests of experience and logic,”²⁶⁰ Chief Justice Burger wrote that a court is to consider whether the place and process “have historically been open to the press and general public” (the “experience” prong) and whether public access “plays a significant positive role in the functioning of the particular process in question” (the “logic” prong).²⁶¹ If both prongs are met, a First Amendment right of access attaches to the proceeding in question, which can be overcome only if the justification for closure withstands strict scrutiny.²⁶²

Today, judges and scholars no longer question that the Constitution provides a right of access to the judicial branch. In fact, in the years following *Press-Enterprise II*, lower courts have held that the First Amendment mandates a right of access not only to criminal proceedings but also to civil trials and pretrial proceedings,²⁶³ as well as to records filed in criminal and civil proceedings.²⁶⁴ This doctrinal expansion reflects courts’ recognition that meaningful public oversight serves identical constitutional values whether the proceeding is criminal or civil.²⁶⁵ Furthermore, while the experience and logic test originated in the context of a right of access to judicial proceedings, its application has broadened considerably, with many courts employing it to determine the scope of a general right of access to government information.²⁶⁶

We have seen a similar transformation in perspective regarding statutory-based rights of access to government information. Opponents of FOIA issued dire

258. See *Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596, 610 (1982) (holding that a First Amendment right of access applies to criminal trials); *Press-Enterprise I*, 464 U.S. 501, 511 (1984) (applying First Amendment right of access to jury voir dire); *Press-Enterprise II*, 478 U.S. 1, 14 (1986) (applying First Amendment right of access to preliminary hearings).

259. 478 U.S. at 13–14.

260. See, e.g., *El Vocero de P.R. v. Puerto Rico*, 508 U.S. 147, 149 (1993) (referring to the “tests of experience and logic” enunciated in *Press-Enterprise II*).

261. *Press-Enterprise II*, 478 U.S. at 8. For more on the experience and logic test, see *infra* Section III.A.

262. See Ardia, *Court Transparency*, *supra* note 30, at 855.

263. See Ardia, *Privacy and Court Records*, *supra* note 30, at 1403 n.112 (citing cases).

264. See *id.* at 1405 nn.122–24 (citing cases).

265. See *id.* at 1403–05 (discussing the rationales lower courts have applied in recognizing a First Amendment right of access to civil proceedings and judicial records). The Ninth Circuit’s opinion in *Courthouse News Service v. Planet* exemplifies how courts have accepted that a right of public access to the courts is of constitutional dimensions. In *Courthouse News Service*, the court wrote that public access to the courts “ensure[s] that the individual citizen can effectively participate in and contribute to our republican system of self-government” and that access to civil proceedings and records “is an indispensable predicate to free expression about the workings of government.” 750 F.3d 776, 785 (9th Cir. 2014) (quoting *Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596, 604 (1982)).

266. See *infra* notes 276–80 and accompanying text.

warnings before the Act's passage,²⁶⁷ with some claiming that if freedom of information legislation were enacted, "the administrative processes of the Federal Government would grind to a halt"; "the President would spend all his time responding to requests for information from high school students"; and "FOIA cases would overburden the Federal courts."²⁶⁸ While critics will always be able to find examples where open government laws have interfered with government operations, these statutes have not brought the government to its knees.²⁶⁹ As history has shown, public access to government information has produced significant benefits, including greater accountability, better policymaking, increased government efficiency, and reduced corruption.²⁷⁰ Grounding a right of access in the Constitution will further support these benefits, but most importantly, it will help to restore faith in American democracy by affirming that the people retain authority over their government.

267. See, e.g., COMM. ON GOV'T OPERATIONS, TWENTY-FIRST REPORT ON ADMINISTRATION OF THE FREEDOM OF INFORMATION ACT, H.R. REP. NO. 92-1419, at 78 (1972) (noting that "[o]pponents of the legislation that became [FOIA] issued dire warnings to the effect that if the bill were enacted 'the administrative processes of the Federal Government would grind to a halt,' that 'the President would spend all his time responding to requests for information from high school students,' [and] that [FOIA] cases 'would overburden the Federal courts.'"); COMM. ON GOV'T OPERATIONS, REPORT ON AMENDING SECTION 552 OF TITLE 5, UNITED STATES CODE, KNOWN AS THE FREEDOM OF INFORMATION ACT, H.R. REP. NO. 93-876, app. 1, at 138 (1974) (statement of Malcolm D. Hawk, Acting Assistant U.S. Att'y Gen.) (arguing that "courts, as they themselves have recognized, are not equipped to subject to judicial scrutiny Executive determinations that certain documents if disclosed would injure our foreign relations or national defense").

268. H.R. REP. NO. 92-1419, at 78. Of course, some of these warnings had a grain of truth in them. See, e.g., Pozen, *supra* note 2, at 1100 ("Those agencies that do have large FOIA practices can expect to be diverted from their mission by tens of thousands of requests each year, along with a steady stream of lawsuits filed by ideologically hostile parties, charges of lackluster implementation, and episodic news stories that draw on the agencies' FOIA disclosures to spotlight alleged incompetence and venality."); Fenster, *supra* note 184, at 913 ("[D]isclosure laws continue to exact financial, deliberative, and bureaucratic burdens on government, even when disclosure serves no useful purpose.").

269. I do not mean to suggest that the burdens FOIA and other disclosure laws place on government are insignificant or unimportant. As discussed *infra* Section III.C, the implementation of a right to know should take these burdens into account and seek to minimize them.

270. See, e.g., Joseph Stiglitz, *Transparency in Government*, in THE RIGHT TO TELL: THE ROLE OF MASS MEDIA IN ECONOMIC DEVELOPMENT 27, 27–29 (World Bank ed., 2002) (noting the benefits of government transparency to economic policymaking); SUSAN ROSE-ACKERMAN, CORRUPTION AND GOVERNMENT 162–65 (1999) (describing how an informed public can hold government officials, particularly incompetent and corrupt ones, accountable); Christina Koningsor, *Transparency Deserts*, 114 NW. U. L. REV. 1461, 1491 (2020) (noting how FOI laws return a benefit to elected officials who "rely on public records logs and individual public records requests to identify trouble spots and gain insight into the issues that preoccupy the public"); Gary D. Bass et al., *Why Critics of Transparency Are Wrong*, BROOKINGS CTR. FOR EFFECTIVE PUB. MGMT. 12–17 (Nov. 2014), <https://www.brookings.edu/wp-content/uploads/2016/06/critics.pdf> [<https://perma.cc/V3NP-2BH5>] (describing how government transparency reduces corruption, increases government efficiency, and improves public safety).

III. THE LIMITS OF A RIGHT TO KNOW ABOUT THE GOVERNMENT

It is not my intention here to provide a comprehensive plan for implementing a right to know about the government. I leave that to others and to future articles. Instead, I offer some fundamental principles that should guide the development of a right to know. First, a right to know about the government must be limited in scope and should extend only so far as is necessary to fulfill the needs of democratic self-government. This will serve to ensure that the right is grounded in constitutional principles. Second, even when a right to know exists, it should yield when countervailing interests are sufficiently weighty. This will help to preserve other important societal values. Third, the government must have leeway in designing policies and procedures that account for the practical realities of providing public access. This will limit the costs and burdens a right to know imposes on government operations. I briefly touch on each of these points below.

A. *Limits on the Scope of a Right to Know*

The most significant limit on a right to know about the government comes from the bounded scope of the right itself. Before we consider its substantive requirements, we must have a principled method for defining the reach of a right to know.²⁷¹ As with all rights under the Constitution, a right to know would be limited in scope and cannot apply to all governmental activities and information. As discussed in Parts I and II, a right to know arises from the Constitution's commitment to popular sovereignty, and it should extend only so far as necessary to sustain the informed participation essential to democratic self-government.

A natural candidate for defining the scope of a right to know about the government is the “experience and logic test” that the Supreme Court developed in the context of a First Amendment right of access to court proceedings.²⁷² Under this test, a court is to consider whether the place and process “have historically been open to the press and general public” and whether public access “plays a significant positive role in the functioning of the particular process in question.”²⁷³ As Chief Justice Burger explained in *Press-Enterprise II*, “These considerations of experience and logic are, of course, related, for history and experience shape the functioning of governmental processes. If the particular proceeding in question passes these tests of experience and logic, a qualified First Amendment right of public access attaches.”²⁷⁴

Although the experience and logic test arose in the context of a public right of access to court proceedings, the test provides a principled means for courts to define the scope of a general right to know about the government. In fact, a number

271. Cf. Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1769 (2004) (“All rules—legal or otherwise—apply only to some facts and only under circumstances. Even before we see what a rule does, we must make the initial determination of whether it applies at all—whether we are within its scope of operation. So too with the First Amendment, which of course is not infinitely applicable.”).

272. See *Press-Enterprise II*, 478 U.S. 1, 8–9 (1986).

273. *Id.* at 8.

274. *Id.* at 9.

of courts have already used the experience and logic test to determine whether to recognize a right of access to government activities and records outside the context of judicial proceedings.²⁷⁵ While courts that applied the experience and logic test in these cases did not always hold that a right of access existed, the fact that they used the test in a variety of non-judicial circumstances shows that the test's utility transcends its judicial origins.

Use of a threshold test like the experience and logic test alleviates the concern that a right to know will extend indefinitely,²⁷⁶ but we need not confine ourselves only to the experience and logic test for defining the scope of a right to know about the government. Other approaches might be better suited to identifying what information is germane to self-government. For instance, Cass Sunstein proposes distinguishing between government outputs (actions) and inputs (deliberations).²⁷⁷ According to Sunstein, the justification for transparency of government outputs "is often exceptionally strong," while the argument for the disclosure of inputs is "qualitatively different and generally weaker."²⁷⁸ Under this approach, views exchanged as part of the government's decision-making processes

275. See Ardia, *A First Amendment Right to Know*, *supra* note 9, at 35–42 (citing cases). For example, in *Index Newspapers LLC v. U.S. Marshals Service*, the Ninth Circuit used the experience and logic test to evaluate a claim of public access to the streets of Portland to observe and record the government's response to Black Lives Matter protests. 977 F.3d 817, 829–31 (9th Cir. 2020). The Ninth Circuit found the test satisfied and wrote:

The *Press-Enterprise II* test emerged from a line of cases involving access to criminal judicial proceedings, but by its terms the test is not limited to any particular type of plaintiff or any particular type of forum. The Ninth Circuit and several other courts have applied *Press-Enterprise II*'s analytical framework to other settings, including planning commission meetings, student disciplinary records, state environmental agency records, settlement records, transcripts of state utility commission meetings, resumes of candidates for school superintendents, and legislator's telephone records, among others.

