COLORADO TITLE SETTING BOARD

IN THE MATTER OF THE TITLE AND BALLOT TITLE AND SUBMISSION CLAUSE FOR INITIATIVE 2025-2026 #286 ("**Right to Access Public Proceedings and Records"**)

MOTION FOR REHEARING – INITIATIVE #286

On behalf of Jon Caldara and Beth Hendrix (the "Proponents"), registered electors of the State of Colorado and designated representatives of Proposed Ballot Initiative 2025-2026 #286 ("Initiative #286"), undersigned counsel hereby submit this Motion for Rehearing pursuant to C.R.S. § 1-40-107, and as grounds therefore state as follows:

I. Introduction

Initiative #286 is a short measure with a single and simple subject: to create a constitutional right of the public to know the affairs of government through access to public records and public meetings. The proposed measure makes explicit, as a fundamental constitutional right, the principle of popular sovereignty by the people of Colorado and their right to know what their government is up to. *See* David S. Ardia, "Popular Sovereignty and a Right to Know About the Government," 67 ARIZ. L. REV. 1, 3 (2025) ("[A]right to know about the government is fundamental to American democracy.") (copy attached); *see also* Chad G. Marzen, "A Constitutional Right To Public Information," 29 PUBLIC INTEREST L. JOURNAL 223, 225 (2020) ("A constitutional right to public records currently is in place in at least seven state constitutions," noting that "in states where a constitutional right to public information does not exist, amendments that ensure such a right specifically exists should be enacted.") (copy attached).

Despite the proposed measure's simplicity, the Title Board voted 2-1 to deny jurisdiction to set title "on the grounds that measure does not constitute a single subject," improperly speculating as to the measures' legal effects and application and determining that the measure is too "broad."

The Proponents respectfully request that the Title Board reconsider. Seven states have adopted constitutional Right to Know provisions. *See* Marzen, "A Constitutional Right To Public Information," *supra* at 229-235 (discussing constitutional Right to Know provisions of California, Floridia, Illinois, Louisiana, Montana, New Hampshire, and North Dakota); see also

Jeffrey A. Roberts, *Should the right to know be enshrined in Colorado's constitution?*, Coloradofoic.org, June 24, 2025 ("Right-to-know provisions in state constitutions tend to be concise, amounting to just a few paragraphs or less, rather than full of details. Florida's is the most extensive, ….").[1] The Title Board majority must reconsider its decision and allow the voters of Colorado to determine whether Colorado should be the 8th state to adopt a right fundamental to our democracy. As government is of, for, and by the People, this Board should satisfy its legal requirement to find jurisdiction to set title.

II. Initiative #286 has a single subject: creation of the public right to know the affairs of government

As stated by the Proponents, Initiative #286's single subject is the simple right of the public to know the affairs of government through access to public records and public proceedings.

A. The creation of the fundamental right of the public to know the affairs of government is a single subject

The creation of a right to know the affairs of government is a single subject, just as "the creation of the public's right to Colorado's environment" is a single subject. *Kemper v. Leahy (In re Title, Ballot Title),* 2014 CO 66, ¶7, 328 P.3d 172, 176. The proposed measure spells out that the people have a fundamental right to know the affairs of government, and it prescribes a readily understood form of strict judicial scrutiny as a workable means to balance the fundamental right to know against privacy or other compelling state interests. *Id.* at ¶15. There is no serious risk that the voters will be unaware of the primary effects of Initiative #286 because each of the sections relates to the same subject. The plain language of Initiative #286 creates a public right and then lays out the procedure for implementing and enforcing that right. Last, Initiative #286 is not particularly lengthy or complex. *Id.*¶ 19.

The proposed measure does not have two distinct and separate purposes which are not dependent or connected with each other. Instead, all of the proposed measure has a single "unifying or common objective," namely, to establish as fundamental the people's right to know what the government is up to. *Blake v. King (In re Title, Ballot Title, & Submission Clause 2007-2008 # 62)*, 184 P.3d 52, 57 (Colo. 2008) ("unifying or common objective"); *Bentley v. Mason (In re Title Ballot Title & Submission Clause for 2015-2016 #63)*, 2016 CO 34, P22, 370 P.3d 629, 633 (Colo. 2016) (holding that "what Petitioners characterize as 'disconnected subjects' are directly tied to and implement the central focus of the initiative"); *Earnest v. Gorman (In re Title, Ballot Title and Submission Clause for 2009-2010 # 45)*, 234 P.3d 642, 646 (Colo. 2010) ("An initiative that tends to carry out one general, broad objective or purpose does

[1] https://coloradofoic.org/should-the-right-to-know-be-enshrined-in-colorados-constitution/

not violate this constitutional rule. . . . Implementing provisions that are directly tied to the initiative's central focus are not separate subjects."). There is no proposal to repeal multiple subjects. *Blake*, 184 P.3d at 57. A yes or no vote will be clear, either to adopt the fundamental right or not. *Id.*

Additionally, neither of the two dangers of omnibus measures are present with Initiative #286. The proposed measure "does not seek to garner support from various factions by combining unrelated subjects in a single proposal." *See Kemper*, 328 P.3d at 178. Initiative #286 is one, single proposal—to establish that the right to know the affairs of government is a fundamental right.

Likewise, voters will not be surprised by effects that are "hidden" in the body of an initiative that is misleading or overly complex. *See Matter of Title, Ballot Title, Submission Clause, Summary for 1997-98 No. 84*, 961 P.2d 456, 461 (Colo. 1998); *see also In re Title, Ballot Title, Submission Clause for 2011-2012 No. 45*, 274 P.3d 576, 581 (Colo. 2012) (finding no risk of voter confusion when the "plain language of the measure unambiguously" explains the measure). Voters will undoubtedly know that the primary effect of Initiative #286 is to establish that the right to know the affairs of government is a fundamental right. *See Kemper*, 328 P.3d at 178("[T]here is no serious risk that the voters will be unaware of the primary effects of Initiative # 89 because each of the sections relates to the same subject, the plain language of Initiative # 89 creates a public right [to the environment] and then lays out the procedures for implementing and enforcing that right, and the proposal is not particularly lengthy or complex."); *In re Title, Ballot Title, Submission Clause for 2011-2012 No. 45*, 274 P.3d at 581 n.2 ("[Petitioner] argues that, if adopted, Initiative 45 would so drastically alter the landscape of Colorado water law that it could not possibly contain a single subject. We again emphasize that our limited role in this process prohibits us from opining on how Initiative 45 might operate if applied.").

To the extent that the Title Board majority seemed to argue that Initiative #286's legal implementation is "hidden," that aspect pertains to the proposed measure's interaction with prior state law in the determination of which privileges or exceptions might need to be litigated to meet the test of strict scrutiny, which is a task that the Colorado Supreme Court has articulated that it, and Title Board, are not equipped to judge at this juncture. *See, e.g.*, *In re Title, Ballot Title & Submission Clause, & Summary for 1999-2000 No. 235(a)*, 3 P.3d 1219, 1225 (Colo. 2000) ("This court cannot determine the future application of an initiative in the process of reviewing the action of the Title Board in setting titles for a proposed initiative.").

Consistent with all fundamental rights, the strict-scrutiny mechanism of implementation that the Title Board majority discussed during the hearing is undeniably directly tied to the Initiative's central focus: to establish the right to know the affairs of government as fundamental. *E.g., Matter of Title, Ballot Title and Submission Clause, Summary Clause for 1997–1998 No. 74*, 962 P.2d 927, 929 (Colo. 1998) ("Implementation details that are 'directly tied' to the

initiative's 'central focus' do not constitute a separate subject.").

Any purported complexity of application does not make creation of a fundamental right deficient with regards to the single-subject requirement.

The Title Board majority's arguments focused on ***application*** of the fundamental right, not the ***creation***. As the case law cited above makes clear, the Title Board is not permitted to make policy arguments against the measure in the guise of evaluating the single-subject requirement.

Other constitutional amendments are far more complex and essentially write procedure into the Constitution, *see, e.g.*, Colo. Const., art. XXVIII (Campaign and Political Finance); Colo. Const., art. XXIX (Ethics in Government); both of which were initiated measures with titles set by prior Title Boards. The measure here simply declares a fundamental right and provides the mechanism for implementation of this right in relation to privacy and other compelling interests.

B. The Title Board majority's speculation as to the measure's effects was improper

The Title Board majority nevertheless speculated that the proposed measure was too "broad" so as to defeat the single-subject requirement. No single subject concerns were raised by the Legislative Council Staff and Office of Legislative Legal Services review. Therefore, this issue was a complete surprise at the hearing. However, this analysis by the Title Board majority is not correct.

First, an initiative's subject or purpose is permitted to be broad without violating the single-subject requirement. *In re Title, Ballot Title, Submission Clause, & Summary for 1999-2000 No. 256*, 12 P.3d 246, 254 (Colo. 2000) (holding that an initiative does not violate the single subject requirement simply because it covers a broad subject).

As argued above, the single subject of creating a fundamental right of the public to know is not overly broad, and all the proposed provisions relate precisely to this single subject. *Kemper*, 2012 CO 25, at ¶5 (necessarily and properly relate to "the public's rights in the waters of natural streams.").

By contrast, this is not a vague subject like "water" with many unrelated issues cobbled together under an overly broad or vague rubric. *Compare In re Title, Ballot Title, Submission Clause, and Summary Adopted April 5, 1995, by Title Bd. Pertaining to a Proposed Initiative "Pub. Rights in Waters II"*, 898 P.2d 1076, 1077 (Colo. 1995); *In re Title, Ballot Title and Submission Clause, for 2007-2008, No. 17*, 172 P.3d 871, 873 (Colo. 2007).

Second, instead of viewing the government as a whole, the Title Board majority pointed to the speculated effects on various branches or parts of the government. The Title Board majority improperly speculated about the effects of the Initiative on these discrete parts of government, worrying about the application to Supreme Court deliberations, the purported lack of protections for public safety or police departments, or the effect on the attorney-client privilege. This approach is erroneous.

The Title Board must refrain from parsing out simple proposals: "Multiple ideas might well be parsed from even the simplest proposal by applying ever more exacting levels of analytic abstraction until an initiative measure has been broken into pieces. Such analysis, however, is neither required by the single subject requirement nor compatible with the right to propose initiatives guaranteed by Colorado's constitution." *In re Proposed Initiative for 1997-1998 # 74*, 962 P.2d at 929; *see also Blake*, 184 P.3d at 59 ("In short, Petitioner thinly parses the language of the measure in an attempt to create separate and distinct subjects. In order to do this, Petitioner speculates about the effects of the measure, postulating that if the measure is interpreted in a way that fits his conclusions, then the measure will have multiple effects. This approach is erroneous.").

The Colorado Supreme Court has consistently cautioned against interpreting a proposed measure's legal effects and application when assessing single subject. The Title Board should refrain from speculating on the measure's potential effects or predicting its application to existing Colorado law. The Title Board's majority did both when it articulated a theory that because the proposed measure applies to the "whole" government, that somehow renders the proposed measure too broad. By failing to consider the government as a whole and considering application of the proposed measure as to separate parts of government, the Title Board improperly created a single subject issue where none exists.

Third, the Title Board improperly speculated on the proposed measure's potential legal application. Neither the Title Board nor the Court can engage in "mere speculation about the potential effects of the Initiative" when determining whether a measure contains a single subject. *Blake,* 184 P.3d at 59. Neither the Title Board nor the Court can determine the Initiative's efficacy, construction, and future application unless and until the voters approve the Initiative. *Id*., 184 P.3d at 59, citing *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 # 258(a)*, 4 P.3d 1094, 1097-98 (Colo. 2000). "In determining whether a proposed initiative comports with the single subject requirement, [w]e do not address the merits of a proposed initiative, nor do we interpret its language or predict its application if adopted by the electorate." *Id.*, 184 P.3d at 59; *In re Title, Ballot Title & Submission Clause, & Summary for 1999-2000 No. 200A,* 992 P.2d 27, 30 (Colo. 2000*)* ("[T]he initiative's efficacy, construction, or future application . . . is a matter for judicial determination in a proper case should the voters approve the initiative."); *Kemper*, 328 P.3d at 179 (Title Board may not speculate on the potential effects of the initiative if enacted).

Fourth, the Title Board's majority in its discussion at the hearing cited *Outcelt v. Buckley (In re Title, Ballot Title & Submission Clause, & Summary for 1999-2000 #44),* 977 P.2d 856 (Colo. 1999), for the proposition that too "broad" of a measure violates the single subject rule. But the holding in *Outcelt* relates to the draft title and summary of a complex initiative that is difficult to comprehend. *See id.* at 858 ("Here, perhaps because the original text of the proposed initiative is difficult to comprehend, the titles and summary are not clear. If the Board 'cannot comprehend the initiatives well enough to state their single subject in the titles . . . the initiatives cannot be forwarded to the voters and must, instead, be returned to the proponent.'") (citation omitted).

Here, there was no vote by the Title Board to reject the staff description as unclear. The Title Board motion only voted on the single subject issue. There was no discussion or vote on the staff draft title and summary not being clear.

The Proponents do not fundamentally object to the staff draft title and summary that was prepared for the initial Title Board hearing, in the sense that this establishes that a simple title and summary for the proposed measure can be developed, and *Outcelt* does not apply.[2] Therefore, this is not a basis that supports the Title Board's action, and thus the action must be reconsidered.

