

A FIRST AMENDMENT RIGHT TO KNOW

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This Article tackles an increasingly important question: Can police round up people on American streets and keep secret the names of those they detain without violating the First Amendment? Alarmingly, the government made this very argument in the summer of 2020 when it sought to break up Black Lives Matter protests occurring in cities across the country. Based in part on a Supreme Court decision from the 1970s involving access to prisons, the government argued that the First Amendment imposes no constraints on government secrecy. If it is true that the government can shield its exercise of police power from public oversight, then this raises profound concerns about accountability and the rule of law in a constitutional democracy.

In this Article, I dissect the Supreme Court's tangled web of "right to know" cases, uncovering a glaring inconsistency in the Court's First Amendment jurisprudence: while the Court champions open criminal trials, it has left the door open for unchecked government secrecy elsewhere. This is a perilous place to be for a republic founded on the principle of self-government. As recent events have shown, the norms of democratic governance are dangerously shallow.

Reconciling seemingly conflicting lines of Supreme Court cases, the Article establishes that the First Amendment's guarantees extend beyond the courtroom to encompass a broader right of access to government information. It then builds upon the Supreme Court's judicial access framework to articulate a general First Amendment right to know, applicable across all branches of government. Focusing on the context of police power and arrests, the Article demonstrates that public access to arrestee information is essential for holding the government accountable and preventing abuses of power. It concludes by showing that access to this information is a

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cornerstone of democratic accountability, ensuring that the government's use of force and coercion remains subject to public scrutiny and aligns with the principles of self-government.

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INTRODUCTION

*“California could decide not to give out arrestee information at all without violating the First Amendment.”*¹

Can this possibly be true? Can the government really refuse to disclose any information to the public about individuals it arrests without violating the First Amendment? Can police round up people on American streets and keep secret the names of those they detain? Astonishingly, the Supreme Court seemed to endorse this possibility in the case quoted above, *Los Angeles Police Department v. United Reporting Publishing Corp.*, which rejected a First Amendment facial challenge to a California law restricting access to arrest records.² The Court justified this statement with a single precedent—a three-justice plurality opinion from 1978, *Houchins v. KQED*—and provided no further analysis of the issue.³ If it is true that the government can hide its exercise of police power from public oversight, then this raises profound concerns about transparency and accountability in a constitutional democracy.⁴ As Judge Skelly Wright once remarked: “The requirement that arrest books be open to the public is to prevent any ‘secret arrests,’ a concept odious to a democratic society.”⁵

Like the undead, *United Reporting* and *Houchins* continue to haunt First Amendment jurisprudence, frequently invoked to support the sweeping proposition that government secrecy

¹ *L.A. Police Dep’t v. United Reporting Publ’g Corp.*, 528 U.S. 32, 40 (1999) (rejecting publisher’s First Amendment facial challenge to California law that restricted access to arrest records).

² *Id.*

³ *Id.* (citing *Houchins v. KQED, Inc.*, 438 U.S. 1, 14 (1978) (rejecting a media company’s claim that it had a First Amendment right of access to a county jail to report on deplorable prison conditions that allegedly led to an inmate’s suicide)).

⁴ See, e.g., Christina Koningisor, *Police Secrecy Exceptionalism*, 123 COLUM. L. REV. 615, 674–76 (2023) (describing the democratic costs imposed by police secrecy); Hannah Bloch-Wehba, *Visible Policing: Technology, Transparency, and Democratic Control*, 109 CALIF. L. REV. 917, 929–30 (2021) (concluding that police secrecy presents “a fundamental challenge to police reform and to the democratic legitimacy of policing decisions”); Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107, 1166 (2000) (arguing that police transparency “is a prerequisite of legitimate, democratic government”); Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2144 (2017) (writing that increased police transparency “can also contribute to the overall democratization of policing in a way that could begin to root out legal estrangement”).

⁵ *Morrow v. District of Columbia*, 417 F.2d 728, 741–42 (D.C. Cir. 1969) (quoting H.R. REP. NO. 83-2332, at 1 (1954)).

faces no constraints from the First Amendment.⁶ A striking example is the government's recent attempt to shield its use of police power from public scrutiny during Black Lives Matter (BLM) protests in 2020.⁷ In *Index Newspapers v. United States Marshals Service*, the government argued that journalists and legal observers had no First Amendment right to access public sidewalks and streets in Portland, Oregon, to monitor potential unlawful police activity by federal and state officials.⁸ The case arose during the summer of 2020 amidst widespread protests against police misconduct. In response, President Donald Trump announced that the U.S. Department of Justice would send a "surge of federal law enforcement" into cities run by "[e]xtreme politicians."⁹ Over the objections of many local officials, federal agents—some operating with obscured names and agency affiliations—were deployed to arrest the protesters.¹⁰ In defense of its actions, the government, citing *Houchins*, asserted that the public possesses no right to observe the

⁶ See, e.g., *In re Bos. Herald, Inc.*, 321 F.3d 174, 180 (1st Cir. 2003) ("There is no general constitutional right of access to information in the government's possession.") (citing *Houchins*, 438 U.S. at 15); *Travis v. Reno*, 163 F.3d 1000, 1007 (7th Cir. 1998) ("There is no constitutional right to have access to particular government information, or to require openness from the bureaucracy." (quoting *Houchins*, 438 U.S. at 14)); *Cortland v. Pierce Cnty.*, 488 F. Supp. 3d 1027, 1030 (W.D. Wash. 2020) (relying on *United Reporting* and *Houchins* to conclude that "[t]here is no First Amendment right to access governmental records"); *Spottsville v. Barnes*, 135 F. Supp. 2d 1316, 1323 (N.D. Ga. 2001), *aff'd*, 32 F. App'x 534 (11th Cir. 2002) (citing *United Reporting* and *Houchins* for the proposition that "there is no First Amendment right of access to public information").