Id. at 830 n.8 (citing *Leigh v. Salazar*, 677 F.3d 892, 899 n.5 (9th Cir. 2012) (collecting cases)).

276. Ardia, *A First Amendment Right to Know*, *supra* note 9, at 38–43. The Sixth Circuit remarked on this in *Detroit Free Press v. Ashcroft*, writing that "the two-part 'experience and logic' test sufficiently addresses all of the *Houchins* Court's concerns for the implications of a constitutionally mandated general right of access to government information." 303 F.3d 681, 695 (6th Cir. 2002).

277. Cass R. Sunstein, *Output Transparency vs. Input Transparency*, in TROUBLING TRANSPARENCY: THE HISTORY AND FUTURE OF FREEDOM OF INFORMATION, *supra* note 187, at 187. Sunstein offers the following examples of government outputs: Department of Transportation study of what kinds of policies reduce deaths on the highways; Department of Labor analysis of the health risks associated with exposure to silica in the workplace; and Environmental Protection Agency regulations to curtail greenhouse gas emissions or policies about when it will bring enforcement actions against those who violate its water quality regulations. *Id.* He also writes that when the government becomes "aware of certain facts—for example, the level of inflation in European nations, the number of people who have died in federal prisons, the apparent plans of terrorist organizations, or levels of crime and air pollution in Los Angeles and Chicago," these facts "should also be seen as outputs, at least if they are a product of some kind of process of information acquisition." *Id.* at 187–88.

278. *Id.* at 188.

would be outside the scope of a right to know. “There are strong reasons to protect processes of internal deliberation, above all to ensure openness, candor, and trust,” Sunstein argues, and “it is often unclear that the public would gain much from seeing inputs, not least because of their massive volume (and usual irrelevance to anything that matters).”²⁷⁹ Government outputs, on the other hand, are of great importance to the public if it is to understand the work of government. As Sunstein explains, “Outside of unusual circumstances, what most matters is what government actually does, not who said what to whom.”²⁸⁰

My aim here is not to prescribe a definitive test for delineating the scope of a right to know about the government, but rather to demonstrate that courts can develop workable frameworks for doing so. Just as the Supreme Court has circumscribed other structural and implied constitutional rights—from state sovereignty to executive privilege—it can articulate principled boundaries for the right to government information. The experience and logic test, developed in the judicial access context, offers one promising framework. Other approaches might draw from existing First Amendment doctrine, separation of powers principles, or historical practices. The essential point is that the theoretical and practical challenges of defining a right to know about the government are not insurmountable—they are precisely the kind of interpretive tasks that courts regularly undertake in giving meaning to constitutional guarantees. Moving forward, the focus should be not on whether a right to know about the government can be defined, but on how best to shape its contours to serve democratic accountability while respecting legitimate countervailing interests.

B. Limits on the Application of a Right to Know

Even when a right to know exists, it must yield to sufficiently compelling countervailing interests. Of course, the government must be able to keep some secrets. No serious proponent of a right to know has argued that the Constitution mandates an absolute right of access to government information.²⁸¹ Like all constitutional rights, a right to know would be subject to exceptions when competing interests, including national security and personal privacy, are sufficiently weighty.²⁸² Where these precise lines should be drawn will need to be worked out.

279. *Id.* at 189.

280. *Id.* at 203.

281. *See, e.g.,* Emerson, *supra* note 7, at 16–17 (writing that the constitutional right to government information cannot be absolute, but insisting that any “exceptions should be scrupulously limited to those that are absolutely essential to the effective operation of government institutions”); Lewis, *supra* note 7, at 22 (“It is equally true, however, that a First Amendment right of access cannot be unlimited.”); Samaha, *supra* note 51, at 911 (“Every society . . . develops a system for disseminating information about government operations. No functioning state can withhold all such information. But no government of any significant size can be perfectly ‘transparent,’ either.”).

282. I have written extensively about the alarming amount of private and sensitive information in government records and the need to protect against the harms that come from the disclosure of this information. *See* David S. Ardia & Anne Klinefelter, *Privacy and Court Records: An Empirical Study*, 30 BERKELEY TECH. L.J. 1807, 1825–27, 1881–90 (2015) (discussing the wide range of privacy interests that are implicated by public access to courts

However, this process of line drawing is a familiar exercise for the courts. Indeed, judges have been engaged in this very task for over forty years in adjudicating public access claims to judicial proceedings and court records.²⁸³

Again, we can look to the Supreme Court's First Amendment cases for guidance on developing a principled approach to evaluating the government's interests in secrecy.²⁸⁴ Although the Court has used slightly different wording when evaluating restrictions on public access to the courts, sometimes requiring that restrictions be "essential to preserve higher values"²⁸⁵ and at other times stating that they must be "necessitated by a compelling governmental interest,"²⁸⁶ the test for restricting public access to the courts generally matches the Court's strict scrutiny test as applied in other settings.²⁸⁷ The strict scrutiny test offers a well-established standard for evaluating the government's purported need for secrecy,²⁸⁸ but as with the experience and logic test, alternative approaches might better align with the Constitution's commitment to self-government.²⁸⁹

We might also look to FOIA and the Sunshine Act for guidance in determining the exceptions to a right to know. FOIA lists nine categories of records

records); Ardia, *Court Transparency*, *supra* note 30, at 912–16 (describing how courts evaluate privacy interests in the context of disputes over public access to court proceedings and records); Ardia, *Privacy and Court Records*, *supra* note 30, at 1390–400 (examining privacy interests raised by online access to courts records).

283. See Ardia, *Court Transparency*, *supra* note 30, at 851–80.

284. We might also look outside the United States for suggestions on how to implement a right to know. See Fuchs, *supra* note 247, at 145–47.

285. See *Press-Enterprise II*, 478 U.S. 1, 13–14 (1986) (“[P]roceedings cannot be closed unless specific, on the record findings are made demonstrating that ‘closure is essential to preserve higher values and is narrowly tailored to serve that interest.’” (quoting *Press-Enterprise I*, 464 U.S. 501, 510 (1984))).

286. *Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596, 606–07 (1982). (“Where . . . the State attempts to deny the right of access . . . , it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.”).

287. See, e.g., *Kamasinski v. Jud. Rev. Council*, 44 F.3d 106, 109 (2d Cir. 1994). Under any test the courts apply to a right to know, the government must have the burden of justifying its limitations on access. See Ardia, *Court Transparency*, *supra* note 30, at 909, 912–16. This will force government officials to explain their reasoning and foreclose the government from cutting off all public access to government meetings and records as described in the hypothetical scenario in the Introduction.

288. See Ardia, *Privacy and Court Records*, *supra* note 30, at 1408.

289. For example, John Inazu argues that the strict scrutiny test should be reformulated to focus more on the government's interests and that courts should apply a proportionality test in evaluating whether restrictions on First Amendment rights should be struck down. See John Inazu, *First Amendment Scrutiny: Realigning First Amendment Doctrine Around Government Interests*, 89 BROOK. L. REV. 1, 3–4 (2023); see also ALEXANDER TESIS, *FREE SPEECH IN THE BALANCE* 40–56 (2020) (arguing for the application of a balancing or proportionality test in the free speech context). Indeed, the Supreme Court has described the test used in *United States v. Nixon* as a balancing test “between the Executive's interest in the confidentiality of its communications and the ‘constitutional need for production of relevant evidence in a criminal proceeding.’” *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 383 (2004) (quoting *United States v. Nixon*, 418 U.S. 683, 711 (1974)).

that are exempt from disclosure, including records that relate to national defense or foreign policy; internal personnel rules and practices; trade secrets and commercial or financial information; pre-decisional memoranda; personnel and medical files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; and certain records or information compiled for law enforcement purposes.²⁹⁰ Each of these exemptions has been the subject of extensive litigation over the years, offering the courts a deep body of caselaw to draw on in implementing a right to know.²⁹¹ As William Perry suggests, “It is even possible that the Supreme Court should and would decide that the norms embodied in the Government in the Sunshine Act or the Freedom of Information Act are constitutionally adequate, so far as a [constitutional] right to know is concerned.”²⁹²

To be clear, a right to know would not be coterminous with the statutory grants of access provided in FOIA and other open government laws.²⁹³ While the scope of a constitutional right of access would likely be narrower in some respects, covering only information that is germane to self-government, it would likely be broader in others. For example, a constitutional right of access would extend beyond the executive branch agencies currently subject to FOIA, encompassing the Executive Office of the President and Congress, entities presently excluded from FOIA’s reach.²⁹⁴

Nevertheless, the government’s past practices in providing public access under FOIA and other transparency laws should be relevant in determining the scope and application of a constitutional right to know.²⁹⁵ Existing open government laws could establish a baseline of access, offering courts valuable guidance in defining and implementing a right to know. Seth Kreimer describes current legislative efforts to ensure open government as embedding a “modern ‘small c’ constitutional practice” into America’s governing structure.²⁹⁶ For nearly six decades, FOIA has

290. 5 U.S.C § 552(b)(1)–(9). The Sunshine Act, which mandates that certain meetings of a covered agency be conducted in public, lists ten specified exceptions, including meetings that disclose matters related to national defense or foreign policy, internal personnel rules and practices of an agency, trade secrets and commercial or financial information obtained from a person and privileged or confidential, among others. *Id.* § 552b(c).

291. See Ardia, *Privacy and Court Records*, *supra* note 30, at 1408–41 (discussing how courts have addressed privacy issues in the context of public access to court records).

292. Perry, *supra* note 7, at 1198. Of course, many constitutional issues will still need to be resolved.

293. This reflects the constitutional right’s foundation in democratic principles rather than statutory policy choices. See *supra* Part I.

294. FOIA does not cover Congress, see *supra* note 164, or the President, the President’s immediate personal staff, or those units in the Executive Office of the President “whose sole function is to advise and assist the President.” *Kissinger v. Reps. Comm. for Freedom of the Press*, 445 U.S. 136, 156 (1980).

295. In the context of public access to the courts, the Supreme Court has said that a First Amendment right of access turns at least in part on “whether the place and process have historically been open to the press and general public.” *Press-Enterprise II*, 478 U.S. 1, 8 (1986).