Fifth, as argued during the hearing, the Title Board majority's position that Initiative #286 is too "broad" would make it impossible for Freedom of Religion or Freedom of Speech to be considered by the initiative process. This cannot be the law. With the Title Board majority's approach, no fundamental right will ever present a single subject. *Cf. Gonzalez-Estay v. Lamm (In re Title & Ballot Title & Submission Clause for 2005-2006 #55)*, 138 P.3d 273, 284 (Colo. 2006) (Coats, J., dissenting) ("In addition, the [Title Board] suggests (without making clear precisely how) that a potential for multiple, unspecified impacts or effects also runs afoul of the single-subject requirement … perhaps because having a potential for multiple effects must demonstrate that any unifying theme will be too broad. But surely any provision expressed with sufficient generality to be appropriate for inclusion in a constitution will necessarily have a potential for, and be intended to have, multiple effects. Such a construction would clearly bar the due process clause or guarantees of free speech from being considered by the initiative process. Nothing in the language or history of the single-subject requirement for popular initiatives … remotely suggests that in addition to being limited to a single subject, a proposal can also have but one, identifiable impact or effect; and any such requirement, if applied uniformly, would preclude all but the most trivial popularly-initiated proposals.").

For example, the First Amendment protects both the speaker's right to make the communication and the audience's right to receive it. *E.g., Virgina State Bd. Of Pharmacy v.*

[2] Proponents do reserve and do not waive any rights to raise objections to the staff draft title and summary report, the argument is simply as stated that the draft title and summary report establishes that *Outcelt* does not apply.

Virgina Citizens Consumer Council, 425 U.S. 748, 757 (1976). Likewise, the First Amendment protects the right to communicate and the right not to communicate. *E.g., Riley v. National Fed'n of the Blind*, 487 U.S. 781, 790 (1988). And of course, the First Amendment protects both the right to speak in one's own name and the right to speak anonymously (or pseudonymously). *E,g. McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 342 & 357 (1995). We don't speak of the right of the audience to hear, or the right not to communicate, or the right to speak anonymously as a separate rights; these are all simply part of the right to free speech.

Here, the right of the public to know the affairs of government is a singular right presenting a singular subject, even though there are different aspects of government affected by such a right. The right to know the affairs of government is a single right and therefore a single subject, as the affairs of "open government" includes public records and meetings. *Cf. In re TITLE*, 875 P.2d 871, 876 (Colo. 1994) ("'Open government' is a commonly understood concept and, as used in contemporary public debate and law, deals with issues involving the requirements of public, as opposed to closed hearings and the access to government documents and records by the public. See Public (Open) Records, § 24-72-201, … (declaring that it is "the public policy of this state that all public records shall be open for inspection by any person . . . ."); Open Meetings Law, § 24-6-401, … (declaring it "to be a matter of statewide concern and the policy of this state that the formation of public policy is public business and may not be conducted in secret"). As such, the phrase 'open government' deals with the accessibility of government information and the requirement that the formation of public policy be conducted under public scrutiny.").

Accordingly, the Title Board majority's approach to fundamental rights is an insoluble Catch-22. If the fundamental right is expressed simply, as it is here, then it is too broad, and hence does not present a single subject. However, the Catch-22 is that if the fundamental right is presented with several complex definitions, then this complexity risks crossing the single subject line.

Last, the Title Board's majority expressed the concerned that the board is unable to tell the voters what is in the measure because the majority asserts that it does not know what the measure means until the courts determine the meaning. To begin, in response to the concern that there is no "definition," there is a definition that records and meetings are public unless they are private or outweighed by another compelling state interest. The right is clearly defined. There may be questions of how this definition applies in particular circumstances, but that is a question of implementation for the custodian/governmental body in the first instance, and the courts in the second instance. Regardless, the voters will know that the fundamental right to know only applies to matters that are public, it does not apply to matters that are private or present another compelling state interest.

But more importantly, the Title Board must not engage in predicting how a measure

would apply when assessing single subject: "We do not determine the initiative's efficacy, construction, or future application, which is properly determined if and after the voters approve the proposal." *In re Title, Ballot Title, Submission Clause for 2009-2010 No. 45*, 234 P.3d at 645. The Court's "limited review of the Title Board's actions" does not allow it to "determine the future application of an initiative in the process of reviewing the action of the Title Board in setting titles for a proposed initiative." *In re Title, Ballot Title, & Submission Clause for 1999-2000 #235(a)*, 3 P.3d at 1225.

The Title Board is not permitted to speculate on a measure's potential effects; the effect of an initiative is outside of the scope of review. *In re Title, Ballot Title, Submission Clause, & Summary for 1999–2000 No. 256*, 12 P.3d at 257. "It is not the function of the Board or this court to educate the voters on all aspects of the proposal or to consider the practical effects of a proposed initiative." *Matter of Title, Ballot Title & Submission Clause, & Summary Pertaining to Lottery Funds Initiative Adopted on May 20, 1992 v. Smith*, 834 P.2d 261, 265 (Colo. 1992).

C. The Title Board majority's speculation about a "parade of horribles" is unwarranted, as all the expressed concerns would be considered compelling interests in the measure's balancing of the right to know against other interests.

Following Montana, the Initiative here creates a fundamental right of the public to know the affairs of government,[3] and specifies that this public right to know must be balanced against whether the demands of individual privacy or other compelling state interest clearly exceeds the merits of public disclosure.[4]

Existing exemptions to public records or public meetings access—such as those protecting ongoing criminal investigations, the addresses of survivors of domestic violence, medical, mental health and veterinary records, trade secrets, attorney-client-privileged communications, library records, public utility usage, or deliberative process considerations—would all meet the new standard for individual privacy or another highly compelling state interest. *See, e.g.*¸ Colo. Rev. Stat. §§ 24-72-204(3)(a)(I), (IV), (VII), (IX), (XIII), and (XIV);

---

[3] Mont. Const., Art. II § 9, the Right to Know, provides as follows: "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." *See* Marzen, "A Constitutional Right To Public Information," *supra* at 229-235 (discussing constitutional Right to Know provisions of California, Floridia, Illinois, Louisiana, Montana, New Hampshire, and North Dakota).

[4] In analyzing the right to know, Montana has set forth the following three-part test: "First, we consider whether the provision applies to the particular political subdivision against whom enforcement is sought. Second, we determine whether the documents in question are "documents of public bodies" subject to public inspection. Finally, if the first two requirements are satisfied, we decide whether a privacy interest is present, and if so, whether the demand of individual privacy clearly exceeds the merits of public disclosure." *Becky v. Butte-Silver Bow School Dist. No. 1 (1995),* 274 Mont. 131, 906 P.2d 193, 196.

see also Colo. Rev. Stat. § 24-6-402(3)(a)(II) & (III), (b)(I), (4)(a), (4)(b), (4)(c), (d), (f).

The cases interpreting CORA or the Sunshine law are interpreting the same language invoked by the Title Board majority's privacy interest concerns; the only change is that instead of viewing such language through the lens of a statute, the custodians and courts will, under the proposed measure, view the right of access created by the proposed measure here through the lens of the privacy rights and other compelling interests that the state constitution protects elsewhere. *See also* David S. Ardia, "Privacy and Court Records: Online Access and the Loss of Practical Obscurity," 2017 U. ILL. L. REV. 1385, 1408-41(discussing how courts have addressed privacy issues in the context of public access to court records).

The proposed measure does not attempt to supplant case law which protects the privacy interests of government officials and private individuals and does not override the privileges such as attorney client, deliberative process, or the privacy interests of governmental employees.

The proposed measure is about public meetings and documents. As to the question "what meetings?", the answer is that if the privacy interests around the meeting outweigh the needs for access, them the proposed measure does not apply. For example, surely the Supreme Court has a compelling privacy interest in deliberating after argument. Court deliberation is not a public meeting under the proposed measure. Privacy interests are protected because access is balanced against privacy or other compelling interests.

In conclusion, while the Title Board should not speculate, the concerns raised by the board majority are not warranted as they all touch on compelling interests that will meet the strict scrutiny test. Each concern articulated by the Title Board majority is a compelling interest:

- Attorney client privilege and work product present compelling interests. Courts have found that when documents are covered by attorney-client privilege, a compelling interest in filing those documents under seal exists. *See, e.g., Luxottica of Am. Inc. v. Allianz Glob. Risks US Ins.* Co., No. 1:20-CV-698, 2021 U.S. Dist. LEXIS 35132, 2021 WL 735205 (S.D. Ohio Feb. 25, 2021) ("The Court can think of few reasons more compelling to permit a seal than the preservation of these important safeguards"); *Long Point Energy, LLC. v. Gulfport Energy Corp.*, No. 2:20-CV-4644, 2025 U.S. Dist. LEXIS 202828, 2025 WL 2903689, at *2 (S.D. Ohio May 29, 2025) ("courts have found that when documents are covered by attorney-client privilege, a compelling interest in filing those documents under seal exists"); *Huntington Nat'l Bank v. Secure Assets, Inc.*, No. 2:25-cv-689, 2026 U.S. Dist. LEXIS 79609, at *4 (S.D. Ohio Apr. 13, 2026); *Tera II, LLC v. Rice Drilling D, LLC*, No. 2:19-cv-2221, 2022 U.S. Dist. LEXIS 68892, at *39 (S.D. Ohio Apr. 14, 2022) ("The attorney-client privilege is a recognized privilege that gives rise to a compelling interest in sealing."); *United States v. William Beaumont Hosps.*, No. 2:10-cv-13440, 2021 U.S. Dist. LEXIS 44726, at*4 (E.D. Mich. Mar. 10, 2021) (there is a

compelling interest to seal information related to the attorney-client privilege and work-product); *Munson Hardisty, LLC v. Legacy Pointe Apartments, LLC,* No. 3:15-cv-547, 2017 U.S. Dist. LEXIS 82028, 2017 WL 2350174, at *2 (E.D. Tenn. May 30, 2017) (collecting cases detailing the need to seal those kind of communications); see also *Shane Grp., Inc. v. Blue Cross Blue Shield of Mich*., 825 F.3d 299, 308 (6th Cir. 2016); *Diversified Group, Inc. v. Daugerdas,* 217 F.R.D. 152, 162, n.12 (S.D.N.Y. 2003) (noting that attorney-client privilege may constitute "compelling interest" militating against access to summary judgment documents in civil case).

- Public safety is a compelling governmental interest. *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989); *Skinner v. Railway Labor Executives Ass'n,* 489 U.S. 602 (1989); cf. *Frye v. Kansas City Missouri Police Dep't*, 375 F.3d 785, 792 (8th Cir. 2004) (government restriction allowing demonstrators to display signs further from a busy road narrowly tailored to serve compelling interest in public safety).
- Protecting confidential informants is a compelling interest. *In re Tyler*, 210 A.3d 143 (Del. 2019) ("Much like child abuse and confidential informant issues, the State has a compelling interest in keeping its internal reports under seal.").
- Trade secrets are a "recognized exception to the right of public access to judicial records." *Brown & Williamson Tobacco Corp. v. F.T.C.,* 710 F.2d 1165, 1180 (6th Cir. 1983)
- Protection of certain kinds of personal information about unelected public employees is a compelling interest. *See Tschida v. Motl*, 924 F.3d 1297, 1304 (9th Cir. 2019).

III. Conclusion

For the foregoing reasons, the Proponents respectfully request that the Title Board determine that Initiative #286 has a single subject and that the Title Board has jurisdiction to set a title.

Respectfully submitted this 21st day of April, 2026.

S/ Shayne M. Madsen
Shayne M. Madsen, No.8750
Director of Political Law Center
727 East 6th Avenue
Denver 80203
Shayne@i2i.org
303-588-1693

S/ Christopher P. Beall
Christopher P. Beall, No. 28536
Recht Kornfeld, P.C.
1600 Stout Street, Suite 1400
Denver, Colorado 80202
christopher@rklawpc.com
(303) 596-5709

S/ Brett R. Lilly
Brett R. Lilly, No. 25662
Brett R. Lilly, LLC
PO Box 1081
Wheat Ridge CO 80034
info@brettlilly.com
303-233-0973

Attorneys for Proponents Jon Caldara and Beth Hendrix

The following supporters sign off on this Brief as Amicus Curiae:

- The Denver Press Club
- Reporters Committee for Freedom of the Press
- Independence Institute
- Colorado Broadcasters Association
- League of Women Voters of Colorado
- American Civil Liberties Union of Colorado (ACLU)
- Colorado Freedom of Information Coalition (CFOIC)
- Colorado Common Cause
- The Colorado Times Recorder
- The Rocky Mountain Voice
- Colorado Press Association
- Colorado Black Women for Political Action

OPEN MEETINGS LAWS PUBLIC RECORDS LAWS

Should the right to know be enshrined in Colorado's constitution?

JUNE 24, 2025

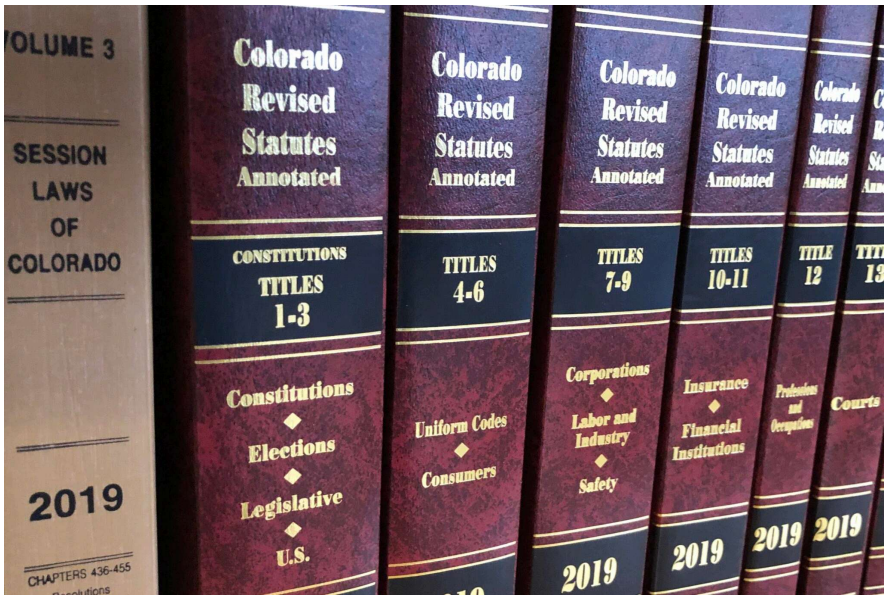
By Jeffrey A. Roberts
CFOIC Executive Director

Colorado's constitution guarantees freedom of speech and freedom of the press, broadly **stating** that "every person shall be free to speak, write or publish whatever he will on any subject."