⁷ See Larry Buchanan, Quoctrung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html> [<https://perma.cc/C882-7EZR>] (reporting that about 15 million to 26 million people in the United States participated in demonstrations in June 2020 over the death of George Floyd and others).

⁸ 977 F.3d 817, 821, 825 (9th Cir. 2020).

⁹ Bryan Lowry et al., 'We Have No Choice.' Trump Expands Operation Legend, Surging Feds in American Cities, KAN. CITY STAR (July 23, 2020), <https://www.kansascity.com/news/politics-government/article244416727.html> [<https://perma.cc/8QRG-3YN5>].

¹⁰ See Jonathan Levinson et al., *Federal Officers Use Unmarked Vehicles to Grab People in Portland, DHS Confirms*, NAT'L PUB. RADIO (July 17, 2020), <https://www.npr.org/2020/07/17/892277592/federal-officers-use-unmarked-vehicles-to-grab-protesters-in-portland> [<https://perma.cc/3SVH-7PMC>] (reporting that federal law enforcement officers used unmarked vehicles to detain protestors without explanation about why they are being arrested); 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/U7FU-KRTJ>] (reporting that the Trump administration deployed federal law enforcement, without identifiable markings, in response to protests in downtown Washington D.C.).

conduct of law enforcement, even to determine whether they are acting lawfully.¹¹

It is time to put to rest the notion that the First Amendment imposes no limits on government secrecy. As I explain in this Article, the claim that the government enjoys unbridled discretion to withhold information from the public relies on a misreading of the Supreme Court's limited holdings in *Houchins* and *United Reporting*,¹² and it turns nearly a century of First Amendment jurisprudence on its head. An informed public is a cornerstone of American democracy, and the First Amendment exists, in large part, to protect that foundation.¹³ Although the Court in *Houchins* and *United Reporting* permitted the government to impose some limits on access to government information, these decisions do not support the sweeping assertion of unfettered government secrecy. To the contrary, the Supreme Court's recognition of a public right of access to criminal trials in *Richmond Newspapers v. Virginia* and *Globe Newspaper Co. v. Superior Court* confirms that the First Amendment is implicated when the government seeks to withhold information from the public.¹⁴

Part I explores the vital role the First Amendment plays in the Constitution's implementation of representative democracy. While the First Amendment does many things, arguably its most important function is to safeguard the conditions

¹¹ See Transcript of Oral Argument at Rebuttal Argument of Sopan Joshi on Behalf of Defendants-Appellants, *Index Newspapers LLC v. U.S. Marshals Serv.*, 977 F.3d 817 (9th Cir. 2020), 2020 WL 7394880 (unofficial transcript derived from video and audio recordings). As I discuss in subpart IV.A, the Ninth Circuit found this argument unpersuasive and held that the plaintiffs had demonstrated a likelihood of success on the merits of their First Amendment right-of-access claims. See *Index Newspapers LLC v. U.S. Marshals Serv.*, 977 F.3d 817, 831 (9th Cir. 2020).

¹² In *Houchins*, the Court only addressed a claim of a special right of access by the press, not a general public right of access to the jail. *Houchins v. KQED, Inc.*, 438 U.S. 1, 16–17 (1978) (characterizing the issue before the Court as whether the press enjoyed a “*special right of access* to the Alameda County Jail different from or greater than that accorded the public generally”) (emphasis added). *United Reporting* involved a facial challenge to a California law that imposed requirements on commercial entities requesting information, and the Court dismissed the First Amendment claim on procedural grounds. *L.A. Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32, 40 (1999) (writing that because *United Reporting* “did not attempt to qualify and was therefore denied access to the addresses,” it could not bring a facial challenge in lieu of being denied access itself). I discuss both cases in Part II.

¹³ See David S. Ardia, *Beyond the Marketplace of Ideas: Bridging Theory and Doctrine to Promote Self-Governance*, 16 HARV. L. & POL'Y REV. 275, 300 (2022).

¹⁴ 448 U.S. 555, 575 (1980) (holding that the First Amendment provides a right of public access to criminal trials); 457 U.S. 596, 606 (1982) (same).

necessary for self-government.¹⁵ It achieves this, in part, by preventing government censorship of speech concerning public affairs and protecting the rights of assembly, association, petition, and the press—all of which mitigate collective-action problems that can undermine democratic deliberation.¹⁶ As the Supreme Court has recognized, the First Amendment “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.”¹⁷ Indeed, the Framers themselves repeatedly warned that the success of America’s “great experiment in democracy” would depend on an educated and informed citizenry.¹⁸

Part II examines the Supreme Court’s inconsistent and perplexing “right to know”¹⁹ case law. Perhaps recognizing the dangers of allowing the government to control public access to information about its own activities—akin to allowing the “fox to guard the henhouse”²⁰—the Court has provided conflicting messages about whether the First Amendment guarantees a right of access to information from the government. This confusion can be traced to three divergent lines of Supreme Court cases. The first, a series of cases from the 1970s that culminated in *Houchins v. KQED* rejected a special right of media

¹⁵ See Ardia, *supra* note 13, at 299–303 (discussing competing theories of the First Amendment and concluding that the First Amendment’s primary purpose is to support self-government).