296. Kreimer, *supra* note 8, at 1144–47.

served as the cornerstone of the nation's commitment to open government, generating a rich body of administrative practice and judicial precedent.²⁹⁷

C. Limits on the Impact of a Right to Know

Establishing clear boundaries on the scope of a right to know and allowing the government to withhold information in order to preserve other societal values will help to reduce the impact a right to know will have on government operations. Even with these limitations, however, a right to know will still impose costs and burdens on the government. To further minimize these impacts, the government must have flexibility in designing policies and procedures that account for the practical realities of public access. This would likely encompass decisions about access procedures, disclosure methods, and response timelines, among other operational requirements—provided that these administrative choices do not unduly burden the underlying right of access. The Supreme Court has acknowledged, in contexts ranging from voting rights to procedural due process, that when applying constitutional guarantees, courts should consider the government's legitimate resource constraints and operational realities.²⁹⁸ Similarly, a right to know should balance public access with pragmatic implementation, allowing the government to adopt reasonable procedures that fulfill its constitutional obligations while maintaining operational effectiveness.

Government transparency is not costless. Indeed, “[i]t costs something just to announce that a meeting will be public, let alone to make accommodations for the public at that meeting.”²⁹⁹ But this is just the start. Collecting, processing, and releasing information requires significant resources, resulting in the diversion of funds and staff from other duties.³⁰⁰ Furthermore, Margaret Kwoka points out that the majority of FOIA requestors are commercial entities whose frequent requests for information place a large burden on government and end up “transferring wealth

297. 5 U.S.C. § 552. Some statutory mechanisms for public access even predate FOIA. Section 3 of the Administrative Procedure Act, enacted in 1946, required agencies to make certain government information available to the public. Pub. L. 79-404, 60 Stat. 237 (1946). And in the aftermath of Watergate, Congress added the Sunshine Act, 5 U.S.C. § 552b; required the retention of presidential records in the Presidential Records Act, 44 U.S.C. §§ 2201–2209; provided protections for government whistleblowers in the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (codified as amended in scattered sections of 5 U.S.C.); imposed reporting obligations on the Executive Branch in the Federal Funding Accountability and Transparency Act of 2006, 31 U.S.C. § 6101 (requiring disclosure of federal contract, grant, loan, and other financial assistance awards); and created a network of Inspectors General charged with investigating executive branch agencies and reporting to Congress. See Kimberly L. Wehle & Jackson Garrity, *Executive Accountability Legislation from Watergate to Trump—and Beyond*, 7 U. PA. J.L. & PUB. AFFS. 37, 63 (2021).

298. See, e.g., *Burdick v. Takushi*, 504 U.S. 428, 439–40 (1992) (finding that “legitimate interests asserted by the State are sufficient to outweigh the limited burden that the write-in voting ban imposes upon Hawaii's voters”); *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (“[T]he specific dictates of due process generally requires consideration of . . . the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”).

299. Woods, *supra* note 248, at 25.

300. See, e.g., Fenster, *supra* note 184, at 907–08.

from the federal government to private enterprise.”³⁰¹ Public access to government information can also be weaponized to achieve political goals, intentionally hinder government operations, sow public distrust, create legal roadblocks for agencies, and discourage effective decision-making.³⁰² These are serious concerns that should be accounted for when implementing a right to know.

The government would undoubtedly have some leeway in creating policies and procedures that account for the burdens that public access imposes on government operations. With regard to a First Amendment right of access to the courts, judges and court administrators have been granted broad discretion in designing their access policies and procedures to account for the practical realities of public access.³⁰³ In *Globe Newspaper v. Superior Court*, the Supreme Court explained that “limitations on the right of access that resemble ‘time, place, and manner’ restrictions on protected speech . . . would not be subjected to . . . strict scrutiny.”³⁰⁴ Deference under what is known as the “time, place, and manner test” is generally appropriate when the restriction serves an important (or significant) governmental interest, the interest is unrelated to the content of the information to be disclosed, and there are no less restrictive alternatives.³⁰⁵ In the context of access to judicial information, courts have applied this test to restrictions on when and how court records may be inspected, on the number of spectators allowed in the courtroom, and on the use of cameras and recording devices³⁰⁶—finding such restrictions permissible “based on the legitimate societal interest in protecting the adjudicatory process from disruption.”³⁰⁷

In applying a right to know about the government, courts should permit similar discretion on the part of the government to devise administrative systems for providing public access. So long as officials do not create different procedures based on the content of the information, the “time, place, and manner test” should permit the government to impose reasonable requirements for access that are tied to its operational needs. This would likely allow the government to create policies addressing, among other things, how many people can attend a meeting in person, how records can be requested, how long it takes to receive records, how disclosures

301. Kwoka, *supra* note 175, at 1415.

302. See, e.g., FUKUYAMA, *supra* note 248, at 504; Pozen, *supra* note 2, at 1127–28.

303. See Ardia, *Privacy and Court Records*, *supra* note 30, at 1439–42 (discussing how judges have addressed the administrative needs of courts in administering the First Amendment right of access to court proceedings and records).

304. 457 U.S. 596, 607 n.17 (1982) (citations omitted); see also *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 581 n.18 (1980) (plurality opinion) (“[A] trial judge, in the interest of the fair administration of justice, [may] impose reasonable limitations on access to a trial.”).

305. See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *United States v. O’Brien*, 391 U.S. 367, 377 (1968).

306. See Ardia, *Privacy and Court Records*, *supra* note 30, at 1439–41.

307. *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1179 (6th Cir. 1983); see also *Illinois v. Allen*, 397 U.S. 337, 343 (1970); *United States v. DeLuca*, 137 F.3d 24, 33–35 (1st Cir. 1998); *Bell v. Evatt*, 72 F.3d 421, 433 (4th Cir. 1995); *United States v. Hastings*, 695 F.2d 1278, 1282 (11th Cir. 1983); *Freitas v. Admin. Dir.*, 92 P.3d 993, 999 (Haw. 2004); *Williams v. State*, 690 N.E.2d 162, 168–69 (Ind. 1997).

are formatted, and how fees are assessed for public access. Of course, the government must still show that its access policies and procedures are reasonable, and it cannot impose such onerous requirements that it effectively denies public access entirely—but the government should have some discretion to craft policies and procedures that address the practical realities of public access.

It may even be the case that the government can comply with the requirements of a right to know by instituting proactive disclosure practices. Experts on government transparency have directed a great deal of attention at improving the efficacy of existing disclosure laws while seeking to reduce the burdens these laws impose on the government. Many of the scholars I cite here have been leaders in this effort.³⁰⁸ For example, David Pozen writes that “we ought to be considering how we can reduce reliance on FOIA’s request-and-respond paradigm while strengthening the role of alternative transparency models,” suggesting that “whole categories of records deemed appropriate for release can be posted online or otherwise published on a regular schedule.”³⁰⁹ Others recommend that effective transparency “requires better institutional design,” including “vest[ing] authority in non-judicial institutions that can develop expertise in overseeing informational disputes between members of the public and government agencies.”³¹⁰ We might draw inspiration for such an approach from Michael Karanicolas and Margaret Kwoka’s intriguing article titled *Overseeing Oversight*, which argues for the creation of an independent administrative body, such as an information commission located outside of the executive branch that has the power to order agencies to release records.³¹¹ Karanicolas and Kwoka explain that “a specialized information commission or commissioner will be able to develop a strong level of expertise in the right to information and in the appropriate secrecy standards for concepts like national security and commercial confidentiality.”³¹²

These proposals provide a good starting point for implementing a right to know about the government, but one of the benefits (and burdens, too) of recognizing a *constitutionally* based right of access to government information is that it will force us to think beyond the existing approaches that dominate the debate over government transparency today. As Barry Sullivan points out, the passage of FOIA “relieved courts from having to explore some of the difficult questions connected with the recognition of a general, individually enforceable constitutional

308. See generally, e.g., Fenster, *supra* note 184; Kitrosser, *Secrecy in the Immigration Courts*, *supra* note 8; Kreimer, *supra* note 8; Kwoka, *supra* note 175; Pozen, *supra* note 2.

309. Pozen, *supra* note 2, at 1148–49; see also *id.* at 1149 (“FOIA has always contained some limited provisions to this effect, but a stronger version of affirmative disclosure was the major road not taken when FOIA was enacted.”).

310. Fenster, *supra* note 184, at 946.

311. Michael Karanicolas & Margaret B. Kwoka, *Overseeing Oversight*, 54 CONN. L. REV. 655, 688–97 (2022).

312. *Id.* at 693. Karanicolas and Kwoka note that at the state level several such bodies already exist. *Id.* at 696 (“Connecticut, New Jersey, New York, Indiana, and Utah all have established specialized administrative oversight bodies to process complaints related to their local freedom of information legislation.”).

‘right to know’”³¹³ Elevating access rights to constitutional status will require courts—and scholars—to engage with more fundamental questions: the relationship between government information and democratic legitimacy, the structural requirements of meaningful citizen oversight, and the balance between transparency and effective governance.

CONCLUSION

As the past decade has shown, the norms of democratic governance are dangerously shallow. A flood of misinformation, emanating at times from the government itself, coupled with the steady erosion of congressional oversight and expanded assertions of executive privilege are straining the Constitution’s carefully crafted system of checks and balances. Because these strains are likely to increase as the country becomes further polarized in its politics, it is more important than ever to reaffirm the Constitution’s commitment to self-government as a means to revitalize American democracy.

The refusal to make a right of access to government information a *constitutional* right signals that the government has the final say on matters of public oversight. This is a disturbing state of affairs for any democracy. Access to government information is not a luxury to be handed out by government officials, but the very foundation of democratic legitimacy. If the government can dictate what the public knows, the idea of consent of the governed is meaningless. As Harold Cross pointed out in 1953, without a right of access to information about the government, “the citizens of a democracy have but changed their kings.”³¹⁴

The Supreme Court’s recognition of a First Amendment right of access to judicial proceedings provides compelling precedent for a broader right to know about the government. However, the justification for a right to know about the government extends beyond the First Amendment to the Constitution’s structural implementation of popular sovereignty. Although the Constitution does many things, it is, at its core, a blueprint for *self*-government. If citizens are the true sovereigns, as the Constitution makes clear, they must have access to the information necessary to understand, evaluate, and control the actions of their government.

A right to know grounded in the Constitution’s promise of popular sovereignty provides a principled and lasting foundation for self-government. It empowers individuals to hold their representatives accountable for their actions and ensures that power resides not in the halls of government, but in the hands of the people. As James Madison warned, “Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.”³¹⁵ It is time we heeded this wisdom.