Should it also guarantee freedom of information?

An ad hoc group that includes the Colorado Freedom of Information Coalition is exploring that idea this summer for a **possible ballot initiative** in 2026. The impetus is what seems to be a backsliding in the General Assembly on government transparency matters: The legislature **exempted itself** from major portions of the Colorado Open Meetings Law in 2024 and lawmakers next year will likely

try for a third straight session to **weaken** the Colorado Open Records Act.



Also involved in the initiative talks are the Independence Institute, the League of Women Voters of Colorado, Colorado Common Cause, the Colorado Press Association and the Colorado Broadcasters Association. As part of that effort, we're looking at other states that have enshrined the public's right to know in their constitutions.

There is no federal constitutional right to know, which U.S. Supreme Court reaffirmed in 2013 when it **upheld** a law requiring users of Virginia's public records law to be residents of that state. But at least eight state constitutions expressly mention the right to inspect government documents or attend government meetings, or both.

Those states are California, Florida, Illinois, Louisiana, Missouri, Montana, New Hampshire and North Dakota.

Fortifying the right to know in a state constitution can serve two purposes: 1) giving weight to public access when legal disputes arise and 2) possibly constraining legislators who might want to dilute the open-government statutes (even those enacted by voters such as Colorado's open meetings law **in 1972**).

Public Access Committee backs fee increase for judicial branch administrative records

ARCHIVES

Select Month

CATEGORIES

Awards

Colorado Legislature

Colorado Legislature 2014

Colorado Legislature 2015

Colorado Legislature 2016

Colorado Legislature 2017

Colorado Legislature 2018

Colorado Legislature 2019

Colorado Legislature 2020

Colorado Legislature 2021

Colorado Legislature 2022

Colorado Legislature 2023

Colorado Legislature 2024

"The public's right of access to government documents and proceedings can be a fickle friend, subject to legislative manipulation at the whim of special interests," noted University of Florida law students Jessica Terkovich and Aryeh Frank in a 2021 **research paper** for The Journal of Civic Information.

Their paper and a 2020 paper in the Public Interest Law Journal examined states with right-to-know constitutional provisions, looking mostly at whether those provisions make a difference in court.

Terkovich and Frank concluded that "at least on the margins, the existence of the right appears to do some work, if only as a make-weight factor when judges balance the interests of disclosure and concealment."

"States without constitutional provisions can be just as accessible to requesters because of their effective statutory protections," they wrote. "Nevertheless, constitutional protections are an important factor to be weighed by the courts in the complex balancing of the right to know and private interests and should not be discounted."

In states with a constitutional right to public information, "state courts have held that the right is a fundamental one," like free speech, a free press, the right to vote, the right to due process and freedom of religion, explained Pennsylvania State University law professor Chad Marzen in the 2020 Public Interest Law Journal **paper** (while he was at Florida State University).

Fundamental rights have a higher degree of protection from government interference. "This degree of protection would ensure public records laws would be fully interpreted with a presumption toward disclosure, and any governmental action which would potentially limit disclosure would be required to be 'necessary' and also relate to a 'compelling governmental purpose,'" Marzen

Colorado Legislature 2025
Court Proceedings
Court Records
First Amendment
Journalism
Open Government Resources
Open Meetings Laws
Other
Public Records Laws

contended, making a case for both federal- and state-level right-to-know constitutional amendments.

Marzen also wrote that a constitutional right to public information helps to "shift the policy analyses of courts toward public disclosure" when public records laws come into conflict with exemption and privacy claims. He cited cases in Montana and Florida in which constitutional rights were deciding factors in court decisions "to uphold the letter and spirit of public records laws."

The Montana Supreme Court in 2015 referenced the Montana Constitution's right-to-know provision in **deciding** that disciplinary records of a school district employee accused of fraud should be released to news organizations.

In one of several Florida cases cited by Marzen, a Florida appeals court pointed to the Florida Constitution in **holding** that a mayor's text messages on a private device may be subject to disclosure. The purpose of Article I, section 24 of the state constitution "is to ensure that citizens may review (and criticize) government actions. That purpose would be defeated if a public official could shield the disclosure of public records by conducting business on a private device," the court noted.

Right-to-know provisions in state constitutions tend to be concise, amounting to just a few paragraphs or less, rather than full of details. Florida's is the most extensive, not only guaranteeing every person's right to inspect public records and attend meetings of public bodies but also making those rights "self-executing," meaning they do not require additional legislation to be implemented. "In essence," Marzen wrote, "… these rights automatically apply even in the scenario of the Florida Legislature repealing its freedom of information law, known as the Sunshine Law." The Florida Constitution also requires a two-thirds vote of both chambers of the legislature to enact new exemptions.

Below are links to each state constitution with a government transparency provision — plus a proposed transparency amendment to the Arkansas Constitution.

California. **Article 1, Section 3** (part of a declaration of rights). Excerpt: "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."

Florida. **Section 24** (part of a declaration of rights). Excerpts: 1) "Every person has the right to inspect or copy 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." 2) "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."

Illinois. **Article VIII**. Excerpt: "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."

Louisiana. **Article XII, Section 3**. Excerpt: "No person shall be denied the right to observe the deliberations of public bodies and examine public documents, except in cases established by law."

Missouri. Article III, Section 19 (applies only to the state legislature). Excerpts: 1) "Legislative records shall be public records and subject to generally applicable state laws governing public access to public records, including the Sunshine Law." 2) "Legislative proceedings, including committee proceedings, shall be public meetings subject to generally applicable law governing public access to public meetings, including the Sunshine Law. Open public meetings of legislative proceedings shall be subject to recording by citizens, so long as the proceedings are not materially disrupted."

Montana. Article II, Section 9 (part of a declaration of rights). Excerpt: "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."

New Hampshire. Part 1, Article 8 (part of a bill of rights). Excerpt: "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."

North Dakota. Article XI, Sections 5 and 6. Excerpts: 1) "Unless otherwise provided by law, all meetings 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 open to the public." 2) ". 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."

Arkansas. **Proposed** for 2024 but ultimately not on the ballot. Excerpt: "It is the duty of public officers to conduct government business in a manner that is open to Arkansans in its disclosure of public records upon a citizen's request and conduct of public meetings."

*Follow the Colorado Freedom of Information Coalition on **X** or **BlueSky**. Like CFOIC's **Facebook** page. Do you appreciate the information and resources provided by CFOIC? Please consider making a tax-deductible **donation**.*

Tweet

TOPICS: Arkansas Constituion Aryeh Frank California Constitution CFOIC Chad Marzen Colorado Broadcasters Association Colorado Common Cause Colorado Constitution Colorado Freedom Of Information Coalition Colorado Legislature Colorado Open Meetings Law Colorado Open Records Act Colorado Press Association Florida Constitution Illinois Constitution Independence Institute Jessica Terkovich Journal Of Civic Information League Of Women Voters Of Colorado Louisiana Constitution Missouri Constitution Montana Constitution New Hampshire Constitution North Dakota Constituion Public Interest Law Journal Right To Know

Previous post Next post

RELATED ARTICLES

Party lines separate lawmakers on bill to require disclosure of presidential candidates' tax returns

Colorado Supreme Court won't hear appeal by teachers' union in sick-leave records case

CFOIC letter to The Denver Post in support of open-records bill

A 'reverse' CORA lawsuit backfires on the town of Paonia

PHONE: 720-274-7177
EMAIL:
COLORADOFOIC@GMAIL.COM

National [redacted]
Freedom [redacted]
Of [redacted]
Information [redacted]
Coalition [redacted]

POPULAR SOVEREIGNTY AND A RIGHT TO KNOW ABOUT THE GOVERNMENT

David S. Ardia*

Imagine that a future U.S. President, upset about negative press coverage and plummeting approval ratings, issues an executive order instructing all federal agencies to henceforth provide no public access to executive branch records and meetings. Imagine further that the President's party controls both chambers of Congress, which rescinds all statutory disclosure obligations imposed on the executive branch, including the Freedom of Information Act ("FOIA"), the Government in the Sunshine Act ("Sunshine Act"), and the Presidential Records Act. Is the public's ability to understand the actions of government solely a matter for their elected representatives to decide? Disturbingly, many courts and scholars seem to think so.

If the government attempts to keep its citizens in the dark, or even actively misleads them, how can this not strike at the very heart of the Constitution? I argue in this Article that a right to know about the government is fundamental to the Constitution's system of checks and balances. While past scholarship has largely grounded the right to know in the First Amendment, this Article advances a more compelling claim: the Framers' unwavering commitment to popular sovereignty demands that the people have a right to know about their government. Recognizing a right to know as a constitutional imperative, rooted in the people's sovereign authority, establishes a durable foundation for limited government—one that ensures that citizens can hold their leaders accountable and fully exercise their role in self-government.

Implementing a right to know about the government will present many challenges. Fortunately, we can draw guidance from the Supreme Court's cases applying a public right of access to the courts, and we have decades of experience with open government statutes such as FOIA and the Sunshine Act. Building on this foundation, I lay out three core principles that should guide the development of a right to know about the government. First, a right to know should be limited in scope

---

* Reef C. Ivey II Excellence Fund Term Professor of Law, University of North Carolina School of Law, and Faculty Co-Director, UNC Center for Media Law and Policy. Thanks to Margaret Kwoka, Bill Marshall, Mary-Rose Papandrea, and participants at the UNC Faculty Scholarship Workshop for helpful comments and discussion. Thank you also to Amy Price and Blythe Riggan for exceptional research assistance.

and extend only so far as is necessary to fulfill the needs of democratic self-government. Second, even when a right to know applies, it should yield when countervailing interests are sufficiently weighty. Third, the government must have leeway in designing access policies and procedures that account for the practical realities of providing public access.

TABLE OF CONTENTS

INTRODUCTION

Imagine that a future U.S. President, upset about negative press coverage and plummeting public approval ratings, issues an executive order instructing all federal agencies to henceforth provide no public access to executive branch records and meetings. He also cancels all press conferences and orders the White House Press Secretary and senior aides to communicate with the public only through Gov Social, a new privately owned social media platform launched at the behest of the President. Within days, the Department of Homeland Security stops providing statistics on immigration and customs enforcement; the Environmental Protection Agency halts the disclosure of air and water pollution permits; the Department of Labor ceases providing monthly unemployment reports; and the Centers for Disease Control and Prevention shuts down its online dashboard tracking the spread of infectious diseases.

Lawsuits inevitably follow. Many of the President's directives violate the Freedom of Information Act ("FOIA"), the Government in the Sunshine Act

("Sunshine Act"), and other disclosure statutes.[1] The courts do their best to enforce these rather toothless laws,[2] issuing fines and ordering agency officials to comply. The President refuses to back down, however, and the Department of Justice moves to intervene in the lawsuits, arguing that FOIA and other disclosure statutes are ultra vires: that separation of powers principles preclude Congress from mandating that the executive branch open its records and meetings to the public. Some constituents complain to their representatives about the restrictions, but the President's party holds a majority in the U.S. House and Senate; and while Congress conducts a few cursory hearings, members of the administration refuse to appear (arguing executive privilege).

All the while, the Administration offers selective disclosures in an orchestrated campaign to sway public sentiment in its favor. Members of the President's party fan out across cable television, talk radio, and social media claiming that transparency laws are being used by the President's political opponents to conduct "witch hunts" and spread "fake news." The Administration also puts out charts claiming that taxpayer money is being wasted on burdensome and expensive disclosure requirements (they do not provide the underlying data or mention any of the benefits the statutes provide). Responding to an upwelling of public indignation, Congress rescinds all statutory disclosure obligations imposed on the executive branch, including FOIA, the Sunshine Act, and the Presidential Records Act.

Is the public's ability to understand the actions of government solely a matter for their elected representatives to decide? If the government attempts to keep its citizens in the dark, or even actively misleads them, would this not implicate the Constitution? I argue in this Article that a right to know about the government is fundamental to American democracy. The Constitution's implementation of republican government is predicated on an informed electorate. Without access to information about the government, the Framers' carefully crafted system of checks and balances falls apart, rendering the people incapable of exercising their sovereign authority over the government.[3] As James Madison, a key architect of the Constitution, famously warned, "A popular Government, without popular

---

1. Freedom of Information Act of 1966, 5 U.S.C. § 552; Government in the Sunshine Act of 1976, 5 U.S.C. § 552b; *see also, e.g.*, Federal Advisory Committee Act of 1972, 5 U.S.C. app. 2 §§ 1–16 (establishing open meeting, public involvement, and reporting requirements for federal advisory committees); Presidential Records Act of 1978, 44 U.S.C. §§ 2201–2209 (specifying that presidential records belong to the United States and establishing a process by which the public may obtain access to the records).