¹⁶ See *infra* subpart I.B.

¹⁷ Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 207 (2015); see also cases cited *infra* note 43.

¹⁸ CARL BECKER, OUR GREAT EXPERIMENT IN DEMOCRACY: A HISTORY OF THE UNITED STATES, at x (1927) (“American ‘democracy’ was, and is, an experiment”); 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 15 (Henry Reeve trans., London: Saunders & Otley 1835); see also *infra* notes 53–56 and accompanying text.

¹⁹ 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); Phillip Montague, *Government, the Press, and the People’s Right to Know*, 28 J. Soc. PHIL. 68, 74 (1997) (“[P]eople might have a right to be provided with information necessary for them to make informed decisions affecting their health or safety—for example, a right to be informed that certain products are toxic, or that certain places are dangerous.”). My use of this phrase is limited to a right of access to government information only.

²⁰ A popular idiom that connotes “[a] person likely to exploit the information or resources that they have been charged to protect or control.” *Fox Guarding the Henhouse*, THEFREECTIONARY.COM, <https://idioms.thefreedictionary.com/fox-guarding+the+henhouse> [<https://perma.cc/REE7-LJVV>].

access to prisons.²¹ More than two decades later, the Court invoked these prison access cases to support the tenuous proposition that the First Amendment would not be implicated even if the government were to refuse to provide any public access to information in its possession.²² However, in a third line of cases beginning just two years after *Houchins*, the Court came to the opposite conclusion, holding that the First Amendment does mandate a right of access to certain governmental functions, namely criminal trials and pre-trial proceedings.²³ Unfortunately, the Court has never reconciled the apparent conflict in these three lines of cases.

Part III undertakes the task of reconciling the Supreme Court's access precedents, demonstrating that the Court never intended to establish a categorical rule precluding a First Amendment right to know about the government. In fact, just one year after *Houchins*, the Court itself acknowledged that the question of a First Amendment right of access to government information remained unresolved.²⁴ And in the years that followed, the Court held that the First Amendment mandates a right of access to criminal trials and later extended that right to pretrial proceedings, reasoning that the public's right to attend criminal proceedings is implicit in the First Amendment's guarantees.²⁵ As the Court explained in

²¹ See *Pell v. Procunier*, 417 U.S. 817, 834 (1974) (rejecting constitutional challenge to state prison regulation under which media representatives were able to interview inmates, but were unable to select particular inmate, and prisoner himself could not initiate interview); *Saxbe v. Wash. Post Co.*, 417 U.S. 843, 850 (1974) (rejecting constitutional challenge to federal prison regulation prohibiting face-to-face interviews by the press); *Houchins v. KQED, Inc.*, 438 U.S. 1, 15–16 (1978) (plurality opinion) (finding no constitutional violation by county jail that refused to allow press to interview inmates).

²² See *L.A. Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32, 40 (1999) (citing *Houchins*); *McBurney v. Young*, 569 U.S. 221, 232 (2013) (citing *Houchins* and *United Reporting*).

²³ See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575–76 (1980) (holding that a First Amendment right of access applies to criminal trials); *Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596 (1982) (same); *Press-Enter. Co. v. Superior Ct. (Press-Enterprise I)*, 464 U.S. 505 (1984) (applying First Amendment right of access to jury voir dire); *Press-Enter. Co. v. Superior Ct. (Press-Enterprise II)*, 478 U.S. 1 (1986) (applying First Amendment right of access to preliminary hearings). In its two *Press-Enterprise* cases, the Supreme Court suggested that a First Amendment right of access also extends to the records associated with criminal proceedings. See *infra* notes 134–140 and accompanying text.

²⁴ See *infra* notes 184–188 and accompanying text.

²⁵ *Richmond Newspapers*, 448 U.S. at 579–80 (plurality opinion) (“Notwithstanding the appropriate caution against reading into the Constitution rights not explicitly defined, the Court has acknowledged that certain unarticulated rights are implicit in enumerated guarantees.”); *Globe Newspaper*, 457 U.S. at 604

Globe Newspaper Co. v. Superior Court, public access to the courts “serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government.”²⁶

Part IV builds on the Supreme Court’s judicial access cases to articulate a general First Amendment right to know about the government.²⁷ Although these cases arose in the setting of criminal trials, the principles underlying the Court’s decisions—ensuring an informed citizenry and promoting government accountability—apply far beyond courthouses to a wide range of governmental functions. Recognizing this broader applicability, lower courts have held that the First Amendment right of access encompasses not only criminal proceedings but also civil proceedings and the records filed in both criminal and civil cases.²⁸ Several federal circuit courts of appeal have gone even further in holding that the First Amendment provides a presumption of public access to government information and functions outside the judicial branch.²⁹ These decisions affirm that the First Amendment’s protections are not confined to any single branch of government but apply broadly to all government information that is necessary for self-government.

Part IV concludes by exploring how a First Amendment right to know might be applied in the context of the government’s use of its police power—with a particular focus on access to information about arrests. As this part will show, the public has long been deeply involved in all aspects of the criminal justice system, from arrest through trial to punishment. Recognizing a right to know about the government’s arrest and detention practices aligns with the longstanding tradition of public oversight over law enforcement. Indeed, access to

(noting that the Court has “long eschewed any ‘narrow, literal conception’ of the Amendment’s terms . . . for the Framers were concerned with broad principles, and wrote against a background of shared values and practices” (quoting *NAACP v. Button*, 371 U.S. 415, 430 (1963))).