313. Sullivan, *supra* note 170, at 18.

314. CROSS, *supra* note 6, at xiii.

315. Letter from James Madison to W.T. Barry, *supra* note 4, at 103.

ARTICLE

A CONSTITUTIONAL RIGHT TO PUBLIC INFORMATION

CHAD G. MARZEN*

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INTRODUCTION

In recent years, advocates of increased governmental transparency and access to public records have garnered legislative successes at the state level. For instance, in 2017 Oregon implemented a statutory timeframe requiring public

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entities to acknowledge receipt of public records requests within five business days¹ and to respond to such requests within ten business days.² In 2017, South Carolina enacted reform of the South Carolina Freedom of Information Act³ and implemented legislation providing for a ten business day deadline for public entities to respond to requests for records less than two years old.⁴ In Wyoming, legislation to establish a thirty calendar day deadline⁵ for governmental entities to furnish records responsive to a public records request passed through the Wyoming Legislature and was signed into law in 2019.⁶ With these developments in recent years, those advocating for more open, transparent government seemingly have momentum.

Despite these successes at the state level, the United States Supreme Court's decision in *McBurney v. Young* created a serious setback for open government advocates.⁷ In *McBurney*, the court reaffirmed there is no constitutional right to public records.⁸ The court also ruled that a state has the discretion to limit access to public records to its own citizens as this policy violates neither the Privileges and Immunities Clause nor the dormant Commerce Clause.⁹ The *McBurney* decision makes it permissible for states to amend their public records laws to prohibit non-state-citizen access to the records, even in the event that a noncitizen may have a compelling interest in the public records requested.¹⁰

In the wake of *McBurney*, this Article calls for policymakers at both the federal and state level to ensure government records remain open and accessible to the public.¹¹ I urge policy makers to fight not only to strengthen the Freedom

¹ See OR. REV. STAT. § 192.324(2) (2019).

² See OR. REV. STAT. § 192.329(5) (2019).

³ See H.R. 3352, 122nd Gen. Assemb., Reg. Sess. (S.C. 2017).

⁴ See S.C. CODE ANN. § 30-4-30(C) (2019).

⁵ See S File No. 57, 65th Leg., 2019 Gen. Sess. (Wyo. 2019).

⁶ See Ramsey Scott, *Legislators contemplate changes to new open records law*, GILLETTE NEWS RECORD (June 5, 2019), https://www.gillette newsrecord.com/news/wyoming/article_39902b53-72f7-51c1-ba2b-eef0d45276e7.html.

⁷ See *McBurney v. Young*, 569 U.S. 221 (2013).

⁸ *Id.* at 232 (“This Court has repeatedly made clear that there is no constitutional right to obtain all the information provided by FOIA laws.”).

⁹ *Id.* at 237 (“Because Virginia’s citizens-only FOIA provision neither abridges any of the petitioners’ fundamental privileges and immunities nor impermissibly regulates commerce, petitioners’ constitutional claims fail.”).

¹⁰ See James Bosher, *Questions linger over impact of McBurney v. Young decision* (2020), REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, <https://www.rcfp.org/journals/questions-linger-over-impac/> (last visited Mar. 18, 2020).

¹¹ See discussion *infra*. Part III.

of Information Act¹² and the various state public records laws,¹³ but also to pursue an amendment to the United States Constitution providing a right to public information.¹⁴ In addition, in states where a constitutional right to public information does not exist, amendments that ensure such a right specifically exists should be enacted.¹⁵ A constitutional right to public records currently is in place in at least seven state constitutions.¹⁶ These state constitutions can guide legislators on how to draft a model federal or state constitutional amendment. This Article contributes a draft of such an amendment to start this conversation.¹⁷

Part I of this Article explains the *McBurney* decision and the ramifications of the absence of a federal constitutional right to public information.¹⁸ Part II discusses the state constitutional right to public records provisions of the state constitutions of California, Florida, Illinois, Louisiana, Montana, New Hampshire, and North Dakota.¹⁹ Part III of this Article examines how access to public records and documents will be improved by the implementation of a federal constitutional amendment and state constitutional amendments(s) solidifying a constitutional right to public information.²⁰ Part IV then briefly offers a proposed draft of a federal and/or state constitutional amendment providing for a constitutional right to public information.²¹ In concluding, this Article contends the enshrining of a right to public information in both the United States Constitution as well as various state constitutions will ensure

¹² See e.g., Aram A. Gavoor & Daniel Miktus, *Oversight of Oversight: A Proposal for More Effective FOIA Reform*, 66 CATH. U. L. REV. 525, 534 (2017) (“Though agencies and presidential administrations praise FOIA and open government principles, they also quietly endeavor to undermine FOIA’s purposes. Rather than permit agencies and presidential administrations that will naturally oppose meaningful FOIA modification to derail such reform efforts, Congress should enact precise FOIA reform measures to ensure that FOIA’s main goals and purposes are fully realized.”).

¹³ See generally Chad G. Marzen, *Public Records Denials*, 11 N.Y.U. J. L. & LIBERTY 966 (2018) (discussing various provisions of state public records laws).

¹⁴ See discussion *infra*. Part III.

¹⁵ See discussion *infra*. Part III.

¹⁶ The author reviewed each of the fifty state constitutions using the following keywords: “public records,” “public documents,” “documents of public” and “records of public.” At least seven state constitutions were identified which include a specific right to public records. These states include: California (see CAL. CONST. art. I, § 3(b)(1)); Florida (see FLA. CONST. art. I, § 24); Illinois (see ILL. CONST. art. VIII, § 1(c)); Louisiana (see LA. CONST. art. XII, § 3); Montana (see MONT. CONST. art. II, § 9); New Hampshire (see N.H. CONST. art. 8) & North Dakota (see N.D. CONST. art. XI, § 6).

¹⁷ See discussion *infra*. Part III.

¹⁸ See discussion *infra* Part I.

¹⁹ See discussion *infra* Part II.

²⁰ See discussion *infra* Part III.

²¹ See discussion *infra* Part IV.

greater access of public records and documents to the general public, consistent with the democratic value of open, transparent government.²²

I. THE *MCBURNEY* DECISION AND FEDERAL CONSTITUTIONAL LAW

Several states, including Alabama,²³ Arkansas,²⁴ Delaware,²⁵ Missouri,²⁶ New Hampshire,²⁷ New Jersey,²⁸ Tennessee²⁹ and Virginia,³⁰ limit access to public records by only allowing citizens of the state to request public records. Plaintiffs in the *McBurney v. Young* case challenged the Virginia statute limiting

²² See discussion *infra* Conclusion.

²³ See ALA. CODE § 36-12-40 (2019) (“Every citizen has a right to inspect and take a copy of any public writing of this state, except as otherwise expressly provided by statute...”); State ex. rel. Kernells v. Ezell, 282 So.2d 266, 268 (Ala. 1973).

²⁴ See ARK. CODE ANN. § 25-19-105(a)(1)(A) (2019) (“Except as otherwise specifically provided by this section or by laws specifically enacted to provide otherwise, all public records shall be open to inspection and copying by any citizen of the State of Arkansas during the regular business hours of the custodian of the records”).

²⁵ See DEL. CODE ANN. tit. 29, § 10003(a) (2019) (“All public records shall be open to inspection and copying during regular business hours by the custodian of the records for the appropriate public body. Reasonable access to and reasonable facilities for copying of these records shall not be denied to any citizen”).

²⁶ See MO. REV. STAT. § 109.180 (2019) (“Except as otherwise provided by law, all state, county and municipal records kept pursuant to statute or ordinance shall at all reasonable times be open for a personal inspection by any citizen of Missouri, and those in charge of the records shall not refuse the privilege to any citizen”).

²⁷ See N.H. REV. STAT. § 91-A:4 (2019) (“Every citizen during the regular or business hours of all public bodies or agencies, and on the regular business premises of such public bodies or agencies, has the right to inspect all governmental records in the possession, custody, or control of such public bodies or agencies, including minutes of meetings of the public bodies, and to copy and make memoranda or abstracts of the records or minutes so inspected, except as otherwise prohibited by statute or RSA 91-A:5”).

²⁸ See N.J. STAT. ANN. § 47:1A-1 (2019) (“The Legislature finds and declares it to be the public policy of this State that: government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access accorded by P.L. 1963, c. 73 (C:47:1A-1 et. seq.) as amended and supplemented, shall be construed in favor of the public’s right of access”).

²⁹ See TENN. CODE ANN. § 10-7-503(a)(2)(A) (“All state, county and municipal records shall, at all times during business hours, which for public hospitals shall be during the business hours of their administrative offices, be open for personal inspection by any citizen of this state, and those in charge of the records shall not refuse such right of inspection to any citizen, unless otherwise provided by state law”).

³⁰ See VA. CODE ANN. § 2.2-3704 (2019) (“Except as otherwise specifically provided by law, all public records shall be open to citizens of the Commonwealth, representatives of newspapers and magazines with circulation in the Commonwealth, and representatives of radio and television stations broadcasting in or into the Commonwealth during the regular office hours of the custodian of such records”).

the applicability of the benefits of public records laws.³¹ In *McBurney*, two people, one from Rhode Island and the other from California, filed requests for public records in Virginia under the Virginia Freedom of Information Act (“FOIA”).³² One of the plaintiffs was a citizen of Rhode Island whose ex-spouse lived in Virginia.³³ After his spouse defaulted on a child support obligation, the citizen of Rhode Island sought public records from an agency in Virginia relating to his application for child support.³⁴ The request was denied on the basis that he was not a Virginia citizen.³⁵

The other plaintiff, a California citizen, operated a business that requested real estate tax records for clients from states throughout the United States.³⁶ He requested real estate tax records for a particular client from a county in Virginia and his FOIA request was also denied because he was not a citizen of Virginia.³⁷ The United States District Court for the Eastern District of Virginia upheld the denial of the records³⁸ and the United States Court of Appeals for the Fourth Circuit affirmed this decision.³⁹

Both plaintiffs argued violations of the Privileges and Immunities Clause and the plaintiff from California, who operated the business, contended that the denials of the public records requests also violated the dormant Commerce Clause.⁴⁰ The dormant Commerce Clause claim did not persuade the *McBurney* court, which held that the state of “Virginia neither prohibits access to an interstate market nor imposes burdensome regulation on that market. Rather, it merely creates and provides to its own citizens copies – which would not otherwise exist – of state records.”⁴¹

The Privileges and Immunities Clause of the Constitution requires that “the Citizens of each State shall be entitled to all Privileges and Immunities of

³¹ See *McBurney v. Young*, 569 U.S. 224, 225 (2013).