2. Scholars have long criticized these statutes as lacking effective enforcement mechanisms. *See, e.g.*, David E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. PA. L. REV. 1097, 1099 (2017); William Funk, *Public Participation and Transparency in Administrative Law—Three Examples as an Object Lesson*, 61 ADMIN. L. REV. 171, 181–83, 185, 188–89 (2009).

3. The idea that sovereignty resides in the people derives support from many sources. *See, e.g.*, U.S. CONST. pmbl. ("We the People of the United States . . . do ordain and establish this Constitution for the United States of America."); THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("Governments are instituted among men, deriving their just powers from the consent of the governed.").

information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both."[4]

Scholars and open government advocates have long argued for a right of public access to government information, largely grounding a "right to know"[5] in various theories of the First Amendment.[6] These arguments were especially

4. Letter from James Madison to W.T. Barry (Aug. 4, 1822), *in* 9 THE WRITINGS OF JAMES MADISON, 1819–1836, at 103, 103 (Gaillard Hunt ed., 1910). Although James Madison made this statement in a letter where he extolled the importance of government support for public schools, it is clear from Madison's many other statements during the founding period that his views on the matter were broader than just public education. Indeed, he repeatedly remarked that an informed public was integral to the system of checks and balances at the heart of the Constitution. *See infra* Part I.

5. A "right to know" has been used to encompass a broad set of informational rights, including a right to receive information from both public and private sources. *See, e.g.*, LANI WATSON, THE RIGHT TO KNOW: EPISTEMIC RIGHTS AND WHY WE NEED THEM 23 (2021) (describing the right to know as an epistemic right "that protect[s] and govern[s] the quality, distribution and accessibility of epistemic goods" like knowledge, truth, belief, justification, and understanding). The idea of a right to know *about the government* was popularized in the United States during the mid-twentieth century by scholars who argued specifically for a right of access to government information. *See infra* notes 6–7 and accompanying text. My use of this phrase tracks these American scholars and is limited to a right of access to government information only.

6. *See* David M. O'Brien, *The First Amendment and the Public's Right to Know*, 7 HASTINGS CONST. L.Q. 579, 580 (1980) ("An increasing number of constitutional scholars argue that the public's 'right to know' is implicitly guaranteed by the First Amendment and by the general principles of a constitutional democracy."). One of the first, and most influential, advocates for a right to know was Harold Cross, who was instrumental in marshalling support for FOIA. *See* HAROLD CROSS, THE PEOPLE'S RIGHT TO KNOW xiii (1953) ("Public business is the public's business. The people have the right to know. Freedom of information is their just heritage.").

common in the 1970s and 1980s[7] but mostly faded in the decades that followed.[8] This is due in part to the widespread—but mistaken—belief that the Supreme Court categorically rejected a constitutional right of access in its prison access cases,[9] but it is also because advocates for public access have been mollified by the next best solution: the limited statutory grants of access provided by FOIA and other open government statutes. While these laws have been immensely important in providing a window into the government, danger still looms because these statutory "rights" are ultimately ephemeral.[10]

---

7. *See, e.g.*, Frank Horton, *The Public's Right to Know*, 3 N.C. CENT. L.J. 123 (1972); Thomas I. Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U. L.Q. 1 (1976); David M. Ivester, *The Constitutional Right to Know*, 4 HASTINGS CONST. L.Q. 109 (1977); Anthony Lewis, *A Public Right to Know About Public Institutions: The First Amendment as Sword*, 1980 SUP. CT. REV. 1; Michael J. Perry, *Freedom of Expression: An Essay on Theory and Doctrine*, 78 NW. U. L. REV. 1137 (1983); Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449 (1985). Arguments for a right to know were driven in part by concerns over an increasingly opaque government. As Eugene Cerruti explains:

> Shortly after World War II, concern mounted over the government's ability and tendency to institutionalize secrecy in government. The initial concern was with the anti-communist sleuthing of various legislative bodies which dramatized the power of secretly held information to control the public agenda of both domestic and foreign policy debate. From this emerged the call for a more "open" government and the political claim that the electorate had a "right to know" the information acquired and relied upon by government officials.

Eugene Cerruti, *"Dancing in the Courthouse": The First Amendment Right of Access Opens a New Round*, 29 U. RICH. L. REV. 237, 237 (1995).

8. A notable exception is the bump in scholarship triggered by the government's Global War on Terror after September 11, 2001. *See, e.g.*, Heidi Kitrosser, *Secrecy in the Immigration Courts and Beyond: Considering the Right to Know in the Administrative State*, 39 HARV. C.R.-C.L. L. REV. 95 (2004) [hereinafter Kitrosser, *Secrecy in the Immigration Courts*]; Mary-Rose Papandrea, *Under Attack: The Public's Right to Know and the War on Terror*, 25 B.C. THIRD WORLD L.J. 35 (2005); Raleigh Hannah Levine, *Toward a New Public Access Doctrine*, 27 CARDOZO L. REV. 1739 (2006); Seth F. Kreimer, *Rays of Sunlight in a Shadow "War": FOIA, the Abuses of Anti-Terrorism, and the Strategy of Transparency*, 11 LEWIS & CLARK L. REV. 1141 (2007).

9. *See* Pell v. Procunier, 417 U.S. 817 (1974); Saxbe v. Wash. Post Co., 417 U.S. 843 (1974); Houchins v. KQED, Inc., 438 U.S. 1 (1978) (plurality opinion). The claim that the Supreme Court rejected a constitutionally based right of access to government information in its prison access cases distorts the Court's limited holdings in these cases and fails to account for the Court's later decisions recognizing a First Amendment right of access to criminal trials and pretrial proceedings. *See* Matthew L. Schafer, *Does* Houchins v. KQED, Inc. *Matter?*, 70 BUFF. L. REV. 1331, 1427–33 (2022); David S. Ardia, *A First Amendment Right to Know About the Government*, 111 CORNELL L. REV. (forthcoming Jan. 2026) (manuscript at 17–22) (on file with author) [hereinafter Ardia, *A First Amendment Right to Know*].

10. *See* Mary-Rose Papandrea, *Information is Power: Exploring a Constitutional Right of Access*, *in* NATIONAL SECURITY, LEAKS AND THE FREEDOM OF THE PRESS: THE PENTAGON PAPERS FIFTY YEARS ON 230, 232 (Geoffrey Stone & Lee Bollinger eds., 2021) ("Because these [statutory] access rights are not constitutionally protected . . . they are ephemeral.").

Without a *constitutional* right of access to information about the government, we have been left to rely on the benevolence of government officials. This is a perilous place to be for a republic founded on the principle of *self*-government. As the past decade has shown, the norms of democratic government are dangerously shallow.[11] It is not hard to imagine a Congress of the same political party as the President acquiescing in the curtailment of public oversight, especially if due to political gerrymandering, members no longer suffer electoral repercussions from appealing only to a minority of voters whose primary interest is to retain political power rather than to ensure government accountability.

I argue in this Article that a right to know about the government is fundamental to American democracy.[12] While previous scholarship has largely anchored the case for a right to know in the First Amendment's guarantees of speech and press,[13] this Article advances a more compelling claim: the Framers' unwavering commitment to "popular sovereignty" demands that the people have a right to know about their government.[14] Indeed, it is the cornerstone of the Constitution's system of self-government. In the Constitution's implementation of representative democracy, an educated and informed citizenry is the very engine powering self-government. Recognizing a right to know as a constitutional imperative, rooted in the people's sovereign authority, establishes a durable

---

11. *See* STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE 8–9, 146, 176–203 (2018) (discussing the weakening of the "soft guardrails" of American democracy). Steven Levitsky and Daniel Ziblatt explain:

> Two basic norms have preserved America's checks and balances in ways we have come to take for granted: mutual toleration, or the understanding that competing parties accept one another as legitimate rivals, and forbearance, or the idea that politicians should exercise restraint in deploying their institutional prerogatives. . . . Norms of toleration and restraint served as the soft guardrails of American democracy, helping it avoid the kind of partisan fight to the death that has destroyed democracies elsewhere in the world, including Europe in the 1930s and South America in the 1960s and 1970s.
>
> Today, however, the guardrails of American democracy are weakening. . . . Donald Trump may have accelerated this process, but he didn't cause it. The challenges facing American democracy run deeper. The weakening of our democratic norms is rooted in extreme partisan polarization—one that extends beyond policy differences into an existential conflict over race and culture.

Id. at 8–9.

12. *See infra* Part I.

13. I argue elsewhere that a right to know is also compelled by the First Amendment. *See* Ardia, *A First Amendment Right to Know*, *supra* note 9, at 3.

14. Although the precise contours of "popular sovereignty" remain contested, the basic concept is that government derives its power and legitimacy from the people, who retain sovereignty over the government. *See, e.g.*, Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1435, 1437 (1987) (explaining that the American conception of popular sovereignty is rooted in the idea that "governments could be delegated limited powers to govern" and that "[t]rue sovereignty resided in the People themselves"); Peter De Marneffe, *Popular Sovereignty, Original Meaning, and Common Law Constitutionalism*, 23 L. & PHIL. 223, 239 (2004) (writing that popular sovereignty in the context of "[r]epublican government is . . . government of the people, by the people, and for the people").

foundation for limited government—one that ensures that citizens can hold their leaders accountable and fully exercise their role in self-government.

Part I begins by explaining that a right to know about the government is an essential, structural component of the Constitution's implementation of popular sovereignty. Although the Constitution does many things, it is, at its core, a blueprint for *self*-government. The Framers of the Constitution were deeply concerned that the federal government would become tyrannical, so they devised a system of checks and balances to diffuse government power and to ensure that self-government would not be eroded.[15] In doing so, they created not only a separation of powers between the various branches and levels of government, but also a separation of powers between the government and the people, with the people retaining ultimate authority over the government. To exercise this critical oversight role, the people must know what their government is doing.[16]

Part II addresses the most common arguments that have been made opposing a constitutional right of access to government information, including assertions that government transparency is an intractable political question; judges lack the competence to evaluate competing claims of transparency and secrecy; and the recognition of a constitutional right of access to government information will paralyze the government and make it incapable of functioning. It should be noted that many of these same arguments were made in opposition to FOIA.[17] As history has shown, however, public access to government information has not brought the government to its knees; rather, public access has produced significant benefits, including greater accountability, better policymaking, increased government efficiency, and reduced corruption.[18] 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.

This is not to say that implementing a right to know will be costless or easy. Fortunately, we can draw guidance from the Supreme Court's judicial access cases,[19] and we have decades of experience with FOIA and other disclosure statutes.[20] Drawing on this experience, Part III lays out three core principles that should guide the development of a right to know. First, a right to know about the government should be limited in scope and extend only so far as is necessary to

---

15. *See infra* Section I.A.

16. *See infra* Section I.B.

17. *See infra* notes 267–70 and accompanying text.

18. *See infra* note 270 and accompanying text.

19. *See, e.g.*, Globe Newspaper Co. v. Superior Ct., 457 U.S. 596 (1982) (applying First Amendment right of access to criminal trials); Press-Enter. v. Superior Ct. (*Press-Enterprise I*), 464 U.S. 501 (1984) (applying First Amendment right of access to jury voir dire); Press-Enter. v. Superior Ct. (*Press-Enterprise II*), 478 U.S. 1 (1986) (applying First Amendment right of access to preliminary hearings).

20. Although current open government statutes have been widely criticized for failing to live up to their transparency and accountability aspirations, *see infra* note 175, they do provide a useful guide to implementing a right to know about the government. *See infra* Sections III.B–C.

fulfill the needs of democratic self-government.[21] Second, even when a right to know applies, it should yield when countervailing interests supporting secrecy are sufficiently weighty.[22] Third, the government must have leeway in designing access policies and procedures that account for the practical realities of providing public access.[23]

I. CONSTITUTIONAL STRUCTURE AND A RIGHT TO KNOW ABOUT THE GOVERNMENT

Knowledge about the government forms the cornerstone of all democratic systems of governance. Without such knowledge, the promise of government founded on the consent of the governed rings hollow. As this Part will show, a right to know about the government finds support not only in the First Amendment's guarantees, but also in the indispensable role an informed citizenry plays in preserving the checks and balances at the heart of the governance structures established by the Constitution. This carefully crafted system of limited government was designed to ensure that the people, from whom all power flows, retained sovereign authority over their government.

A. The Constitution's System of Checks and Balances Safeguards Popular Sovereignty

The argument for a right to know about the government begins with the observation that the Constitution created a system of government in which the people hold the ultimate authority.[24] The belief that citizens retain authority over their government was central to the national compact that led to ratification of the Constitution,[25] with many of the Framers influenced by the writings of John Locke and John Milton,[26] among other political theorists, who provided a strong philosophical foundation for the notion of self-government.[27] As Alexander

---

21. *See infra* Section III.A.

22. *See infra* Section III.B.

23. *See infra* Section III.C.

24. *See* U.S. CONST. pmbl. ("We the People of the United States . . . do ordain and establish this Constitution for the United States of America."); THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("Governments are instituted among men, deriving their just powers from the consent of the governed.").

25. *See* GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815, at 6–7 (2009) ("[N]early all Americans . . . were keenly aware that by becoming members of thirteen republics they had undertaken a bold and perhaps world shattering experiment in self-government.").

26. *See* JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT 54–55 (Thomas P. Peardon ed., 1952) (1689); JOHN MILTON, AREOPAGITICA 1–10 (1644); *see cf.* JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 6–9 (Currin V. Shields ed., Liberal Arts Press 1953) (1861).