²⁶ 457 U.S. at 604; see also *Richmond Newspapers*, 448 U.S. at 575–76 (stating that the First Amendment “goes beyond protection of . . . the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw”).

²⁷ I argue elsewhere that, in addition to the First Amendment, fundamental principles of constitutional structure, particularly the Constitution’s implementation of popular sovereignty, support a right of access to government information. See David S. Ardia, *Popular Sovereignty and a Right to Know About the Government*, 67 ARIZ. L. REV. 1, 19–28 (2025). My focus here is on a right of access to government information grounded in the First Amendment.

²⁸ See *infra* notes 242–243 and accompanying text.

²⁹ See *infra* notes 261–286 and accompanying text.

information about arrests is not merely a matter of public curiosity; it is fundamental to holding the government accountable for its use of force and coercion. Without it, the public is deprived of the knowledge necessary to scrutinize, evaluate, and ultimately check the state's exercise of power. In a constitutional democracy, denying this access erodes the very foundations of self-government.

I

THE FIRST AMENDMENT'S VITAL ROLE SUPPORTING SELF-GOVERNMENT

We begin with first principles. The Constitution established a system of government in which ultimate authority rests with the people.³⁰ This bedrock belief—that citizens retain sovereignty over their government—was central to the national compact that led to the Constitution's ratification.³¹ Many of the Framers, drawing on the works of political theorists such as John Locke and John Milton,³² embraced the philosophical underpinnings of self-government.³³ As Alexander Hamilton asserted 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."³⁴ James Madison felt similarly, declaring in *The Federalist No. 46* that "ultimate authority . . . resides in the people alone."³⁵ These

³⁰ 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.").

³¹ See Ardia, *supra* note 27, at 8.

³² See JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT 54–55 (Thomas P. Peardon ed., 1952) (1689); JOHN MILTON, AREOPAGITICA (1644); see also JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 6–9 (Currin V. Shields ed., 1958) (1861).

³³ 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) ("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.").

³⁴ THE FEDERALIST NO. 22, at 112 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

³⁵ THE FEDERALIST NO. 46, at 243 (James Madison) (George W. Carey & James McClellan eds., 2001); see also THE FEDERALIST NO. 49, at 261 (James Madison)

statements reflect not merely theoretical aspirations, but the structural premise of the Constitution itself.³⁶

A. Freedom of Speech and Self-Government

Although historians continue to debate the Framers' intent in proscribing that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble,"³⁷ there is now widespread agreement that the First Amendment's protections play an essential role supporting self-government.³⁸ One of the first scholars to directly link the First Amendment to self-government was Alexander Meiklejohn, whose book *Free Speech and Its Relation to Self-Government*.³⁹ continues to influence constitutional law and political theory today. For Meiklejohn, the First Amendment's protection for speech is rooted in the idea that citizens have the right to participate in the democratic process and to make informed decisions about how they are governed.⁴⁰ He later remarked that "[w]hat is essential is not that everyone shall speak, but that everything worth saying shall be said."⁴¹

(George W. Carey & James McClellan eds., 2001) ("[T]he people are the only legitimate fountain of power . . .").

³⁶ See Ardia, *supra* note 27, at 8–29.

³⁷ U.S. CONST. amend. I. For a discussion of the debate over the meaning of the First Amendment, see Ardia, *supra* note 13, at 279–85.

³⁸ See, e.g., ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 25 (1948); CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 121–65 (1993) (contending that free speech is a "precondition" for democracy); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 20–21 (1971) (arguing that freedom of speech is necessary for "democratic organization"); Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 *CALIF. L. REV.* 2353, 2362 (2000) ("The democratic theory of the First Amendment . . . protects speech insofar as it is required by the practice of self-government . . ."); James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 *VA. L. REV.* 491, 497 (2011) ("[T]he value that best explains the pattern of free speech decisions is a commitment to democratic self-governance."); Ashutosh Bhagwat, *The Democratic First Amendment*, 110 *Nw. U. L. REV.* 1097, 1102 (2016) ("[A] broad consensus has emerged over the past half-century regarding the fundamental reason why the Constitution protects free speech: to advance democratic self-governance.");

³⁹ MEIKLEJOHN, *supra* note 38.

⁴⁰ *Id.* at 29.

⁴¹ ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 26 (Greenwood Press 1979) (1960). At least initially, Meiklejohn felt that such speech had to be explicitly political. MEIKLEJOHN, *supra* note 38, at 45–46. This exceedingly narrow definition faced immediate criticism, and Meiklejohn ultimately revised his theory, concluding that speech about education, philosophy, science, literature, and the arts also can be necessary for self-governance. See Ardia, *supra* note 13, at 307.

The conclusion that the First Amendment was intended to support self-government stems from the recognition that freedom of speech is an indispensable condition for democratic deliberation. While scholars and jurists point to other values that are advanced by the First Amendment, a democratic polity is simply unsustainable without robust protections for speech, particularly speech concerning government operations. As the Supreme Court noted in *Mills v. Alabama*, “[w]hatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.”⁴² Since *Mills*, the Court has continued to emphasize the essential role that speech plays in self-government,⁴³ remarking in *Snyder v. Phelps* that “speech concerning public affairs is more than self-expression; it is the essence of self-government.”⁴⁴

The First Amendment supports self-government in many ways. The amendment’s protections for speech and the press prevent the government from stifling criticism of government officials and ensure that debate on public issues can be “uninhibited, robust, and wide-open.”⁴⁵ Other provisions in the First Amendment, such as the rights of assembly, association, and petition, serve similar ends by helping to alleviate collective-action problems that can undermine the exercise of self-government.⁴⁶ These “cognate

⁴² 384 U.S. 214, 218 (1966).