³² *Id.* at 224–225.

³³ *Id.* at 224.

³⁴ *Id.* at 224–225.

³⁵ *Id.* at 225.

³⁶ *Id.*

³⁷ *McBurney v. Young*, 569 U.S. 224, 225 (2013).

³⁸ *McBurney v. Cuccinelli*, 780 F. Supp. 2d 439 (E.D. Va. 2011).

³⁹ *McBurney v. Young*, 667 F.3d 454 (4th Cir. 2012).

⁴⁰ See Edward A. Zelinsky, *The False Modesty of Department of Revenue v. Davis: Disrupting the Dormant Commerce Clause Through the Traditional Public Function Doctrine*, 29 VA. TAX. REV. 407, 412 (2010) (“The Commerce Clause of the U.S. Constitution affirmatively bestows upon Congress the power “To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” One of the great debates of the American constitutional tradition is whether this explicit grant of legislative power implicitly constrains the authority of the states. From this debate has emerged the notion of the ‘dormant’ (or ‘negative’) Commerce Clause, i.e., the proposition that, even in the absence of federal legislation, the Clause on its own displaces the authority of the states relative to interstate commerce”); see also *Young*, 569 U.S. at 225.

⁴¹ *Id.* at 235–236.

Citizens in the several States.”⁴² The United States Supreme Court in *Paul v. Virginia* noted the purpose of the Privileges and Immunities Clause is “to place the citizens of each State upon the same footing with citizens of other States, as far as the advantages resulting from citizenship in those States are concerned.”⁴³ The plaintiffs contended four specific privileges were violated in the denial of the public records requests: the right to a common calling,⁴⁴ right to place all citizens on the “same footing” by infringing access to records which are “indispensable to securing property rights,”⁴⁵ the right to access to the courts in Virginia,⁴⁶ and the right to public information.⁴⁷

The plaintiffs in *McBurney* first argued the Virginia FOIA statute denied the California plaintiff the ability to engage in his business because it denied him the ability to collect records in Virginia.⁴⁸ Thus, the statute infringed upon his right to a “common calling.”⁴⁹ The Supreme Court specifically remarked that the Court has struck down laws on the “common calling” basis “only when those laws were enacted for the protectionist purpose of burdening out-of-state citizens.”⁵⁰ As an example of the protectionist purpose the Court cited⁵¹ the case of *Hicklin v. Orbeck*, where the United States Supreme Court struck down an Alaska statute which gave a hiring preference for Alaska residents over nonresidents working in the state’s oil and gas industry.⁵² The Supreme Court in *McBurney* contrasted the Virginia FOIA statute with the *Hicklin* decision, concluding that “while the Clause forbids a State from intentionally giving its own citizens a competitive advantage in business or employment, the Clause does not require that a State tailor its every action to avoid incidental effect on out-of-state tradesmen.”⁵³

In addition, the court in *McBurney* found that the Virginia FOIA statute also did not impose a significant burden on noncitizens to own or transfer property in Virginia.⁵⁴ While the Supreme Court acknowledged that real estate tax assessment records in Virginia could only be requested through the FOIA law by state citizens, it also noted that almost every county in Virginia placed this information online.⁵⁵ The *McBurney* Court concluded that “requiring

⁴² U.S. CONST. art. IV, § 2, cl. 1.

⁴³ *Paul v. Virginia*, 75 U.S. 168, 180 (1868).

⁴⁴ Brief for Petitioner at 17-18, *McBurney v. Young*, 569 U.S. 221 (2013) (No. 12-17).

⁴⁵ *Id.* at 18.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 35.

⁴⁹ *Id.*

⁵⁰ See *McBurney v. Young*, 569 U.S. 221, 227 (2013).

⁵¹ *Id.*

⁵² *Hicklin v. Orbeck*, 437 U.S. 518 (1978).

⁵³ *Young*, 569 U.S. at 229.

⁵⁴ *Id.* at 230-31.

⁵⁵ *Id.* at 230.

noncitizens to conduct a few minutes of Internet research in lieu of using a relatively cumbersome state FOIA process cannot be said to impose any significant burden on noncitizens' ability to own or transfer property in Virginia."⁵⁶

The *McBurney* Court also rejected the argument that the Virginia FOIA law denied plaintiffs access to the courts.⁵⁷ The Court noted that Virginia's laws provide for discovery and the ability to send subpoenas *duces tecum* in litigation and it gives all, both citizens of the state and noncitizens of the state, access to judicial records.⁵⁸

Finally, the *McBurney* Court also found that there is not a constitutional right to public information.⁵⁹ The Supreme Court's prior jurisprudence reveals no constitutional right. In *Houchins v. KQED, Inc.*, the Court found that "there is no discernible basis for a constitutional duty to disclose, or for standards governing disclosure of or access to information."⁶⁰ The *McBurney* Court reaffirmed that there is no constitutional right⁶¹ and also noted that there is no common law right to public information.⁶²

Overall, the *McBurney* decision not only leaves a gap in constitutional rights—in clarifying that there is no constitutional right to public information afforded by the United States Constitution—it also explicitly grants states the ability to restrict the release of public information to citizens of that state only.⁶³ As will be discussed further, the ramifications of this decision galvanizes a compelling argument to enact a constitutional amendment adding the right to public information to the United States Constitution.

II. STATE CONSTITUTIONS AND THE RIGHT TO PUBLIC INFORMATION

Despite the United States Supreme Court decision in *McBurney*, several states have the right to public records specifically enumerated in their state

⁵⁶ *McBurney v. Young*, 569 U.S. 221, 230–31 (2013).

⁵⁷ *Id.* at 231–32.

⁵⁸ *Id.*

⁵⁹ *Id.* at 232.

⁶⁰ *Houchins v. KQED, Inc.*, 438 U.S. 1, 14 (1978).

⁶¹ *Young*, 569 U.S. at 232 ("This Court has repeatedly made clear that there is no constitutional right to obtain all the information provided by FOIA laws").

⁶² *Id.* at 233–34. Despite this holding, at least one scholar has noted in a 2015 law review article that there was once a "thriving" doctrine for the common law right to information. See Joe Regalia, *The Common Law Right to Information*, 18 RICH. J. L. & PUB. INT. 89, 90 (2015) ("A once-thriving doctrine, today the common law right to information has been largely forgotten by U.S. courts at both the state and federal level"). Although the *McBurney* Court failed to recognize a federal common law right to public information, a number of state cases note there is a state common law right to public information. See e.g., *State of Missouri ex. rel. Pulitzer Missouri Newspapers, Inc. v. Seay*, 330 S.W.3d 823, 826 (Mo. App. S.D. 2011) ("In Missouri, there is a common law right of public access to court and other public records").

⁶³ See *Young*, 569 U.S. at 230–232.

constitutions. The length, breadth, and contours of these state constitutional rights vary, from conferring rights to access public information generally, to conferring the limited right to examine public records involving the utilization of public funds, as is the case of Illinois.⁶⁴ Two states, Montana and New Hampshire, refer to the state constitutional right to examine records as a “right-to-know.”⁶⁵ Each of these state constitutional amendments will be discussed briefly in this section.

A. California

California’s state constitution enumerates the right to public records as a general “right to access to information” under Article I’s Declaration of Rights.⁶⁶ The California Constitution states: “The people have the right of access to information concerning the conduct of the people’s business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.”⁶⁷

B. Florida

Florida’s constitutional amendment providing the right to inspect public records and mandate open meetings in cases where “public business” is discussed is the most extensive of any state with a specific constitutional right to public information.⁶⁸ The Florida Constitution stipulates that “every person has the right to inspect or copy” the public records made in connection with the “official business” of any “public body, officer, or employee of the state.”⁶⁹ Only records that are particularly exempted by the Florida Legislature or by the Florida Constitution are exempt from disclosure.⁷⁰ The Florida Constitution states:

Every person has the right to inspect or copy of any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created by law or this Constitution.⁷¹

⁶⁴ ILL. CONST. art VIII, § 1 (c).

⁶⁵ MONT. CONST. art. II, § 9 & N.H. CONST. art. 8.

⁶⁶ CAL. CONST. art. I, § 3 (b)(1).

⁶⁷ *Id.*

⁶⁸ FL. CONST. art. I, § 24.

⁶⁹ *See* FL. CONST. art. I, § 24(a).

⁷⁰ *Id.*

⁷¹ *Id.*

The Florida Constitution also requires that all meetings of public bodies where public bodies take “official acts” or discuss “public business” be open.⁷² The Constitution provides:

All meetings of any collegial public body of the executive branch of state government or of any collegial public body of a county, municipality, school district, or special district, at which official acts are to be taken or at which public business of such body is to be transacted or discussed, shall be open and noticed to the public and meetings of the legislature shall be open and noticed as provided in Article III, Section 4(e), except with respect to meetings exempted pursuant to this section or specifically closed by this Constitution.⁷³

In contrast to all other state constitutions providing a right to public information, the Florida Constitution specifically states that the constitutional rights to inspect or copy public records, as well as the right to open meetings, are “self-executing” rights which do not require additional legislation to be implemented.⁷⁴ The self-executing/non-self-executing distinction is a critical one. For example, in the realm of treaty enforcement in domestic courts, courts generally find self-executing treaty rights to be automatically enforceable in courts, while non-self-executing treaties require implementing legislation for treaty provisions to be successfully invoked.⁷⁵ In essence, by the Florida Constitution providing the right to inspect or copy public records, as well as the right for open meetings to be self-executing, these rights automatically apply even in the scenario of the Florida Legislature repealing its freedom of information law, known as the Sunshine Law.⁷⁶

Finally, the Florida Constitution requires that exemptions to the right to public information be enumerated.⁷⁷ The Florida Constitution also places a very high bar for the creation of new exemptions, demanding a two-thirds vote of both the Florida House of Representatives and Florida Senate.⁷⁸ In effect, the Florida Constitution creates a presumption that a public record must be produced through a public records request and any exemption must overcome this presumption to be applicable. The Florida Constitution states the following with regard to exemptions:

⁷² See FL. CONST. art. I, § 24(b).

⁷³ *Id.*

⁷⁴ See FL. CONST. art. I, § 24(c).