27. *See, e.g.*, James A. Gardner, *Consent, Legitimacy and Elections: Implementing Popular Sovereignty Under the Lockean Constitution*, 52 U. PITT. L. REV. 189, 208 (1990) (concluding the Constitution relies on a Lockean theory of popular sovereignty and consent because "the preamble suggests (1) a people, (2) comprising a pre-existing society, (3) establishing a government—the essence of Lockean popular sovereignty"); Lisa Grow Sun & RonNell Andersen Jones, *Disaggregating Disasters*, 60 UCLA L. REV. 884, 891 (2013)

Hamilton argued in *The Federalist No. 22*: "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."[28] James Madison was even clearer, stating in *The Federalist No. 46* that "ultimate authority . . . resides in the people alone."[29] These statements reflect not merely theoretical aspirations but the very structural premise of the Constitution itself.

I have written extensively about the importance of interpreting the First Amendment in light of the *structural role* the Amendment's protections play in facilitating self-government.[30] This emphasis on understanding constitutional structure goes beyond the text of the Constitution to examine the "relationships between the national government and the states, the branches of the national government, the government and the people and, in sum, the general arrangement of offices, powers, and relationships allegedly manifest in the Constitution's text and the settled facts of constitutional history."[31] As scholars have noted, "The framers did, after all, exercise intentional and deliberate choices in establishing [the] basic structure [of government], which they embodied in a document intended to have enduring organic and operative effects for an unknowable future."[32] And they did so to ensure that regardless of what lay ahead, the people would retain sovereignty over their government.

The Constitution's division of power is a structural component of self-government.[33] By creating separate branches of government with distinct authorities

---

("Under the classic Rawlsian political liberalism, only a society offering full information on which individuals may base their decision to associate can generate governing institutions that are understood, legitimate, and just.").

28. THE FEDERALIST NO. 22, at 112 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

29. THE FEDERALIST NO. 46, *supra* note 28, at 243 (James Madison); *see also* THE FEDERALIST NO. 49, *supra* note 28, at 261 (James Madison) ("[T]he people are the only legitimate fountain of power.").

30. *See generally* David S. Ardia, *Beyond the Marketplace of Ideas: Bridging Theory and Doctrine to Promote Self-Governance*, 16 HARV. L. & POL'Y REV. 275 (2022) [hereinafter Ardia, *Beyond the Marketplace of Ideas*]; David S. Ardia, *Court Transparency and the First Amendment*, 38 CARDOZO L. REV. 835 (2017) [hereinafter Ardia, *Court Transparency*]; David S. Ardia, *Privacy and Court Records: Online Access and the Loss of Practical Obscurity*, 2017 U. ILL. L. REV. 1385 (2017) [hereinafter Ardia, *Privacy and Court Records*].

31. SOTIRIOS A. BARBER & JAMES E. FLEMING, CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS 120 (2007); *see also* PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 74 (1982); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1236 (1995).

32. Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 308 (1978).

33. *See* MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE 4–5 (1995) ("[B]ecause the political structure envisioned in the Constitution is so central to the values that inhere in the concept of limited government (namely, the avoidance of tyranny

and responsibilities, the Constitution ensures that no one person or group can seize too much power. In general terms, this entails a legislative branch authorized to create laws, an executive branch empowered to execute those laws, and a judicial branch responsible for interpreting the nation's laws.[34] This grant of powers, however, is not absolute. The Constitution gives each branch ways to check the power of the other branches and reserves some powers for the states. For example, the President can veto laws passed by Congress, but Congress can override a veto;[35] Congress can impeach and remove the President or federal judges;[36] and while the judiciary can rule on the enforceability of laws passed by Congress,[37] Congress can amend the laws in response to court decisions.

What is often overlooked in the discussion of the Constitution's system of checks and balances is the role of the people. Yet the people are an essential structural entity in the Constitution's power-sharing scheme, which spreads power not just across the three branches of the federal government and between the federal and state governments, but also between the government and the people.[38] The Tenth Amendment states this explicitly, commanding 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*"[39]—but the idea that the people hold the ultimate authority over the government pervades the Constitution.[40] Indeed, Alexander Hamilton wrote in *The Federalist No. 84* that the express reservation of rights "to the people" in the Tenth Amendment was not even necessary because, he argued, "the Constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS," which serves the same function of "declar[ing] and

---

and the preservation of individual liberty), the provisions that dictate that structure need to be enforced . . . with . . . consistency and enthusiasm . . . ."); Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 523–26 (2015) ("[T]he Framers, fearing tyranny and corruption, constrained the exercise of newly expanded federal powers. One of the principal methods of constraint was, of course, a system of checks and balances. These checks helped legitimize and rationalize sovereign authority.").

34. *See generally* U.S. CONST. arts. I–III.

35. *Id.* art. I, § 7, cl. 2.

36. *Id.* art. I, § 2, cl. 5; *id.* art. I, § 3, cl. 6; *id.* art. II, § 4.

37. *See id.* art. I, §§ 7–8. Although nowhere explicitly stated in the Constitution, the Supreme Court has held that the federal judiciary also has the power to declare laws or government actions unconstitutional. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177–78 (1803) (deriving the power of judicial review from general understandings of the judicial function and the structure of government created by the Constitution).

38. *See* Ozan O. Varol, *Structural Rights*, 105 GEO. L.J. 1001, 1034 (2017) ("In a typical constitution, the people are a collective, structural entity—albeit an entity with divergent preferences and interests—and are empowered with individual rights.").

39. U.S. CONST. amend. X (emphasis added).

40. *See* Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 7 (2010) (noting that "[t]he Tenth Amendment, added in 1791, emphasizes that the powers delegated by the people are less than a complete grant to the national government," and the amendment "reflects a deeper structural principle underlying the text and its choice of enumerated powers").

specify[ing] the political privileges of the citizens in the structure and administration of the government."[41]

As the debate over the need for a Bill of Rights demonstrates,[42] the Framers put a great deal of emphasis on governmental structure as a means of preventing tyranny and ensuring popular sovereignty.[43] Although the precise contours of the doctrine of popular sovereignty remain contested, the core concept is that government derives its power and legitimacy from the people, who retain authority over the government.[44] Ian Bartrum explains that the Constitution's implementation of popular sovereignty means that the federal government was granted only limited authority to act as an *agent of the people*: "Unlike the Hobbesian social contract model, wherein the people surrendered sovereignty itself to the commonwealth, the American People retained some essential features of sovereign dignity and autonomy, and appointed the government only as their agent."[45] The reference to "We the People" in the Constitution's Preamble was not simply a rhetorical flourish, it was the "driving ideological force behind the American Revolution, the founding of our nation, and the Constitution that now binds it."[46] As Alexis de Tocqueville, a keen student of American democracy, wrote in 1835: "When one wants to speak of

---

41. THE FEDERALIST NO. 84, *supra* note 28, at 447 (Alexander Hamilton); *see also* ASHUTOSH BHAGWAT, THE MYTH OF RIGHTS: THE PURPOSES AND LIMITS OF CONSTITUTIONAL RIGHTS 37 (2010) (observing that constitutional rights "were conceived by the framing generation not as a source of individual autonomy, but as a tool for the People collectively to protect themselves against an oppressive government"); ROBERT F. NAGEL, CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW 64–65 (1989) (writing that the framers of the Constitution viewed structure as "the great protection of the individual").

42. *See* JACK N. RAKOVE, ORIGINAL MEANINGS 318–38 (1996) (discussing the debates concerning the necessity of a bill of rights).

43. *See, e.g.*, Jack W. Nowlin, *The Judicial Restraint Amendment: Populist Constitutional Reform in the Spirit of the Bill of Rights*, 78 NOTRE DAME L. REV. 171, 228, 233 (2002) (noting that "the debates in Philadelphia concerning the framing of the Constitution dealt almost entirely with structural-procedural questions" and concluding that the rights included in the First Amendment "are directly related to the healthy functioning of a representative form of government and thus to what the Founders viewed as the fundamental and preeminent right to representation"); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1147 (1991) (writing that the First Amendment's limitation on Congress "obviously sounds in structure, and focuses (at least in part) on the representational linkage between Congress and its constituents").

44. *See, e.g.*, Amar, *supra* note 14, at 1435, 1439 (footnote omitted) (omission in original) ("[T]his single idea [of popular sovereignty] informs every article of the Federalist Constitution, from the Preamble to Article VII. It was thus no happenstance that the Federalists chose to introduce their work with words that ringingly proclaimed the primacy of that new understanding: 'We the People of the United States . . . do ordain and establish this Constitution for the United States of America.'").

45. Ian Bartrum, *James Wilson and the Moral Foundations of Popular Sovereignty*, 64 BUFF. L. REV. 225, 228 (2016); *see also* Amar, *supra* note 14, at 1435 (explaining that the American conception of popular sovereignty was rooted in the idea that "governments could be delegated limited powers to govern" and that "[t]rue sovereignty resided in the People themselves").

46. Elizabeth Anne Reese, *Or to the People: Popular Sovereignty and the Power to Choose a Government*, 39 CARDOZO L. REV. 2051, 2053 (2018).

the political laws of the United States, it is always with the dogma of the sovereignty of the people that one must begin."[47]

B. Popular Sovereignty Depends on Knowledge About the Government

It hardly needs to be stated that if citizens are kept in the dark about their government's actions, they cannot serve as an effective restraint on government, and the Constitution's carefully crafted system of checks and balances will tilt dangerously in the direction of tyranny.[48] Elections alone do not confer democratic legitimacy. As Mark Rosen points out, "Representative democracy does not spontaneously occur by citizens gathering to choose laws."[49] Identifying what he calls the "rules of the road" that operationalize representative democracy, Rosen argues that "republicanism takes place within an extensive legal framework that determines such matters as who gets to vote, how campaigns are conducted, and what conditions must be met for representatives to make valid law."[50]

Put simply, the people must have information about the government in order to grant it authority to govern on their behalf, and a government that denies them such information is illegitimate.[51] In important respects, Rosen's rules of the

---

47. 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 53 (Harvey C. Mansfield & Delba Winthrop eds. & trans., 2000) (1835); *see also* PAUL K. CONKIN, SELF-EVIDENT TRUTHS 28–41 (1974) (noting that popular sovereignty became "a common, unifying belief" among the colonies); WOOD, *supra* note 25, at 182 (concluding that it was "axiomatic by 1776 that the only moral foundation of government is the consent of the people").

48. *See* JOHN DEWEY, THE PUBLIC AND ITS PROBLEMS 177–79 (1927) (stating that "[o]pinions and beliefs concerning the public presuppose effective and organized inquiry," and warning that "[g]enuine public policy cannot be generated unless it be informed by knowledge"); Heidi Kitrosser, *Secrecy and Separated Powers: Executive Privilege Revisited*, 92 IOWA L. REV. 489, 515–16 (2007) [hereinafter Kitrosser, *Secrecy and Separated Powers*] ("Popular sovereignty would not have much meaning without a norm of openness as to governors' activities, without which governors could easily manipulate the people through information control. . . . That popular sovereignty must mean informed popular sovereignty is suggested also by the philosophical premises that underscore popular control.").

49. Mark D. Rosen, *The Structural Constitutional Principle of Republican Legitimacy*, 54 WM. & MARY L. REV. 371, 376 (2012); *see also* Jack M. Balkin, *History, Rights, and the Moral Reading*, 96 B.U. L. REV. 1425, 1428 (2016) ("[D]emocracies, like all forms of government, must satisfy conditions of political legitimacy.").

50. Rosen, *supra* note 49, at 376; *see also* Sun & Jones, *supra* note 27, at 891 (footnote omitted) ("A contractual notion of democratic rule, focused on the sanctioning of government by the people, sees honest, transparent, communicative government as a prerequisite to informed consent of the governed and as a vital ingredient of popular legitimacy."); Stuart Chinn, *Procedural Integrity and Partisan Gerrymandering*, 58 HOUS. L. REV. 597, 616 (2021) (arguing that procedural integrity is a necessary component for democratic legitimacy).

51. *See* Martin E. Halstuk & Benjamin W. Cramer, *Informed Dissent: Toward a Constitutional Right to Know*, 5 J. CIVIC INFO. 1, 2 (2023) ("The consent of the governed requires access to information, thus leading to the *informed consent* that must be acknowledged by political leaders who operate under the oversight of the public."); Adam M. Samaha, *Government Secrets, Constitutional Law, and Platforms for Judicial Intervention*, 53 UCLA L. REV. 909, 917–18 (2006) ("Without meaningful information on government plans, performance, and officers, the ability to vote, speak, and organize around political

road parallel Robert Post's theory of "democratic legitimation," which asserts that those who are subject to law must "experience themselves as the authors of law."[52] For this to happen, those who are subject to the law must be empowered—and competent—to actually participate in the lawmaking process.[53] In his elaboration of the importance of democratic competence, Post highlights the significance of informed public discourse, writing that "an educated and informed public opinion will more intelligently and effectively supervise the government."[54] As Post notes, without an *informed* public, self-government is not possible, and freedom to participate in public discourse alone cannot create democratic legitimation.[55]

Not surprisingly, the conviction that an informed public is necessary for democratic legitimacy sits at the core of nearly all theories of self-government. In the words of Alexander Meiklejohn:

> The welfare of the community requires that those who decide issues shall understand them. . . . Just so far as, at any point, the citizens who are to decide an issue are denied acquaintance with information or opinion . . . which is relevant to that issue, just so far the result must be ill-considered, ill-balanced planning for the general good. It is that mutilation of the thinking process of the community against which the First Amendment to the Constitution is directed.[56]

Like Meiklejohn, many constitutional scholars emphasize the role that an informed public plays in facilitating self-government.[57] Thomas Emerson writes that "if democracy is to work, there can be no holding back of information; otherwise ultimate decisionmaking by the people, to whom that function is committed,

---

causes becomes rather empty. . . . This understanding could itself foreclose the government's democratic legitimacy.").