⁴³ See, e.g., *Walker*, 576 U.S. at 207 (“[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.”); *Knox v. Serv. Emps. Int’l Union, Local 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.”); *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.”); *Buckley v. Valeo*, 424 U.S. 1, 93 n.127 (1976) (per curiam) (“[T]he central purpose of the Speech and Press Clauses was to assure a society in which ‘uninhibited, robust, and wide-open’ public debate concerning matters of public interest would thrive, for only in such a society can a healthy representative democracy flourish.” (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964))).

⁴⁴ 562 U.S. 443, 452 (2011) (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964)).

⁴⁵ *Sullivan*, 376 U.S. at 270.

⁴⁶ See Tabatha Abu El-Haj, *The Neglected Right of Assembly*, 56 UCLA L. REV. 543, 543 (2009); Jason Mazzone, *Freedom’s Associations*, 77 WASH. L. REV. 639, 743 (2002); Ozan O. Varol, *Structural Rights*, 105 GEO. L.J. 1001, 1034 (2017).

rights”⁴⁷ make up what Ashutosh Bhagwat calls the “Democratic First Amendment.”⁴⁸ Their inclusion together in the First Amendment was not simply serendipitous. The Supreme Court commented on this in *Thomas v. Collins*, writing: “It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable.”⁴⁹

B. The First Amendment and an Informed Public

While the precise relationship between the First Amendment and self-government remains the subject of scholarly debate,⁵⁰ few would challenge the notion that individuals cannot be self-governing if they are denied information about their government. This point has long been affirmed by social, legal, and political theorists. For instance, the English philosopher Jeremy Bentham wrote in 1837 that “[i]n an assembly elected by the people, and renewed from time to time, publicity is absolutely necessary to enable the electors to act from knowledge.”⁵¹ The influential American philosopher and democratic reformer John Dewey observed a century later that “[o]pinions and beliefs concerning the public presuppose effective and organized inquiry,” and warned that “[g]enuinely public policy cannot be generated unless it be informed by knowledge.”⁵²

This was clearly the view of the Framers, who saw an educated and informed public as central to their vision of American democracy.⁵³ As James Madison famously said, “[a] popular

⁴⁷ See *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937); *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

⁴⁸ Bhagwat, *supra* note 38, at 1099.

⁴⁹ 323 U.S. at 530.

⁵⁰ See Ardia, *supra* note 13, at 337.

⁵¹ JEREMY BENTHAM, AN ESSAY ON POLITICAL TACTICS (1837), reprinted in 2 THE WORKS OF JEREMY BENTHAM 299, 312 (John Bowring ed., Russell & Russell 1962).

⁵² JOHN DEWEY, THE PUBLIC AND ITS PROBLEMS 177–79 (1927); see also JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 296 (William Rehg trans., 1996) (“Democratic procedure, which establishes a network of pragmatic considerations, compromises, and discourses of self-understanding and of justice, grounds the presumption that reasonable or fair results are obtained insofar as the flow of relevant information and its proper handling have not been obstructed.”).

⁵³ See, e.g., Letter from Thomas Jefferson to Edward Carrington (Jan. 16, 1787), in 5 THE WORKS OF THOMAS JEFFERSON 251, 252–53 (Paul Leicester Ford ed., 1904) (remarking that way the people retain power over their governors “is to give

government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both.”⁵⁴ In his first presidential address to Congress, George Washington urged the new members to support an educated and 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.”⁵⁵ Washington returned to this theme in his farewell address:

Promote then as an object of primary importance, [i]nstitutions 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.⁵⁶

In fact, the First Amendment is not the only provision in the Constitution that supports an informed citizenry. Even before the Bill of Rights was added in 1791, the Framers evidenced concern for an informed public in a number of the Constitution’s provisions. Article I, Section 8, for example, gave Congress the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”⁵⁷ In adding this clause, the Framers sought to decentralize and democratize innovation and information

them full information of their affairs”); 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.”); Letter from James Madison to William Barry (Aug. 4, 1822), in 9 THE WRITINGS OF JAMES MADISON 103, 103 (Gaillard Hunt ed., 1910) (writing that “a people who mean to be their own Governors, must arm themselves with the power which knowledge gives”).

⁵⁴ Letter from James Madison to William Barry, *supra* note 53. Although Madison’s letter to William Barry related primarily to Kentucky’s support for a general system of education, Madison’s many references in his letter—and in his other writings—to the importance of the advancement and diffusion of knowledge demonstrates that his strong views on the subject encompassed more than just the institutions of education. See Barry Sullivan, *Executive Secrecy: Congress, the People, and the Courts*, 72 EMORY L.J. 1301, 1314 (2023) (recounting how Madison understood that access to information is one of several conditions, including education, that are necessary for sustaining an effective representative democracy).

⁵⁵ George Washington, First Annual Message (Jan. 8, 1790), in GEORGE WASHINGTON: A COLLECTION 467, 469 (W. B. Allen ed., 1988).

⁵⁶ George Washington, Farewell Address (Sep. 19, 1796), in GEORGE WASHINGTON: A COLLECTION 512, 522 (W. B. Allen ed., 1988).