⁷⁵ See David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 *YALE J. INT’L L.* 129, 146 (1999) (“When courts say that a particular treaty provision is self-executing, they sometimes mean that it is automatically incorporated into domestic law upon ratification of the treaty. Under this interpretation, the statement that a treaty provision is not self-executing means that it has no status as domestic law in the absence of implementing legislation.”).

⁷⁶ See FLA. STAT. ANN. § 119.01 et. seq. (West 2019).

⁷⁷ See FLA. CONST. art. I, § 24(c).

⁷⁸ *Id.*

This section shall be self-executing. The legislature, however, may provide by general law passed by a two-thirds vote of each house for the exemption of records from the requirements of subsection (a) and the exemption of meetings from the requirements of subsection (b), provided that such law shall state with specificity the public necessity justifying the exemption and shall be no broader than necessary to accomplish the stated purpose of the law. The legislature shall enact laws governing the enforcement of this section, including the maintenance, control, destruction, disposal, and disposition of records made public by this section, except that each house of the legislature may adopt rules governing the enforcement of this section in relation to records of the legislative branch. Laws enacted pursuant to this subsection shall contain only exemptions from therequirements of subsections (a) or (b) and provisions governing the enforcement of this section, and shall relate to one subject.⁷⁹

C. Illinois

In contrast to Florida, the Constitution of the state of Illinois contains the most limited right to public records out of the state constitutions that confer a constitutional right to public information. In Illinois, only reports and records involving the “obligation, receipt and use of public funds” are available to the public for inspection.⁸⁰ In addition, the text of the Constitution only provides for “inspection” and does not explicitly mention the right to copy records.⁸¹ The Illinois Constitution states the following: “Reports and records of the obligation, receipt and use of public funds of the State, units of local government and school districts are public records available for inspection by the public according to law.”⁸²

D. Louisiana

The Louisiana Constitution labels the right to public information as a “right to direct participation.”⁸³ The provision specifically confers the right to “examine” public documents.⁸⁴ It states, “No person shall be denied the right to observe the deliberations of public bodies and examine public documents, except in cases established by law.”⁸⁵

⁷⁹ *Id.*

⁸⁰ See ILL. CONST. art VIII, § 1(c).

⁸¹ *Id.*

⁸² *Id.*

⁸³ See LA. CONST. art. XII, § 3.

⁸⁴ *Id.*

⁸⁵ *Id.*

E. Montana

The right to public information in the Montana Constitution is listed in the Constitution's "Declaration of Rights."⁸⁶ The right is characterized as the public's "right-to-know," and specifically provides a right to "examine" documents.⁸⁷ The Montana Constitution also provides a balancing test to weigh the right to examine documents with the right to privacy.⁸⁸ The Montana Constitution states: "No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure."⁸⁹

F. New Hampshire

Just like the Montana Constitution, in the New Hampshire Constitution's right to public information is characterized as a "right-to-know."⁹⁰ This right is included in the Constitution's Bill of Rights.⁹¹ The Constitution states:

All power residing originally in, and being derived from, the people, all the magistrates and officers of government are their substitutes and agents, and at all times accountable to them. Government, therefore, should be open, accessible, accountable and responsive. To that end, the public's right of access to governmental proceedings and records shall not be unreasonably restricted.⁹²

G. North Dakota

North Dakota explicitly requires public records to be "open and accessible for inspection during reasonable office hours."⁹³ Article XI, Section 6 of the North Dakota Constitution states:

Unless otherwise provided by law, all records of public or governmental bodies, boards, bureaus, commissions, or agencies of the state or any political subdivision of the state, or organizations or agencies supported in whole or in part by public funds, or expending public funds, shall be public records, open and accessible for inspection during reasonable office hours.⁹⁴

⁸⁶ See MONT. CONST. art. II, § 9.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ See MONT. CONST. art. II, § 9.

⁹⁰ See N.H. CONST. art. 8.

⁹¹ *Id.*

⁹² *Id.*

⁹³ See N.D. CONST. art. XI, § 6.

⁹⁴ *Id.*

III. ARGUMENTS FOR A CONSTITUTIONAL RIGHT TO PUBLIC INFORMATION

Given the fact that several states have a right to public information enumerated in their constitution, the adoption of a federal constitutional amendment is not outlandish. In states that have adopted a constitutional right to public information, a number of cases have highlighted the importance of implementing this right to protect open and transparent government. There are multiple salient ... constitutions. These cases and the courts' decisions are discussed below. There are multiple salient arguments supporting the inclusion of a specific constitutional right to public information in the United States Constitution as well as each of the state constitutions.

A. *A Federal Constitutional Amendment and State Constitutional Amendments Protecting the Right to Public Information Would Assist Investigations and Promote Public Safety*

Perhaps one of the most convincing arguments to support both a federal constitutional amendment and state constitutional amendments to establish a constitutional right to public information is that such a right would promote justice by assisting with investigations. Consider the following hypothetical scenario, which could occur in the wake of the *McBurney* decision. A private investigator who lives in Iowa is investigating a suspicious fatality in the state of Virginia, which restricts access to the privileges of its FOIA laws to state citizens. Someone has committed a murder. The private investigator is hired by a family member of the decedent, who also lives outside of the state of Virginia, to investigate the fatality. The family member would like the investigator to request copies of the applicable law enforcement agency's police report, the law enforcement agency's file that is not work-product, and any and all 911 calls concerning the incident. However, due to Virginia's FOIA laws restricting access to out-of-state residents, that investigator has encountered a major roadblock in her independent investigation, which may yield justice as well as promote the safety of the public.

There are other pathways for that private investigator to proceed. That investigator could call another investigator in Virginia to submit a FOIA request.⁹⁵ Or, that investigator might contact a law firm in Virginia to submit the request.⁹⁶ Despite these alternate avenues, public records laws should not make it difficult for out-of-state private investigators, particularly those investigating potential crimes, to obtain the documents necessary to complete an impartial, independent investigation. A federal constitutional amendment would essentially overrule these negative ramifications of *McBurney* and allow any individuals to avail themselves of a state's public records law.

⁹⁵ See VA. CODE ANN. § 2.2-3704 (2019).

⁹⁶ *Id.*

A federal constitutional amendment and state constitutional amendments would promote public safety. When crimes are committed, they affect society as a whole.⁹⁷ There are a number of examples of investigators and the media utilizing public information to help solve cases. For instance, in March 2019 the CBS News program “48 Hours” aired an episode investigating a suspicious incident in Moncks Corner, South Carolina, that occurred in 2008.⁹⁸ In this incident, a woman was found dead alongside railroad tracks and her daughter was found drowned in a nearby pond.⁹⁹ Because of the “48 Hours” investigation, the Berkeley County Sheriff’s Office in South Carolina is reopening the case.¹⁰⁰ I believe a constitutional right to public information will assist in investigations like this one, making it easier for crimes to be solved by providing the public easier access to public information. This right would help further the goal of public safety for all.

B. The Supremacy Clause of the United States Constitution Would Affirm the Right to Public Information in Cases of Conflicting Federal and State Laws, and State Constitutions Would Take Precedence in Cases Involving State Law

Under the Supremacy Clause of the United States Constitution, the Constitution, federal law, and treaties constitute the “supreme law of the land.”¹⁰¹ In the case of a conflict between the United States Constitution and federal law, the Constitution takes precedence; in the case of a conflict between a state constitution and a state law, the state constitution takes precedence.¹⁰²

A limited constitutional right to privacy has been recognized in United States Supreme Court jurisprudence. In *Griswold v. Connecticut*, the United States Supreme Court struck down a Connecticut law outlawing the utilization of contraception.¹⁰³ The Supreme Court stated:

We deal with a right of privacy older than the Bill of Rights – older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not

⁹⁷ An example of one crime that affects society as a whole is the crime of rape. See Adrien Katherine Wing & Sylke Merchan, *Rape, Ethnicity, and Culture: Spirit Injury from Bosnia to Black America*, 25 COLUM. HUM. RTS. L. REV. 1 (1993) (“Rape, which is pervasive in Bosnia, constitutes an injury not only to the individual victim but to the society as a whole”).

⁹⁸ See *Case Reopened into Mysterious Deaths of S.C. Woman and Daughter after “48 Hours” Investigation*, CBS NEWS (Aug. 3, 2019), <https://www.cbsnews.com/news/case-reopened-into-mysterious-deaths-of-s-c-woman-kadie-major-and-daughter-after-48-hours-investigation/>.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ See U.S. CONST. art. VI, cl. 2.

¹⁰² *Id.*

¹⁰³ See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.¹⁰⁴

While the Supreme Court has recognized a federal constitutional limited right to privacy, the nature, extent, and limits of this right remains unclear.¹⁰⁵ However, with the lack of a constitutional right to public information, it is plausible argument that the right to privacy, where there is a recognized right, would trump access to public records since there is no recognized constitutional right to public records.

Similarly, such an interpretation can also occur at the state level. The right to privacy is enumerated within a number of state constitutions.¹⁰⁶ Within the states which have specifically enumerated a right to privacy within their respective state constitutions, such state constitutional provisions could potentially be interpreted to supersede a state FOIA law in the event of a conflict.

The *Pengra v. State* case decided by the Supreme Court of Montana is an insightful example of the right to privacy conflicting with the right to public information.¹⁰⁷ Montana recognizes both a state constitutional right to public information¹⁰⁸ as well as a right to privacy.¹⁰⁹ The tragic underlying facts of the *Pengra* case involve the brutal rape and death of a woman by a state prison probationer.¹¹⁰ A suit by the surviving spouse against the state of Montana settled, and the surviving spouse sought to seal the settlement agreement.¹¹¹ Several newspapers in Montana intervened in order to obtain the details of the settlement amount.¹¹² The newspapers opposed the surviving spouse's motion to seal the settlement agreement, and the trial court denied the motion.¹¹³

The surviving spouse argued that he and his daughter's state constitutional right to privacy protected the terms of the agreement, and that this constitutional

¹⁰⁴ *Id.* at 486.

¹⁰⁵ See e.g., Judge Harold R. Demoss Jr. & Michael Coblenz, *An Unenumerated Right: Two Views on the Right to Privacy*, 40 TEX. TECH L. REV. 249 (2008).

¹⁰⁶ See Ken Gormley & Rhonda G. Hartman, *Privacy and the States*, 65 TEMP. L. REV. 1279, 1282–83 (1992).

¹⁰⁷ See *Pengra v. State*, 14 P.3d 499 (Mont. 2000).