52. ROBERT C. POST, DEMOCRACY, EXPERTISE, ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE 17 (2012). According to Post, the First Amendment's speech and press protections were intended to advance two related values associated with self-government: "democratic legitimation" and "democratic competence." *Id.* at xiii. For Post, protections for speech support democratic legitimation because such protections help to ensure "that those who are subject to law . . . also experience themselves as the authors of law." *Id.* at 17. Democratic competence, on the other hand, involves "the cognitive empowerment of persons within public discourse." *Id.* at 34.

53. *Id.* at 32–33 ("Reliable expert knowledge is necessary not only for intelligent self-governance, but also for the very value of democratic legitimation.").

54. *Id.* at 35.

55. *Id.* at 34 ("Cognitive empowerment is necessary both for intelligent self-governance and for the value of democratic legitimation.").

56. ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 26–27 (1948).

57. *See, e.g.*, CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 121–65 (1993); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20–21 (1971); Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CALIF. L. REV. 2353, 2362 (2000); James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 VA. L. REV. 491, 497 (2011); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 595–96 (1982) (arguing that all other theories of the First Amendment are subsets of "self-realization").

becomes impossible."[58] Marin Scordato and Paula Monopoli point out that "mere adherence to the formalities of granting consent in the absence of information about the functioning of the government and the society in which it operates would fail as a mechanism for conferring genuine authority on the government."[59]

The Constitution makes clear that governmental authority rests on the consent of the governed.[60] Naturally then, those who are consenting must have the information necessary to genuinely give their consent.[61] Consent that is not informed is meaningless.[62] The Framers thought the necessity of informed consent to be axiomatic and repeatedly remarked on the need for an enlightened citizenry if the new nation was to be successful.[63] James Madison's eloquent statement tying self-government to public information has been quoted countless times, including in the Introduction to this Article, but the full quote provides more insight into his conviction that access to information about the government is essential to preserving the balance of power between the people and their government: "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, *must arm themselves with the power which knowledge gives*."[64]

Concern that the nation's new government would undermine popular sovereignty by denying citizens the information they needed for meaningful

---

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

59. Marin R. Scordato & Paula A. Monopoli, *Free Speech Rationales After September 11th: The First Amendment in Post-World Trade Center America*, 13 STAN. L. & POL'Y REV. 185, 197 (2002); *see also* Halstuk & Cramer, *supra* note 51, at 27 ("[T]he early constitutional ideal of the consent of the governed requires that information be available to citizens who can formulate the informed consent necessary for self-government, which in turn can fuel informed *dissent* while demanding accountability from political leaders.").

60. *See supra* notes 25–30 and accompanying text.

61. *See* Edward A. Harris, *From Social Contract to Hypothetical Agreement: Consent and the Obligation to Obey the Law*, 92 COLUM. L. REV. 651, 672 (1992) ("Social consent theory holds that obligations can be willingly self-imposed only by the informed and voluntary actions of the individual."); Martin H. Redish & Abby Marie Mollen, *Understanding Post's and Meiklejohn's Mistakes: The Central Role of Adversary Democracy in the Theory of Free Expression*, 103 NW. U. L. REV. 1303, 1324 (2009) ("To be truly legitimating, participation in the public discourse must be free and informed.").

62. *See* John Cornyn, *Ensuring the Consent of the Governed: America's Commitment to Freedom of Information and Openness in Government*, 17 LBJ J. PUB. AFFS. 7, 10 (2004) (remarking that "government never rules without the consent of the governed" and that "consent is meaningless unless it is informed consent"); Raleigh Hannah Levine, *The (Un)informed Electorate: Insights into the Supreme Court's Electoral Speech Cases*, 54 CASE W. RES. L. REV. 225, 229 (2003) ("Simply put, the consent [of the governed], and hence the democracy itself, lack legitimacy if the majority's consent is not informed . . . ."); Michael J. Perry, *Freedom of Expression: An Essay on Theory and Doctrine*, 78 NW. U. L. REV. 1137, 1144 (1983) ("To the extent that government manipulates, by interfering with communication of or access to information or ideas useful in evaluating public policy or performance, it manipulates the vote and the other political choices people make.").

63. *See infra* notes 95–97 and accompanying text.

64. Letter from James Madison to W.T. Barry, *supra* note 4, at 103 (emphasis added).

oversight of the government was clearly on the minds of those who drafted the Constitution.[65] In 1765, John Adams wrote in his *Dissertation on the Canon and Feudal Law* that the people "have a right, an indisputable, unalienable, indefeasible, divine right to that most dreaded and envied kind of knowledge, I mean, of the characters and conduct of their rulers."[66] On this point at least, both the Federalists and Anti-Federalists seem to have been in agreement. Patrick Henry, a vocal Anti-Federalist who famously shouted, "give me liberty, or give me death" in support of independence,[67] later told his fellow Virginians who were debating ratification of the Constitution that "[t]he liberties of a people never were, nor ever will be, secure, when the transactions of their rulers may be concealed from them."[68]

Given the desire to foster an informed society, it is no surprise that one of Congress's first priorities was to pass the Post Office Act of 1792, which provided postal subsidies for the distribution of newspapers, among other things.[69] Anuj Desai writes that these subsidies "were premised on the underlying educational rationale espoused by Rush, Washington, Madison, Jefferson, and others."[70] Desai goes on to note that the Framers understood that "if the 'people' are to be sovereign, it is vital that they be informed about public affairs, and it is part of the government's affirmative responsibility to ensure that the people can in fact secure access to such information."[71]

C. Consent of the Governed Is a Sham If Government Can Dictate What the People Know

If the Supreme Court were faced with a case like the one described in the Introduction—wherein the President has ordered all executive branch agencies to

---

65. *See, e.g.*, Letter from Thomas Jefferson to Edward Carrington (Jan. 16, 1787), *in* 5 THE WORKS OF THOMAS JEFFERSON: CORRESPONDENCE 1786–1789, at 251, 253 (Paul Leicester Ford ed., 1905) (remarking that way the people retain power over their governors "is to give them full information of their affairs"); George Washington, Farewell Address (Sept. 19, 1796), *in* GEORGE WASHINGTON: A COLLECTION 512, 522 (William B. Allen ed., 1988) ("In proportion as the structure of a government gives force to public opinion, it is essential that public opinion should be enlightened."); Letter from James Madison to W.T. Barry, *supra* note 4, at 103 (noting that "a people who mean to be their own Governors, must arm themselves with the power which knowledge gives").

66. John Adams, *A Dissertation on the Canon and the Feudal Law, No. 3*, BOS. GAZETTE, Sept. 30, 1765, at 2, *reprinted in* 1 PAPERS OF JOHN ADAMS 120–21 (Robert J. Taylor et al. eds., 1977).

67. Attributed to Patrick Henry from a speech he made to the Second Virginia Convention on March 23, 1775. *See* THOMAS S. KIDD, PATRICK HENRY: FIRST AMONG PATRIOTS 97, 99 (2011).

68. Patrick Henry, Speech at the Convention of the Commonwealth of Virginia (June 9, 1788), *in* 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 150, 170 (Jonathan Elliot ed., J.B. Lippincott Co. 1901) (1836).

69. Post Office Act of 1792, ch. 7, § 16, 1 Stat. 232, 236 (codified as amended in scattered sections in 39 U.S.C.).

70. Anuj C. Desai, *The Transformation of Statutes into Constitutional Law: How Early Post Office Policy Shaped Modern First Amendment Doctrine*, 58 HASTINGS L.J. 671, 694–95 (2007).

71. *Id.* (quoting RICHARD B. KIELBOWICZ, NEWS IN THE MAIL: THE PRESS, POST OFFICE AND PUBLIC INFORMATION, 1700–1860S, at 16 (1989)).

stop providing public access to government records and meetings—would it conclude that the people's right to be informed about the government is simply a matter for the government itself to decide? What if the President's political party also controls both chambers of Congress, which acquiesces in the unraveling of the nation's transparency laws? What if public protests erupt, which the government attempts to put down with the use of force? Reprising its actions from the summer of 2020, the government refuses to provide the names of individuals arrested at the protests or to disclose information about its use of military personnel in clearing the streets.[72] What if the government falsely tells the public that Antifa is behind the protests[73] or foreign actors or some other group that the government claims is attempting to destabilize the government?

This hypothetical is meant to present a worst-case scenario, but it is not beyond imagining. Government officials have long sought to manipulate public opinion by withholding information and by strategically disseminating disinformation.[74] Aziz Huq and Tom Ginsburg in their bracing article, *How to Lose a Constitutional Democracy*, provide an illustration of how the government can manipulate public opinion to eliminate dissenting minorities from the electorate, based in part on the government's internment of Japanese Americans during World War II:

> [I]magine a government that purports to foster public security by extensive use of detention powers targeting discrete minority populations. The government fails to disclose that its policy is not

---

72. In the summer of 2020, as Black Lives Matter protesters were taking to the streets in many American cities, President Donald Trump announced that the Department of Justice would send a "surge of federal law enforcement" into American cities run by "extreme politicians." Bryan Lowry et al., *'We Have No Choice.' Trump Expands Operation Legend, Surging Feds in American Cities*, KAN. CITY STAR, https://www.kansascity.com/news/politics-government/article244416727.html [https://perma.cc/944N-TP5M] (July 23, 2020, 3:56 PM). Against the will of many local officials, the federal government deployed its agents, some with their names and agency affiliations obscured, to break up the protests. *See* Zolan Kanno-Youngs, *Unidentified Federal Police Prompt Fears Amid Protests in Washington*, N.Y. TIMES (June 4, 2020), https://www.nytimes.com/2020/06/04/us/politics/unidentified-police-protests.html [https://perma.cc/J7ML-33RH].

73. Antifa, shorthand for "antifascist," is an ideology and decentralized movement whose followers "tend not to accept that the conventional capacities of American society will thwart the rise of fascist movements" and "lack faith in the ability of federal, state, or local governments to properly investigate or prosecute fascists who break the law," at times resulting in violence and criminality. LISA N. SACCO, CONG. RESCH. SERV., IF10839, ARE ANTIFA MEMBERS DOMESTIC TERRORISTS? BACKGROUND ON ANTIFA AND FEDERAL CLASSIFICATION OF THEIR ACTIONS 1 (2020).

74. Again, the events of summer 2020 prove instructive. *See, e.g.*, Michael Biesecker et al., *As Trump Blames Antifa, Protest Records Show Scant Evidence*, ASSOCIATED PRESS NEWS (June 6, 2020, 8:56 AM), https://apnews.com/article/american-protests-donald-trump-ap-top-news-mn-state-wire-virus-outbreak-20b9b86dba5c480bad759a3bd34cd875 [https://perma.cc/TB9J-TS2A]; *Arrest Records Disprove Trump's Claims That Antifa Caused Disruption During Black Lives Matter Protests*, INDEPENDENT (UK) (Oct. 20, 2020, 9:13 PM), https://www.independent.co.uk/news/world/americas/us-politics/arrest-records-disprove-trump-s-claims-that-antifa-caused-disruption-during-black-lives-matter-protests-b1186421.html [https://perma.cc/4RDN-GDKX].

> based on evidence that the minority in question in fact includes a meaningful number of individuals who pose a security threat. At the same time, it employs a divisive language of identity-based differences to both vindicate its policy and to raise political support among nonminority voters. The absence of accurate information about the government's policy not only facilitates grave violations of individual rights, but it also allows the government to deploy those grave violations as a means of amplifying public support. Incomplete information thus not only leads voters to erroneous judgments, it also allows government to promote exclusionary ideals and to eliminate dissenting minorities from the electorate.[75]

Transparency can serve as a crucial antidote to government mendacity,[76] but when the government is free to decide for itself what information to share with the public, the promise of accountable government becomes empty.[77] Given that self-government depends on knowledge about the government, it cannot be the case that the government is free to decide what the public knows. The people's right to knowledge about "the characters and conduct of their rulers"[78] is what separates democracy from autocracy.[79] When kings or dictators wield sovereignty over the people, there is little basis to question their decisions about what information they share with their subjects; but this is not so when the people are the true sovereigns and government officials are merely their agents.[80]

The Framers were deeply concerned about their new government's legitimacy, which rested on the idea that its power derives from the consent of the governed. Indeed, the Constitution begins with the declaration that the federal government's authority comes directly from the people: "We the People of the

---

75. Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78, 131–32 (2018); *see also id.* at 130–31 ("Where information is systematically withheld or distorted by government so as to engender correlated, population-wide errors, democracy cannot fulfill this epistemic mandate.").

76. *See* Grosjean v. Am. Press Co., 297 U.S. 233, 249–50 (1936) ("[I]nformed public opinion is the most potent of all restraints upon misgovernment.").

77. *See* Joel Levin, *Attorney General William Barr, the Mueller Report, and the Problem of Truth*, 69 WASH. U. J.L. & POL'Y 147, 168 (2022) ("[C]onsent is intelligible only if it is informed. If a government's sole justification to continue to operate depends on informed consent, then hiding the truth, lying about what is, obfuscating reality, or allowing or promoting fraudulent representations extinguishes consent and a government's mandate comes to an end."); Samaha, *supra* note 51, at 917–18 ("Without meaningful information on government plans, performance, and officers, the ability to vote, speak, and organize around political causes becomes rather empty.").

78. Adams, *supra* note 66, at 2.

79. *See* Bartrum, *supra* note 45, at 303 ("[T]he very purpose of a democratic government is to ensure citizens the necessary freedom to make uncoerced moral judgments, and thus to experience truly autonomous moral agency.").