⁵⁷ U.S. CONST. art. I, § 8, cl. 8.

production.⁵⁸ Article I, Section 8 also gave Congress the power “[t]o establish Post Offices and post Roads.”⁵⁹ Jack Balkin, who has written that the First Amendment should be understood broadly as “an information policy,” notes that the new American republic, extending over such a large area, clearly needed infrastructure to ensure that people could communicate with each other: “Good roads and a good mail system were essential to self-government in a large republic.”⁶⁰

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, among other things, provided postal subsidies for the distribution of newspapers.⁶¹ Anuj Desai writes that these subsidies “were premised on the underlying educational rationale espoused by Rush, Washington, Madison, Jefferson, and others: 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.”⁶² Thomas Jefferson felt so strongly about the importance of an informed public that he wrote in a letter to Edward Carrington, Virginia’s delegate to the Continental Congress, that if he had to choose between “a government without newspapers or newspapers without a government, I should not hesitate a moment to prefer the latter.”⁶³

⁵⁸ See Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 *YALE L.J.* 283, 289 (1996) (“In adopting the Constitution’s Copyright Clause and enacting the first federal copyright statute, the Framers were animated by the belief that copyright’s support for the diffusion of knowledge is ‘essential to the preservation of a free Constitution.’” (footnote omitted) (quoting BRUCE W. BUGBEE, *GENESIS OF AMERICAN PATENT AND COPYRIGHT LAW* 137 (1967))).

⁵⁹ U.S. CONST. art. I, § 8, cl. 7.

⁶⁰ Jack M. Balkin, *The First Amendment is an Information Policy*, 41 *HOFSTRA L. REV.* 1, 3 (2012).

⁶¹ Act of Feb. 20, 1792, ch. 7, § 22, 1 Stat. 232, 238 (expired 1794).

⁶² 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).

⁶³ JEFFERSON, *supra* note 53, at 253. A longer recitation of Jefferson’s letter further clarifies his view of the importance of an informed public:

The basis of our governments being the opinion of the people, the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspapers or newspapers without a government, I should not hesitate a moment to prefer the latter. But I should mean that every man should receive those papers & be capable of reading them.

C. The Importance of Knowledge About the Government

While Jefferson's stated willingness to forego government in favor of newspapers was undoubtedly hyperbole, his comment about the vital role that a free press plays in supporting an informed electorate was prescient. History is filled with examples where the dogged work of journalists in uncovering government secrets fundamentally altered the public's understanding of its government and led to important legislative, governance, and policy changes, from the Teapot Dome scandal in the 1920s that prompted the first Ethics in Government Act,⁶⁴ through the impeachment of President Richard Nixon following Watergate,⁶⁵ to the statutory limits Congress imposed on the government's ability to monitor the communications of Americans after the publication of National Security Agency documents provided by Edward Snowden.⁶⁶ In fact, many of

⁶⁴ See, e.g., Donald C. Smaltz, *The Independent Counsel: A View from Inside*, 86 GEO. L.J. 2307, 2315–16 (1998) (describing how the disclosure of government leases granted to two oil tycoons, Edward Doheny and Harry Sinclair, in return for \$400,000 in “personal loans,” led to the appointment of the nation's first special prosecutor which served as a model for the Ethics in Government Act of 1978 containing modern special prosecutor laws).

⁶⁵ See, e.g., CARL BERNSTEIN & BOB WOODWARD, *ALL THE PRESIDENT'S MEN* 25, 63, 71, 79, 331 (1974) (describing the role of investigative journalists at *The Washington Post* and government informants in driving public interest in the Watergate scandal and raising suspicion about White House involvement, leading ultimately to the resignation of the President). The Watergate break-in was part of a political scandal in the United States that occurred during the presidency of Richard Nixon; it began in 1972 when five men were caught breaking into the Democratic National Committee headquarters at the Watergate complex in Washington D.C. See *The Watergate Scandal*, TEACH DEMOCRACY, <https://teachdemocracy.org/online-lesson/the-watergate-scandal/> [<https://perma.cc/XMK5-JSUX>]. Over time, it was revealed that Nixon and members of his administration had engaged in illegal activities, including wiretapping and attempting to cover up the burglary, leading to Nixon's resignation in 1974 and the indictment of several of his top advisors. *Id.* The scandal ultimately had far-reaching implications for American politics, leading to increased scrutiny of government actions and an erosion of public trust in political institutions.

⁶⁶ See, e.g., Micah L. Issit, *The Snowden Effect*, in *OPINIONS THROUGHOUT HISTORY: NATIONAL SECURITY VS. CIVIL AND PRIVACY RIGHTS* 415, 415–28 (2018) (discussing NSA contractor Edward Snowden's leak of classified documents to various reporters detailing the agency's collection of American citizens' communication records and how the public's disapproval of government surveillance influenced Congress's passing of the FREEDOM Act restricting bulk data collection). Although it is often difficult to know the extent to which disclosures of government information influence public understanding, the Pew Research Center has extensively studied the aftermath of Watergate and the Snowden revelations. See Andrew Kohut, *From the Archives: How the Watergate Crisis Eroded Public Support for Richard Nixon*, PEW RSCH. CTR. (Sep. 25, 2019), <https://www.pewresearch.org/fact-tank/2019/09/25/how-the-watergate-crisis-eroded-public-support-for-richard-nixon/> [<https://perma.cc/9T7W-TEFS>] (citing a Gallup Poll that found

the nation's most significant legislative initiatives appear to have been propelled, if not prompted in the first instance, by public backlash incited by the disclosure of information that government officials initially sought to suppress.⁶⁷