¹⁰⁸ See MONT. CONST. art. II, § 9.

¹⁰⁹ See MONT. CONST. art. II, § 10.

¹¹⁰ See *Pengra*, 14 P.3d at 500.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 501.

right superseded the Montana statute¹¹⁴ requiring that settlement amounts in claims against the state be made available for public inspection.¹¹⁵

In essence, the *Pengra* case presented a direct conflict between the constitutional right to public information and the constitutional right to privacy.¹¹⁶ In analyzing the question of whether disclosure of the settlement amount violates a plaintiff's right to privacy, the *Pengra* court noted that an affidavit filed by the surviving spouse's psychologist was not filed with the trial court until weeks following the decision.¹¹⁷ This affidavit generally concluded that the surviving spouse's child would suffer adverse effects due to publicity from the case.¹¹⁸

The *Pengra* court found that even if the psychologist's affidavit had been filed in a timely manner, the affidavit still didn't include specific factual assertions of how the child would suffer from disclosure of the settlement amount.¹¹⁹ In addition, the court in *Pengra* emphasized the conduct of the surviving spouse during the litigation—he did not take steps in the underlying litigation against the state of Montana to keep it private.¹²⁰ The *Pengra* court appeared to reason from this point that the surviving spouse's conduct constitute a waiver of his right to privacy through the doctrine of waiver.¹²¹

As a public policy matter, the *Pengra* court found that there were compelling reasons to hold that settlement amounts in cases against the state of Montana be disclosed. The *Pengra* court remarked:

Disclosure of such agreements provides an irreplaceable opportunity for taxpayers to assess the seriousness of unlawful and negligent activities of their public institutions. The taxpayers are entitled to know how much they pay for such actions or inactions. And without muzzling the entire legislative process and all those involved in obtaining the appropriation to pay the claim, it appears that whatever privacy right the settling party has

¹¹⁴ See MONT. CODE ANN. § 2-9-303 (2019) (“All terms, conditions and details of the governmental portion of a compromise or settlement agreement entered into or approved pursuant to subsection (1) are public records available for public inspection unless a right of individual privacy clearly exceeds the merits of public disclosure.”).

¹¹⁵ See *Pengra v. State*, 14 P.3d 499, 501–502 (Mont. 2000).

¹¹⁶ *Id.* at 502.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* (“The claim that the Pengras have a subjective expectation of privacy in the settlement amount is, moreover, discredited by the surrounding circumstances of this case. Pengra took no steps to keep private his lawsuit against the State, and in fact requested a jury trial in the District Court. Pengra’s counsel admitted at oral argument before this Court that if the settlement amount had not been sufficient, his client would have gone forward with the public jury trial of this case.”)

¹²¹ See *Kelly v. Lovejoy*, 565 P.2d 321, 324 (Mont. 1977) (“Waiver is generally defined as a voluntary and intentional relinquishment of a known right, claim or privilege.”).

will be compromised, anyway, when the legislature appropriates the funds to pay the settlement.¹²²

Thus, the *Pengra* court held that the public's right to know the settlement amounts outweighed the surviving spouse and daughter's right to privacy.¹²³

Montana's constitutional right to public information in the *Pengra* case highlights the importance of enumerating rights within state constitutions. Assuming arguendo that Montana did not include a state constitutional right to public information, but had in its constitution a specific enumerated right to privacy, the constitutional right to privacy would directly trump Montana's statute allowing public disclosure of settlement amounts in actions against the state of Montana. Therefore, the Montana Supreme Court in *Pengra* would have reached a different outcome. In states without a constitutional right to public information, it is possible that the constitutional right to privacy would trump the statutory provisions of public records and FOI laws. Such a scenario emphasizes the urgency to enshrine a constitutional right to public information.

C. A Constitutional Right to Public Information Would Affirm it as a "Fundamental Right" Subject to Strict Scrutiny Analysis

A constitutional right to public information at both the federal and state levels would solidify the right as fundamental, subjecting cases analyzed by the Supreme Court of the United States to strict scrutiny. Fundamental rights are those rights generally given the utmost degree of protection from government infringement.¹²⁴ Fundamental rights include the right to free speech,¹²⁵ the right

¹²² See *Pengra v. State*, 14 P.3d 499, 503 (Mont. 2000).

¹²³ *Id.*

¹²⁴ See Stephanie L. Grauerholz, Comment, *Colorado's Amendment 2 Defeated: The Emergence of a Fundamental Right to Participate in the Political Process*, 44 DEPAUL L. REV. 841, 861 (1995) ("Fundamental rights are rights which the Court determine as 'having a value so essential to individual liberty in society' that they permit the Court to review acts of other government branches. The test for determining whether a particular right is fundamental is whether the right is 'explicitly or implicitly guaranteed by the Constitution.'").

¹²⁵ *Id.* at 861.

to vote,¹²⁶ the right to freedom of the press,¹²⁷ the right to procedural due process of law,¹²⁸ and the right to freedom of religion.¹²⁹

In states with a constitutional right to public information, state courts have held that the right is a fundamental one. As the Justice Nelson of the Supreme Court of Montana remarked in a concurring opinion in *Yellowstone County v. Billings Gazette*, “the right-to-know guarantees of Article II, Section 9, of the Montana Constitution, are among the most important guarantees that Montanans enjoy. As this right is contained in the Constitution’s Declaration of Rights, it is a fundamental right.”¹³⁰ Appellate courts in Florida¹³¹ as well as Louisiana¹³² have also affirmed the right to public information as a fundamental right.

In the event of a state action infringing upon a fundamental right, the action would be subject to strict scrutiny analysis. Under strict scrutiny analysis, governmental action which infringes upon a fundamental constitutional right must necessarily relate to a compelling state interest.¹³³ Strict scrutiny is the highest standard of constitutional review,¹³⁴ and is much more difficult for the

¹²⁶ *Id.* at 862.

¹²⁷ See Robert J. Cordy, *The Interdependent Relationship of a Free Press and an Independent Judiciary in a Constitutional Democracy*, 60 B.C. L. REV. E-SUPPLEMENT I-1, *1 (2019) (“In the Declaration of Rights to the Massachusetts Constitution of 1780 (the oldest written constitution in the world still in effect), John Adams identifies two rights as ‘essential’ to the security of freedom and the preservation of all other rights—a free press and access to an independent judiciary. These important rights are broadly recognized as fundamental to human rights and to a constitutional democracy, both in the United States Constitution and internationally.”).

¹²⁸ See e.g., Ben F.C. Wallace, Note, *Charting Procedural Due Process and the Fundamental Right to Vote*, 77 OHIO ST. L. J. 647 (2016).

¹²⁹ Grauerholz, *supra* note 124, at 861.

¹³⁰ See *Yellowstone Cty v. Billings Gazette*, 143 P.3d 135, 142–143 (Mont. 2006) (Nelson, J., concurring).

¹³¹ See *Rhea v. Dist. Bd. of Trs. of Santa Fe Coll.*, 109 So.3d 851, 855 (Fla. Dist. Ct. App. 2013) (“A citizen’s access to public records is a fundamental constitutional right in Florida.”).

¹³² See *Times Picayune Publ’g Corp. v. Bd. of Supervisors*, 845 So.2d 599, 605 (La. Ct. App. 1 Cir. 2003) (“It is well-settled that the public’s right of access to public records is a fundamental right guaranteed by both the Louisiana Constitution and the Public Records Law set forth in La. R.S. 44:1 *et seq.*”).

¹³³ See Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267 (2007) (“To satisfy strict scrutiny, the government must demonstrate a compelling interest, and it must further show that a challenged statute or regulation is either necessary, narrowly drawn, or narrowly tailored to protect that interest.”).

¹³⁴ See Kristapor Vartanian, *Equal Protection*, 10 GEO. J. GENDER & L. 227, 230 (2009) (“Strict scrutiny is the most rigorous form of judicial review.”).

state to satisfy as opposed to the “intermediate scrutiny”¹³⁵ and “rational basis” tests.¹³⁶

If the right to public information became a constitutional right at both the federal and state levels, the right would be afforded the highest degree of protection in constitutional analysis, as it would be considered a fundamental right. This degree of protection would ensure public records laws would be fully interpreted with a presumption toward disclosure,¹³⁷ and any governmental action which would potentially limit disclosure would be required to be “necessary” and also relate to a “compelling governmental purpose.”

D. A Constitutional Right to Public Information Would Help Shift Policy and Court Analyses in Favor of Public Disclosure

Finally, a constitutional right to public information at both the federal and state levels would operate to help shift the policy analyses of courts toward public disclosure. Inevitably, public records laws sometimes come into conflict with asserted exemption and privacy claims. In several cases at the state level, particularly cases in Montana and Florida, a leading citing factor in court decisions to uphold the letter and spirit of public records laws in favor of this closure is the presence of a state constitution.

In Montana, in early 2014, several media organizations sought records relating to the termination of a director of food services for the Missoula County Public Schools.¹³⁸ According to the Supreme Court, there was an investigation into whether this individual “had engaged in fraudulent or illegal financial transactions.”¹³⁹ The individual asserted that the documents in her employment file were not public records.¹⁴⁰

Analyzing whether the personnel file records were public records, the Montana Supreme Court cited the Montana Constitution’s right-to-know provision.¹⁴¹ In determining whether public documents were protected from

¹³⁵ *Id.* at 234 (“Intermediate scrutiny, sometimes referred to as quasi-suspect or heightened scrutiny, is used to evaluate classifications affecting members of quasi-suspect classes . . . to withstand intermediate scrutiny, a quasi-suspect classification ‘must serve important governmental objectives and must be substantially related to achievement of those objectives’.”).

¹³⁶ *Id.* at 235 (“Rational basis review is the most deferential standard applied by courts in equal protection analysis . . . To pass rational basis review, a statute must be rationally related to a legitimate governmental purpose.”).

¹³⁷ See *Yellowstone Cty. v. Billings Gazette*, 143 P.3d 135, 143 (Mont. 2006) (Nelson, J., concurring) (“In interpreting this provision [constitutional right-to-know provision], we have held that there is a constitutional presumption that all documents of every kind in the hands of public officials are amenable to inspection.”).

¹³⁸ See *Missoula Cty. Pub. Schs. v. Bitterroot Star*, 345 P.3d 1035 (Mont. 2015).