80. *See* Loren P. Beth, *The Public's Right to Know: The Supreme Court as Pandora?*, 81 MICH. L. REV. 880, 885 (1983) ("In highly authoritarian regimes the obvious answer has always been essentially that 'papa knows best'—that, in other words, the people need to know only those things which their governors wish them to know. This answer has never seemed satisfactory in our republican system, in which the governors are not only assumed to represent the people, but in a very real sense are the people.").

United States . . . do ordain and establish this Constitution for the United States of America."[81] Nicholas Rozenkranz points out that the Constitution "affirms our popular sovereignty with the largest letters on the parchment, the first three words, the ringing subject."[82] In establishing a republican form of government, the people never parted with their sovereignty; they simply delegated limited authority to the government while stipulating that certain powers be reserved for themselves.[83]

The principle that consent must be informed to be valid is not only a fundamental tenet of democratic theory but also a widely recognized requirement in many legal settings,[84] including agency law, which prescribes that an agent owes its principal a duty of disclosure and candor.[85] The Framers' implementation of popular sovereignty and federalism was strongly influenced by agency law, which helped them conceptualize a system of shared authority.[86] In *The Federalist No. 46*, James Madison highlighted this agency relationship between the people and their government, reminding critics of the Constitution that even in a federal system, the people retained ultimate authority over the government:

> The federal and state governments are in fact but different *agents and trustees of the people*, instituted with different powers, and designated for different purposes. The adversaries of the constitution seem to have lost sight of the people altogether in their reasonings on this subject; and to have viewed these different establishments, not only as mutual rivals and enemies, but as uncontrolled by any common superior, in their efforts to usurp the authorities of each other. These gentlemen must here be reminded of their error. They

---

81. *See* U.S. CONST. pmbl.

82. Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209, 1214 (2010).

83. *See* THE FEDERALIST NO. 84, *supra* note 28, at 445–47 (Alexander Hamilton); Amar, *supra* note 14, at 1435 n.41 ("[T]he Americans came to believe that the People never parted with their ultimate sovereignty. Rather, they delegated certain sovereign powers to various governmental agents, but could revoke those delegations, and reclaim those powers, at any time and for any reason."). And of course, as the ultimate sovereigns, the people can take back the powers they granted or modify the structures of government to ensure their continued sovereignty. *See* U.S. CONST. art. V (laying out a process for amending the Constitution).

84. *See, e.g.*, John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 655–57 (1995) (describing informed consent in fiduciary law); Janine Griffiths-Baker & Nancy J. Moore, *Regulating Conflicts of Interest in Global Law Firms: Peace in Our Time?*, 80 FORDHAM L. REV. 2541, 2562–63 (2012) (client conflicts in attorney representation); Peter H. Schuck, *Rethinking Informed Consent*, 103 YALE L.J. 899, 920 (1994) (healthcare).

85. *See* RESTATEMENT (THIRD) OF AGENCY § 8.11 (AM.. L. INST. 2006) (outlining an agent's duty to disclose information to its principal); *see also* JOHN F. OLSON ET AL., DIRECTOR AND OFFICER LIABILITY: INDEMNIFICATION AND INSURANCE § 1:12 (2024–2025 ed. 2024) (describing a corporate director's obligation to "fairly and candidly" provide information to shareholders "whenever the latter are called upon, or have a right to exercise their franchise to approve or authorize an action or provision of governance").

86. *See* Amar, *supra* note 14, at 1449 ("Agency theory helped the Federalists conceptualize such a system [of shared authority].").

> must be told, that the ultimate authority, wherever the derivative may be found, resides in the people alone.[87]

Under basic agency principles, government officials (as agents of the people) have an obligation to keep the people (their principals) informed of their actions.[88] Without knowledge about the government, the people cannot instruct their agents as to their preferences, nor can they evaluate whether their representatives are acting in accordance with their electoral mandates.[89] They also are unable to assess the honesty, competence, and political ideology of those who purport to govern with the people's consent. Indeed, without access to government information, the people will not even know there is an issue that warrants their attention or that they need to assert their rights—such as the right of speech, assembly, or petition—to check government overreach.[90]

Which brings us back to the First Amendment. Although I argue that a right to know about the government does not need to be grounded in the First Amendment per se, the Supreme Court's many decisions extolling the importance of the First Amendment in securing an informed electorate provide additional support for the conclusion that a right to know about the government is a necessity in a

---

87. THE FEDERALIST NO. 46, *supra* note 28, at 243 (James Madison) (emphasis added). Benjamin Franklin made a similar point in 1722 when he wrote, under the pseudonym of Silence Dogood, that government officials should act as trustees of the people and have their deeds openly examined:

> The Administration of Government, is nothing else but the Attendance of the *Trustees of the People* upon the Interest and Affairs of the People: And as it is the Part and Business of the People, for whose Sake alone all publick Matters are, or ought to be transacted, to see whether they be well or ill transacted; so it is the Interest, and ought to be the Ambition, of all honest Magistrates, to have their Deeds openly examined, and publickly scann'd.

Benjamin Franklin, *Silence Dogood, No. 8*, THE NEW-ENG. COURANT (July 9, 1722), *reprinted in* 1 THE PAPERS OF BENJAMIN FRANKLIN, JANUARY 6, 1706 THROUGH DECEMBER 31, 1734, at 27 (Leonard W. Labaree ed., 1959).

88. *See, e.g.*, Ilya Somin, *How Judicial Review Can Help Empower People to Vote with Their Feet*, 29 GEO. MASON L. REV. 509, 513 (2022) (equating informed consent in the medical context to informed consent of the governed); David L. Ponet & Ethan J. Leib, *Fiduciary Law's Lessons for Deliberative Democracy*, 91 B.U. L. REV. 1249, 1258 (2011) (applying fiduciary law concepts to democracy and concluding that government officials "only remain beyond censure when seeking the informed consent of the governed"); Leslie Green, *Law, Legitimacy, and Consent*, 62 S. CAL. L. REV. 795, 795 (1989) ("Both Locke and Kant knew that consent is not sufficient for legitimacy because consent does not bind except when it is free and informed and when it does not exceed the agent's powers to consent.").

89. *See* TIMOTHY BESLEY, PRINCIPLED AGENTS?: THE POLITICAL ECONOMY OF GOOD GOVERNMENT 158 (2006); Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 684 (2011); Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 306 (1992); Varol, *supra* note 38, at 1038.

90. *See, e.g.*, Vincent Blasi, *The Checking Value in First Amendment Theory*, 2 AM. BAR FOUND. RSCH. J. 521, 542 (1977).

representative democracy.[91] In *Buckley v. Valeo*, for example, the Court wrote that "[i]n a republic where people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential."[92] Expressly invoking the role the First Amendment plays in ensuring an informed electorate, the Court proclaimed in *New York Times Co. v. Sullivan* that the First Amendment embodies "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[93] Quoting extensively from the writings of James Madison, the Court remarked in *Sullivan* that the "Constitution created a form of government under which 'The people, not the government, possess the absolute sovereignty.'"[94]

This was clearly the sentiment of the founding generation, whose members repeatedly invoked the importance of an educated and informed public.[95] William Livingston—who founded *The Independent Reflector*, one of the first weekly periodicals printed in the colonies—wrote in 1753 that "[k]nowledge among a People makes them free, enterprising and dauntless; but Ignorance enslaves, emasculates and depresses them."[96] In his first presidential address to the new

---

91. *See, e.g.*, De Jonge v. Oregon, 299 U.S. 353, 364 (1937) (remarking on "the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means"); Thornhill v. Alabama, 310 U.S. 88, 104, 102 (1940) ("Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period."); Barr v. Matteo, 360 U.S. 564, 577 (1959) (Black, J., concurring) ("The effective functioning of a free government like ours depends largely on the force of an informed public opinion."); Brown v. Hartlage, 456 U.S. 45, 52 (1982) ("At the core of the First Amendment are certain basic conceptions about the manner in which political discussion in a representative democracy should proceed."); Knox v. Serv. Emps. Int'l Union, Loc. 1000, 567 U.S. 298, 308 (2012) ("Our cases have often noted the close connection between our Nation's commitment to self-government and the rights protected by the First Amendment."); Walker v. Sons of Confederate Veterans, Inc., 576 U.S. 200, 207–08 (2015) ("[T]he Free Speech Clause helps produce informed opinions among members of the public, who are then able to influence the choices of a government that, through words and deeds, will reflect its electoral mandate."). I develop this argument more fully in another article. *See generally* Ardia, *A First Amendment Right to Know*, *supra* note 9.

92. 424 U.S. 1, 14–15 (1976) (per curiam).

93. 376 U.S. 254, 270 (1964).

94. *Id.* at 274.

95. *See, e.g.*, BENJAMIN RUSH, A PLAN FOR THE ESTABLISHMENT OF PUBLIC SCHOOLS AND THE DIFFUSION OF KNOWLEDGE IN PENNSYLVANIA; TO WHICH ARE ADDED, THOUGHTS UPON THE MODE OF EDUCATION PROPER IN A REPUBLIC. ADDRESSED TO THE LEGISLATURE AND CITIZENS OF THE STATE 3–4 (1786) ("A free government can only exist in an equal diffusion of literature. . . . [A]nd where learning is confined to a few people, we always find monarchy, aristocracy, and slavery."); Washington, Farewell Address, *supra* note 65, at 522 ("Promote then as an object of primary importance, institutions for the general diffusion of knowledge. In proportion as the structure of a government gives force to public opinion, it is essential that public opinion should be enlightened.").

96. RICHARD D. BROWN, THE STRENGTH OF A PEOPLE: THE IDEA OF AN INFORMED CITIZENRY IN AMERICA, 1650–1870, at 38–39 (1996) (quoting William Livingston's call for an informed citizenry in the November 8, 1753 *Independent Reflector*).

American Congress, George Washington urged the members to support an informed citizenry, stating that "[k]nowledge is in every country the surest basis of public happiness" and that it "teach[es] the people themselves to know and to value their own rights."[97]

D. A Right to Know About the Government Is a Structural Right

That a right to know about the government is not explicitly stated in the Constitution's text is of no moment. The very idea of constitutional interpretation rests on the understanding that the Constitution is not merely law, but law that courts can "expound and interpret."[98] In interpreting the Constitution, the Supreme Court has long relied on constitutional principles derived from the structures of government that the Constitution created, even when those principles were not expressly defined in the text itself.[99] Indeed, structuralist approaches to divining the meaning of the Constitution have been central to the development of a number of foundational doctrines within constitutional law,[100] including the relationships among the three branches of the federal government (separation of powers),[101] the relationship between the federal and state governments (federalism),[102] and the relationship between citizens and their government (popular sovereignty).[103]

---

97. George Washington, First Annual Message (Jan. 8, 1790), *in* GEORGE WASHINGTON: A COLLECTION, *supra* note 65, at 467, 469.

98. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177–78 (1803).

99. *See, e.g.*, CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 15 (1969) (observing that difficult constitutional issues are resolved "not fundamentally on the basis of . . . textual exegesis which we tend to regard as normal, but on the basis of reasoning from the total structure which the text has created").

100. *See, e.g.*, Christopher Serkin & Nelson Tebbe, *Is the Constitution Special?*, 101 CORNELL L. REV. 701, 731 (2016) ("Structural arguments undergird familiar rules surrounding legislative vetoes, commandeering under the Tenth Amendment, executive privilege, limits on the President's removal power, and other key doctrines."); Balkin, *supra* note 40, at 7 ("When we interpret the Constitution, we constantly make reference to structural principles, such as the separation of powers, or the principle of checks and balances, or democratic self government, or the rule of law.").

101. *See* Thomas B. Colby, *Originalism and Structural Argument*, 113 NW. U. L. REV. 1297, 1310 (2019); Robert A. Schapiro, *Contingency and Universalism in State Separation of Powers Discourse*, 4 ROGER WILLIAMS U.L. REV. 79, 90 (1998).

102. *See* Casey L. Westover, *Structural Interpretation and the New Federalism: Finding the Proper Balance Between State Sovereignty and Federal Supremacy*, 88 MARQ. L. REV. 693, 719–20 (2005); Colby, *supra* note 101, at 1308.

103. *See* Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 395, 434–36 (1996) (describing popular sovereignty, separation of powers, and checks and balances as "structural mechanisms" that "minimize the likelihood of oppressive laws" and "promot[e] liberty"); Reese, *supra* note 46, at 2058 (explaining how popular sovereignty serves as "a structural protection for the democratic part of our democracy"); Bartrum, *supra* note 45, at 228 (characterizing the Constitution's implementation of popular sovereignty as a "structural innovation" ensuring that "ultimate sovereignty lies with 'the People'").

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 Congress[106]—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 laws[109] 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 not 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

James Madison presciently warned, "[A] people who mean to be their own Governors, must arm themselves with the power which knowledge gives."[151]

It is important to keep in mind that the Constitution did not just separate and spread power between the various branches and levels of government; it also created a separation of power between the government and the people—with the people retaining ultimate authority over the government. This last point warrants repeating. The Framers were deeply concerned that the federal government would become tyrannical, so they devised a system of checks and balances not to make government more powerful, but to limit its power and to ensure that popular sovereignty would not be eroded.[152] To borrow the words of Chief Justice Marshall, the public's right to know about the actions of their government is so central to the Constitution's implementation of popular sovereignty, "so necessarily implied in [the notion of self-government], that the expression of it could not make it more certain."[153]

II. ADDRESSING THE CRITICS OF A RIGHT TO KNOW ABOUT THE GOVERNMENT

I am not the first to argue that the courts should recognize a right to know about the government. Arguments for such a right were common in the second half of the twentieth century but have largely faded in the decades since.[154] Although the importance of government transparency is widely acknowledged,[155] a constitutionally based right to know about the government has faced considerable

---

> President or to the Congress were to authorize the general withholding of information needed for a responsible exercise of the franchise.