While protections for speech, press, assembly, and petition are essential to the functioning of democratic government, they are not sufficient to ensure that the people can be self-governing. A right to speak about the government without a right to know about the government would be quite hollow. Indeed, without a right to know about the government, the very idea of "consent of the governed"⁶⁸ is meaningless.⁶⁹ Knowledge

that by April 1973, 83% of Americans had heard of Watergate and in turn Nixon's approval rating dropped to 43% and by August 1973, 71% of Americans had watched the live hearings and Nixon's approval rate dropped again to 31%); Mary Madden, *Public Perceptions of Privacy and Security in the Post-Snowden Era*, PEW RSCH. CTR. (Nov. 12, 2014), <https://www.pewresearch.org/internet/2014/11/12/public-privacy-perceptions/> [<https://perma.cc/4HWN-7UD2>] (finding that in a January 2014 survey after the Snowden leak, 80% of participants believed Americans should be concerned about government's data monitoring).

⁶⁷ See, e.g., SUSAN M. REVERBY, *EXAMINING TUSKEGEE* 77–85, 103 (2009) (reporting on Congress's 1974 enactment of the National Research Act in response to public outrage over the 40-year-long syphilis study in Tuskegee that analyzed the progression of syphilis in black men without treatment and was brought to public attention by U.S. Public Health Services employee Peter Buxtun and Associated Press reporter Jean Heller); KAREN F. STEIN, RACHEL CARSON: CHALLENGING AUTHORS 63 (2012) (noting the impact of government biologist Rachel Carson's book, *Silent Spring*, in prompting a government commission on the use of pesticides, the eventual banning of DDT in the U.S., environmental laws like the Endangered Species Act, and the creation of the Environmental Protection Agency); Joseph A. Palermo, *Politics, Public Opinion, and Popular Culture, in WATERGATE AND THE RESIGNATION OF RICHARD NIXON* 27 (Harry P. Jeffrey & Thomas Maxwell-Long eds., 2004) (cataloging legislation that resulted from the Watergate scandal including the Foreign Corrupt Practices Act of 1977, Foreign Intelligence Surveillance Act of 1978, as well as strengthening provisions of the Freedom of Information Act, Intelligence Oversight Act of 1980, and Ethics in Government Act of 1978); Ken Gormley, *An Original Model of the Independent Counsel Statute*, 97 MICH. L. REV. 601, 626–27 (1998) (noting that the Ethics in Government Act of 1978 was intended to "drag certain investigations of the President and other high-level executive officials out of the muck of partisan politics in order to restore public confidence in government" and was primarily designed to deal with major crises in the executive branch "like Watergate in the 1970s and the Teapot Dome scandal in the 1920s").

⁶⁸ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("Governments are instituted among Men, deriving their just powers from the consent of the governed.").

⁶⁹ See Martin E. Halstuk & Benjamin W. Cramer, *Informed Dissent: Toward a Constitutional Right to Know*, 5 J. CIVIC INFO. 1, 27 (2023) ("[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."); Adam M. Samaha, *Government Secrets, Constitutional Law, and Platforms for Judicial Intervention*, 53 UCLA L. REV. 909, 917–18 (2006)

about the government is a necessary precondition for informed consent, as it allows citizens to evaluate their representatives' actions and to participate in shaping policymaking, ensuring that the direction of government policy aligns with the public will.⁷⁰ “[I]f democracy is to work,” Thomas Emerson once wrote, “there can be no holding back of information; otherwise ultimate decisionmaking by the people, to whom that function is committed, becomes impossible.”⁷¹

Because self-government depends on knowledge about the government, it cannot be the case that government officials can decide for themselves what the public knows.⁷² Cautioning against allowing the government to dictate what information should be available to the public through the federal Freedom of Information Act (FOIA), the Supreme Court observed in *United States Department of Justice v. Reporters Committee for Freedom of the Press* that “[t]he generation that made the nation thought secrecy in government one of the instruments of Old World tyranny and committed itself to the principle that a democracy cannot function unless the people are permitted to know *what their government is up to*.”⁷³ “This phrase should not be dismissed as a convenient formalism,” the Court instructed a decade later in *National Archives and Records Administration v. Favish*, “[i]t defines a structural necessity in a real democracy.”⁷⁴

(“Without meaningful information on government plans, performance, and officers, the ability to vote, speak, and organize around political causes becomes rather empty.”). Even scholars who do not subscribe to a self-governance theory of the First Amendment nevertheless recognize that access to government information is a necessary precondition for a functioning democracy. *See, e.g.*, Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 596–97 (1982) (acknowledging that voters “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”).

⁷⁰ *See* Ardia, *supra* note 27, at 15–21.

⁷¹ Thomas I. Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U. L.Q. 1, 14 (1976).

⁷² *See* Ardia, *supra* note 27, at 31–36.

⁷³ 489 U.S. 749, 772–73 (1989) (emphasis added) (quoting *EPA v. Mink*, 410 U.S. 73, 105 (1973) (Douglas, J., dissenting)).

⁷⁴ 541 U.S. 157, 171–72 (2004) (citing *Reporters Committee*, 489 U.S. at 773).