¹³⁹ *Id.* at 1037.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 1037–1038.

disclosure, the court looked to the Montana Constitution.¹⁴² The Montana Constitution forbids disclosure only “in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.”¹⁴³ Looking at whether individual privacy outweighed public disclosure, the Montana Supreme Court noted that “documents are not shielded from public disclosure simply because they are in a public official’s personnel file when that official occupies a position of trust.”¹⁴⁴ Because the director of food services is a position “involving the public trust,” the Montana Supreme Court upheld the trial court’s order that documents concerning public funds be released to the public.¹⁴⁵

Florida’s vigorous state constitutional protections for open public records have been cited in several cases in recent years.¹⁴⁶ These cases provide further support for a federal constitutional right to public information. In *Chandler v. City of Sanford*, the plaintiff requested an original copy of an email sent by a city employee to George Zimmerman, a neighborhood watch volunteer.¹⁴⁷ The emails were produced, but Zimmerman’s email address was redacted.¹⁴⁸ The city contended it was under a directive of the State Attorney not to release any original records.¹⁴⁹ It also claimed and that the original copy had been turned over to the State Attorney as part of the State Attorney’s investigation.¹⁵⁰

The Florida District Court of Appeals for the Fifth District held that the trial court erred when it dismissed the plaintiff’s petition asserting violations of the Florida Public Records Law.¹⁵¹ The court of appeals remarked that “a governmental agency may not avoid a public records request by transferring custody of its records to another agency.”¹⁵² The court of appeals also stated that the “constitutional right of public access to government records is ‘virtually unfettered’ save for certain constitutional and statutory exemptions.”¹⁵³

In another Florida case, *Board of Trustees, Jacksonville Police & Fire Pension Fund v. Lee*, the Florida Supreme Court cited to the “letter and spirit of the constitutional right to inspect or copy public records.”¹⁵⁴ In *Lee*, the Florida Supreme Court held that when a government agency violates the Florida Public

¹⁴² *Id.*

¹⁴³ MONT. CONST. art. II, § 9. (West, Westlaw through 2019).

¹⁴⁴ *Missoula Cty. Pub. Schs.*, 345 P.3d at 1038.

¹⁴⁵ *Id.*

¹⁴⁶ See *O’Boyle v. Town of Gulf Stream*, 257 So. 3d 1036, 1040 (Fla. Dist. Ct. App. 2018); *Bd. of Trs. v. Lee*, 189 So. 3d 120, 122 (Fla. 2016), *Chandler v. City of Sanford*, 121 So.3d 657 (Fla. Dist. Ct. App. 2013).

¹⁴⁷ *Chandler*, 121 So.3d at 658.

¹⁴⁸ *Id.* at 659.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 660.

¹⁵² *Id.*

¹⁵³ *Chandler v. City of Sanford*, 121 So.3d 660 (Fla. Dist. Ct. App. 2013).

¹⁵⁴ *Bd. of Trs. v. Lee*, 189 So. 3d 120, 122 (Fla. 2016).

Records Act, the Act does not require a plaintiff to prove the government agency acted unreasonably or in bad faith in order to recover attorney fees.¹⁵⁵ Thus, the *Lee* decision makes it easier for plaintiffs to recover attorney's fees for violations of the Public Records Act and the possibility of attorney fee awards deters governmental agencies from violating the law.

Finally, in *O'Boyle v. Town of Gulf Stream*, the Florida District Court of Appeals for the Fourth District cited the Florida Constitution in holding that a town mayor's text messages on a private cell phone may be subject to disclosure under the Florida Public Records Act.¹⁵⁶ The *O'Boyle* court noted that the purpose of the right to public information provision in the Florida Constitution as well as the provisions of Florida's Public Records Law "[are] to ensure that citizens may review (and criticize) government actions."¹⁵⁷ This purpose was specifically cited by the court as a policy reason to support the holding "that electronic information stored on privately-owned devices may be subject to disclosure under the Public Records Act."¹⁵⁸

Appellate courts have also cited to state constitutional provisions in Louisiana,¹⁵⁹ New Hampshire,¹⁶⁰ and North Dakota¹⁶¹ to support the disclosure of public records.

All of these cases demonstrate that, in close decisions, courts are more likely to favor public disclosure if there is a constitutional amendment to cite to support disclosure.

IV. A PROPOSED DRAFT OF A FEDERAL/STATE CONSTITUTIONAL AMENDMENT ENSURING THE RIGHT TO PUBLIC INFORMATION

In light of the strong arguments supporting a constitutional right to public information, this Article analyzes one remaining question: how should federal and state constitutional amendments be drafted? One aspect to examine is whether the right should encompass the right as a right of the people and be a fundamental right. For example, as the Florida Supreme Court quoted in the *Lee* decision, "the right of access to public records . . . [is] a cornerstone of our

¹⁵⁵ *Id.* at 120.

¹⁵⁶ *O'Boyle v. Town of Gulf Stream*, 257 So. 3d 1036, 1040 (Fla. Dist. Ct. App. 2018).

¹⁵⁷ *Id.* at 1042.

¹⁵⁸ *Id.*

¹⁵⁹ *See Times Picayune Publ'g Corp. v. Bd. of Supervisors*, 845 So. 2d 599, 610 (La. Ct. App. 1 Cir. 2003) (holding that the amount of a settlement in a dental malpractice and products liability lawsuit against the state of Louisiana is subject to disclosure under the Louisiana Public Records Act).

¹⁶⁰ *See Lambert v. Belknap Cty. Convention*, 949 A.2d 709, 709–710 (N.H. 2008) (holding that records requested of the candidates who applied for a vacancy to a county sheriff's office were subject to disclosure under the New Hampshire Right-to-Know Law).

¹⁶¹ *See Hovet v. Hebron Pub. Sch. Dist.*, 419 N.W.2d 189, 191 (N.D. 1988) (holding that the personnel file of a public school teacher was a public record subject to disclosure under the North Dakota open-records law).

political culture.”¹⁶² Arguably, the right to public information is necessary, vital, and a foundation of democracy.

I propose a draft of a constitutional amendment could state the following:

The right to public information, being a necessary and vital part of democracy, shall be a fundamental right of the people. The right of the people to inspect and/or copy records of government, and to be provided notice of and attend public meetings of government, shall not unreasonably be restricted.

Such an amendment affirms the right to public information as a fundamental right of the people. It also incorporates the right to inspect or copy public records, and accounts for open meetings as well. This amendment ensures that not only documents and records are encompassed by the amendment, but also the right of people to receive notice and to attend public meetings of government. Finally, this amendment provides that this right shall not be “unreasonably” restricted, and implicitly allows for exemptions involving other constitutional rights (i.e. the right to privacy) to remain applicable in appropriate situations.

The current political environment is highly polarized and, with the 2020 presidential election approaching, partisanship will likely remain high.¹⁶³ However, a democratic and a transparent government are ideals that both liberals and conservatives support.¹⁶⁴ For example, a bipartisan group of lawmakers expressed concern in a March 5, 2019 letter to the Honorable David Bernhardt, Acting Secretary of the U.S. Department of Interior (“DOI”), over a proposed rule change by the DOI concerning the Department’s procedures for compliance with Freedom of Information Act (“FOIA”) requests.¹⁶⁵ The legislators wrote, “The proposed rule appears to restrict public access to DOI’s records and delay the processing of FOIA requests in violation of the letter and spirit of FOIA.”¹⁶⁶ Two of the letter’s four authors, the late Congressman Elijah Cummings¹⁶⁷ and Senator Pat Leahy,¹⁶⁸ are considered ardent liberals. The other two signatories

¹⁶² Bd. of Trs. v. Lee, 189 So. 3d 120, 124 (Fla. 2016).

¹⁶³ See Jeroen van Baar & Oriel Feldman Hall, *The Psychological Roots of Political Polarization*, PSYCHOLOGY TODAY (Oct. 9, 2019), <https://www.psychologytoday.com/us/blog/social-learners/201910/the-psychological-roots-political-polarization>.

¹⁶⁴ Letter from United States Representative Elijah Cummings, United States Senator Patrick Leahy, United States Senator Charles E. Grassley, and United States Senator John Cornyn, to the Honorable David Bernhardt, Acting Secretary of the United States Department of Interior (March 5, 2019) (on file with House Committee on Oversight and Reform).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ See Griffin Connolly, *Rep. Elijah Cummings fondly remembered by Democrats, Republicans*, ROLL CALL (Oct. 17, 2019, 9:35 AM), <https://www.rollcall.com/news/congress/rep-elijah-cummings-fondly-remembered-hill-democrats-republicans>.

¹⁶⁸ See Candy Crowley, *Senators’ Friendship Strong On and Off Capitol Hill*, CNN POLITICS (Feb. 26, 2010, 6:15 PM), <https://www.cnn.com/2010/POLITICS/02/26/leahy.lugar/index.html>.

of the letter, Texas Senator John Cornyn¹⁶⁹ and Iowa Senator Chuck Grassley,¹⁷⁰ are notable conservatives.

This letter demonstrates that, despite a partisan political environment, both liberal and conservative leaders can join together on behalf of open, transparent government and work together to enshrine a constitutional right to public information and to promote democracy.

CONCLUSION

Moving forward in a partisan climate, it will certainly be challenging to enact a federal constitutional amendment, as well as state constitutional amendments, protecting the right to public information. As President Thomas Jefferson wrote in an 1825 letter to Edward Livingston, “Time and changes in the condition and constitution of society may require occasional and corresponding modifications [of the United States Constitution].”¹⁷¹ Access to open public records can help uncover and deter governmental misconduct, malfeasance, and misfeasance, and can promote more ethical and honest behavior. The time to enact a federal constitutional amendment and state constitutional amendments to enshrine the right to public information is now. Such an amendment will provide more openness and transparency in government and make government more accessible to the people.

¹⁶⁹ See Andrea Drusch, *Conservatives Worried About Dems in Texas Decide to Leave Cornyn Alone*, FORT WORTH STAR-TELEGRAM (Mar. 22, 2019, 1:23 PM), <https://www.star-telegram.com/news/politics-government/election/article228280099.html>.

¹⁷⁰ See William Petroski, *Sen. Chuck Grassley: Conservatives Should ‘Stand Up’ on College Campuses*, DES MOINES REGISTER (Oct. 24, 2018, 2:57 PM), <https://www.desmoinesregister.com/story/news/politics/2018/10/24/iowa-senator-chuck-grassley-republican-westside-conservative-club-urbandale-religion-free-speech/1751672002/>.

¹⁷¹ Letter from Thomas Jefferson, to Edward Livingston (Mar. 25, 1825) (on file with the National Archives).