Wallace Parks, *The Open Government Principle: Applying the Right to Know Under the Constitution*, 26 GEO. WASH. L. REV. 1, 7 (1957).

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

152. *See, e.g.*, Amar, *supra* note 14, at 1427 ("[T]rue sovereignty in our system lies only in the People of the United States, and that all governments are thus necessarily limited. These ideas pervade the Constitution and inform its structure of federalism. In the martial language of the eighteenth century, each limited government, state and national, can serve as a 'sentinel' to 'check' the other's 'encroachments' on the constitutional rights reserved by the sovereign People."); Michaels, *supra* note 33, at 523 ("[T]he Framers, fearing tyranny and corruption, constrained the exercise of newly expanded federal powers. One of the principal methods of constraint was, of course, a system of checks and balances. These checks helped legitimize and rationalize sovereign authority.").

153. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 427 (1819).

154. *See supra* notes 7–8 and accompanying text. Although most contemporary scholars have set their sights on improving the statutory grants of access provide by FOIA and its state analogs, some recent scholarship has reinvigorated efforts to create a constitutional right to know. *See* David Cuillier, *The People's Right to Know: Comparing Harold L. Cross' Pre-FOIA World to Post-FOIA Today*, 21 COMMC'N L. & POL'Y 433 (2016); Halstuk & Cramer, *supra* note 51, at 27.

155. *See, e.g.*, Cuillier, *supra* note 154, at 438 ("Citizens' right to be informed about their government has been valued for millennia, at least as far back as the Athenians in 330 B.C."); Sun & Jones, *supra* note 27, at 890 (footnote omitted) ("[I]t is widely assumed that governmental transparency 'is clearly among the pantheon of great political virtues,' and scholars have articulated supporting justifications for this norm that range from the highly theoretical to the acutely practical.").

criticism. Because the critics of a right to know have not been reticent in interposing objections, it is worth considering them here. Indeed, when we do so, we see that many of the objections to a right to know are built on "straw man" arguments,[156] presenting the most extreme outcomes in order to make the case that a right of access to government information is both normatively undesirable and unworkable.

A. Government Transparency Cannot Be Left Solely to the Political Process

A common objection to a constitutional right to know argues that the political branches provide sufficient government accountability, and therefore there is no need for the public to serve as a watchdog over the government. This argument typically takes one of two related forms: first, Congress is fully capable of imposing the necessary accountability on government that the Constitution requires;[157] and second, courts lack the expertise to weigh the need for secrecy against the public's right to be informed, so the question should just be left to Congress and the executive branch.[158]

---

156. A straw man argument distorts, exaggerates, or oversimplifies another person's position in some kind of extreme way and then attacks the extreme distortion, as if that is really the claim the first person is making. *See* George Y. Bizer et al., *The Persuasiveness of the Straw Man Rhetorical Technique*, 4 SOC. INFLUENCE 216, 216–17 (2009).

157. *See, e.g.*, ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 80–81, 86–87 (1975) (concluding that "Congress as well as the press may publish materials that the government wishes to . . . keep private" and the separation of powers ensures adequate transparency); Lillian R. BeVier, *An Informed Public, an Informing Press: The Search for a Constitutional Principle*, 68 CALIF. L. REV. 482, 506–08 (1980) [hereinafter BeVier, *The Search for a Constitutional Principle*] (arguing that access to government information is simply a matter for the people's representatives to decide); Antonin Scalia, *The Freedom of Information Act Has No Clothes*, 6 AEI J. ON GOV'T & SOC'Y 14, 19 (1982) (arguing that the "the institutionalized checks and balances within our system of representative democracy" provide sufficient accountability); O'Brien, *supra* note 6, at 580–86 (concluding that "in denying arguments for a constitutional 'right to know,' the Supreme Court has properly permitted the state legislatures and Congress to determine, as matters of public policy, the legitimacy of the public's interest in obtaining access to government facilities and materials").

158. *See, e.g.*, Louis Henkin, *The Right to Know and the Duty to Withhold: The Case of the Pentagon Papers*, 120 U. PA. L. REV. 271, 278–80 (1971) (expressing doubt about whether "courts [can] meaningfully weigh the Government's 'need' to conceal, the Press's 'need' to publish, [and] the people's 'need' to know"); Walter Gellhorn, *The Right to Know: First Amendment Overbreadth*, 1976 WASH. U. L. REV. 25, 26 (1976) ("[M]any of the choices between unbridled and restricted communication are not, in my estimation, fundamentally constitutional choices. We mislead ourselves by presenting every problem that confronts contemporary society as a justiciable issue to be decided by aloof judges under the rubric of a constitutional principle."); David Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257, 325 (2010) ("[E]ven the most determined judge could not reliably push back against deep secrets. Apart from the traditional concerns about institutional competence and justiciability, the reason is that lawsuits, like FOIA requests, require sufficient prerequisite knowledge to be actionable."); O'Brien, *supra* note 6, at 585–86 (concluding that recognizing a constitutional right to know would require that the courts "exercise extra-constitutional decision-making authority" and that they are not suited to evaluate the "delicate balance between egalitarian demands for an informed populace, on the one hand, and efficient decision-making by government officials on the other").

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).

increase in the assertion of executive privilege to hinder congressional oversight,[165] including President Trump's complete refusal to cooperate with congressional requests for documents and testimony related to Robert Mueller's investigation into Russian interference in the 2016 presidential election.[166] Although there are many more examples that show how the norms of interbranch disclosure have broken down,[167] executive branch secrecy did not begin, nor will it end, with Donald Trump.[168] Even before the Supreme Court recognized the availability of "executive privilege" in *United States v. Nixon*,[169] Presidents had been finding ways to stymie congressional oversight since the Washington Administration. As Barry Sullivan notes, Congress is often unable to force the disclosure of information from the executive branch, and "it is surely significant that the first FOIA case decided by the Supreme Court was one brought by members of Congress, who could not acquire

165. *See* Kimberly Breedon & A. Christopher Bryant, *Executive Privilege in a Hyper-Partisan Era*, 64 WAYNE L. REV. 65, 66 (2018) (recounting the "instances of presidential invocation of 'executive privilege' as a basis for withholding information from committees or members of Congress in the years between Richard Nixon's resignation and the end of Barack Obama's second term"); Mark J. Rozell, *Executive Privilege Revived?: Secrecy and Conflict During the Bush Presidency*, 52 DUKE L.J. 403, 407 (2002) ("President Bush wanted to both revitalize executive privilege and expand the scope of that power substantially.").

166. *See, e.g.*, Jordyn Phelps et al., *White House Rejects House Democrats' Request for Trump-Putin Communications*, ABC NEWS (Mar. 21, 2019, 3:45 PM), https://abcnews.go.com/Politics/white-house-rejects-house-democrats-request-trump-putin/story?id=61843655 [https://perma.cc/53LT-DLGL]; Rachael Bade et al., *Trump Asserts Executive Privilege over Mueller Report; House Panel Holds Barr in Contempt*, WASH. POST (May 8, 2019), https://www.washingtonpost.com/politics/barr-to-trump-invoke-executive-privileged-over-redacted-mueller-materials/2019/05/07/51c52600-713e-11e9-b5ca-3d72a9fa8ff1_story.html [https://perma.cc/M566-UQFL].

167. *See, e.g.*, Keith E. Whittington, *Trump's Defiance Is Destroying Congress's Power*, THE ATLANTIC (Oct. 14, 2019), https://www.theatlantic.com/ideas/archive/2019/10/trumps-defiance-destroying-congress/599923 [https://perma.cc/6HRZ-VXDB] ("The Trump administration has tended to adopt a posture of maximal presidential obstruction of congressional investigations into the conduct of the executive branch and the individuals surrounding it."); Adam Liptak, *Clash Between Trump and House Democrats Poses Threat to Constitutional Order*, N.Y. TIMES (May 7, 2019), https://www.nytimes.com/2019/05/07/us/politics/trump-democrats.html [https://perma.cc/V768-YDQE] ("President Trump's wholesale refusal to provide information to Congress threatens to upend the delicate balance that is the separation of powers outlined in the Constitution.").

168. *See* LEVITSKY & ZIBLATT, *supra* note 11, at 9 ("Today . . . the guardrails of American democracy are weakening . . . . Donald Trump may have accelerated this process, but he didn't cause it. The challenges facing American democracy run deeper."); Claire O. Finkelstein & Richard W. Painter, *Trump Had a Sweeping View of 'Executive Privilege.' Now Biden Is Defending It*, WASH. POST (May 29, 2021), https://www.washingtonpost.com/outlook/2021/05/29/executive-privilege-immunity-biden-trump [https://perma.cc/RX23-AU5K] ("The new administration has set itself on a well-worn path – that of trying to protect the power of the executive branch at the cost of transparency.").

169. 418 U.S. 683, 708 (1974).

the information they wanted through ordinary parliamentary means."[170] As this suggests, beyond empowering citizens to hold their government accountable, a right to know will also enhance the effectiveness of the Constitution's other checks and balances, particularly interbranch oversight by the courts and Congress.[171]

Reliance solely on Congress to ensure government transparency also ignores that its members sometimes have partisan interests and political agendas that can put them in conflict with the sovereign interests of voters. It is, of course, natural that elected officials will seek to restrict public access to government information in order to expand or entrench their individual or party's power. Senator John Cornyn of Texas writes, "Any party in power is always reluctant to share information, out of an understandable (albeit ultimately unpersuasive) fear of arming its enemies and critics."[172] Perhaps this is why Congress, despite its frequent rhetoric praising government transparency, has never imposed meaningful disclosure requirements on itself.[173]

This is not to say that Congress has done nothing to force transparency on other parts of the government. Utilizing its legislative tools, Congress has passed important transparency legislation such as FOIA and the Sunshine Act,[174] but these statutes are narrow in their coverage, contain many exemptions, and have been widely criticized for failing to live up to their aspirations of transparency and accountability.[175] As others have noted, the existing patchwork of open government

---

170. Barry Sullivan, *FOIA and the First Amendment: Representative Democracy and the People's Elusive "Right to Know"*, 72 MD. L. REV. 1, 39, 84 n.107 (2012). The fact is that Congress simply cannot do it on its own. It has limited resources and manpower to investigate and oversee an increasingly complex federal bureaucracy. As history has shown us, the executive branch has many ways to hide from congressional and public scrutiny, even beyond the formal assertion of executive privilege. *See, e.g.*, Sidney A. Shapiro & Rena I. Steinzor, *The People's Agent: Executive Branch Secrecy and Accountability in an Age of Terrorism*, 69 L. & CONTEMP. PROBS. 99, 99 (2006).

171. *See* HEIDI KITROSSER, RECLAIMING ACCOUNTABILITY: TRANSPARENCY, EXECUTIVE POWER, AND THE U.S. CONSTITUTION 15 (2015) (describing the Constitution's "substantive accountability framework," which requires that "the public and the other branches must have mechanisms to discover and assess" the actions of the executive branch).

172. Cornyn, *supra* note 62, at 10.

173. *See* James T. O'Reilly, *Applying Federal Open Government Laws to Congress: An Explorative Analysis and Proposal*, 31 HARV. J. ON LEGIS. 415, 415, 432–56 (1994) ("Many federal laws, including labor, civil rights, and open government statutes, explicitly or implicitly exempt Congress from their requirements."); Mark Fenster, *Seeing the State: Transparency as Metaphor*, 62 ADMIN. L. REV. 617, 638 (2010) ("[W]hen Congress saw fit to place disclosure and other procedural requirements on executive branch agencies through the Freedom of Information Act (FOIA), it imposed no such requirements on itself.").

174. Freedom of Information Act of 1966, 5 U.S.C. § 552; Government in the Sunshine Act of 1976, 5 U.S.C. § 552b; *see also, e.g.*, Federal Advisory Committee Act of 1972, 5 U.S.C. app. 2 §§ 1–16; Presidential Records Act of 1978, 44 U.S.C. §§ 2201–2209; Federal Funding Accountability and Transparency Act of 2006, 31 U.S.C. § 6101.

175. The criticisms of these statutes are legion. *See, e.g.*, Margaret B. Kwoka, *FOIA, Inc.*, 65 DUKE L.J. 1361, 1363–64 (2016) (noting that FOIA "has been rightly critiqued for failing to live up to its promise, hindered by administrative inefficiency, overwithholding of information, and courts' failure to act as a meaningful check on agency secrecy"); David

statutes permits the government to withhold embarrassing information[176] 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 Condones 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 resources[187] 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 COMMC'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 COMMC'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., Charlottsville, 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. Virgina*, 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 Koningisor, *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 TSESIS, 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 devices[306]—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*

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

* Associate Professor of Legal Studies in Business, Florida State University, College of Business – Department of Risk Management/Insurance, Real Estate, and Legal Studies. The author can be reached at cmarzen@fsu.edu.

entities to acknowledge receipt of public records requests within five business days[1] and to respond to such requests within ten business days.[2] In 2017, South Carolina enacted reform of the South Carolina Freedom of Information Act[3] 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 deadline[5] 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.gillettenewsrecord.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 Act[12] 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] Tennessee[29] 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 records[38] 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 the 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 cited[51] 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 right [61] 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 form 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 information[108] 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 statute[114] 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 plaintiffs 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 Florida[131] as well as Louisiana[132] 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 Dakota[161] 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

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 Benhardt, 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 Cummings[167] 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 Cornyn[169] 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).