II

THE SUPREME COURT'S INCONSISTENT RIGHT TO KNOW CASE LAW

Given the essential role that an informed public plays in self-government, scholars and open government advocates have long argued that the First Amendment should be understood to provide a right of access to some types of government information.⁷⁵ Many of these claims were based on the assertion that the right to speak loses its value or becomes ineffective without a corresponding right to information on the topics one wants to speak about.⁷⁶ Although the Supreme Court has relied on this reasoning to find that the First Amendment provides a right to *receive* information to ensure a "recipient's meaningful exercise of his own rights of speech, press, and political freedom,"⁷⁷

⁷⁵ See, e.g., HAROLD CROSS, *THE PEOPLE'S RIGHT TO KNOW*, at xii (1953); Frank Horton, *The Public's Right to Know*, 3 N.C. CENT. L.J. 123, 133-34 (1972); Emerson, *supra* note 71, at 14; David Mitchell 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, 2-3 (1980); Michael J. Perry, *Freedom of Expression: An Essay on Theory and Doctrine*, 78 NW. U. L. REV. 1137, 1160 (1983); Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 489 (1985).

⁷⁶ See, e.g., C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 68-69 (1992) (arguing that individuals should "have a right to demand that the government not prohibit the listener from receiving or using otherwise available information"); Thomas I. Emerson, *Colonial Intentions and Current Realities of the First Amendment*, 125 U. PA. L. REV. 737, 758 (1977) ("Every person also has full rights to read, listen, observe, or otherwise receive communications. . . . [T]he mandate of the first amendment does provide a foundation from which realization of human potential can begin."); Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFFS. 204, 221-22 (1972) ("Persons who see themselves as autonomous see themselves as having a right to make up their own minds, hence also a right to whatever is necessary for them to do this."). While a general right to acquire information may be justified by the necessity of being sufficiently informed about the world, a right to information *from the government* is based on a more unassailable principle: that access to government information is a prerequisite for self-governance. See *infra* Part III.

⁷⁷ Bd. of Educ., *Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 867 (1982) ("[T]he right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom."); see also *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 783 (1978) ("[Our precedents have focused] not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas."); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("This right to receive information and ideas, regardless of their social worth . . . is fundamental to our free society."); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) ("It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here."); *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943) ("The right of freedom of speech and press has broad scope. . . . This freedom embraces the right to distribute literature . . . and necessarily protects the right to receive it.").

it has not fully embraced the idea that the First Amendment provides an affirmative right to *acquire* information, including information held by the government itself. In fact, many scholars and jurists believe that the Supreme Court closed the door on a First Amendment right of access to government information in *Houchins v. KQED* and *Los Angeles Police Department v. United Reporting*.⁷⁸

This assumption, however, is based on a misreading of the Supreme Court's "erratic and fragmented" right to know case law.⁷⁹ Although the Court has exhibited antipathy regarding a general right to acquire information, it has repeatedly held that the First Amendment mandates a right of access to criminal trials and pretrial proceedings. The Court's reasons for recognizing a right of access to criminal proceedings belie the assertion that the First Amendment can never be implicated when the government keeps information from the public. The sections that follow describe the Supreme Court's evolving views on a right of access to information, noting that the Court has never fully addressed the inconsistencies in its right to know cases.

⁷⁸ See, e.g., *Fusaro v. Cogan*, 930 F.3d 241, 249 (4th Cir. 2019); *Phillips v. Dewine*, 841 F.3d 405, 418 (6th Cir. 2016); *City of Chicago v. U.S. Dep't of Treasury, Bureau of Alcohol, Tobacco & Firearms*, 423 F.3d 777, 784 (7th Cir. 2005); *Ctr. for Nat'l Sec. Stud. v. U.S. Dep't of Just.*, 331 F.3d 918, 934 (D.C. Cir. 2003); *Calder v. IRS*, 890 F.2d 781, 784 (5th Cir. 1989); *Cap. Cities Media, Inc. v. Chester*, 797 F.2d 1164, 1171–73 (3d Cir. 1986); *Eggenberger v. W. Albany Twp.*, 90 F. Supp. 3d 860, 864 (D. Minn. 2015), *aff'd*, 820 F.3d 938 (8th Cir. 2016); *Copley Press, Inc. v. Superior Ct.*, 141 P.3d 288, 309 (Cal. 2006); *Uniontown Newspapers, Inc. v. Roberts*, 839 A.2d 185, 191 (Pa. 2003). Scholars also have made this assertion. See, e.g., Sarah G. Reznick, *Gannett v. DePasquale and Richmond Newspapers v. Virginia: Re-Opening Courtroom Doors and Constitutional Windows*, 10 CAP. U. L. REV. 101, 102–03 (1980) ("The door to access was securely closed by the Court . . . in a triad of cases concerning public and media access to prisons."); Eumi K. Lee, *Monetizing Shame: Mugshots, Privacy, and the Right to Access*, 70 RUTGERS L. REV. 557, 580 (2018) ("As a general matter, there is no constitutional right to access government information. . . . This general principle was discussed in *Houchins v. KQED, Inc.*, which was the culmination of cases in the 1970s concerning the media's right to access penal institutions." (footnote omitted)); Aliza Plener Cover, *The Constitutional Guarantee of Criminal Justice Transparency*, 74 ALA. L. REV. 171, 196 (2022) (citing *Houchins* to support the conclusion that "[t]he Supreme Court has generally taken the position that the First Amendment does not protect a right of access to information in the government's possession").

⁷⁹ Barry P. McDonald, *The First Amendment and the Free Flow of Information: Towards a Realistic Right to Gather Information in the Information Age*, 65 OHIO ST. L.J. 249, 251 (2004) (remarking that in cases seeking a right of access to information "the Court responded in a remarkably erratic and fragmented way").

A. The Court's Initial Antipathy Regarding a Right to Know

Although the Supreme Court broadly applies the First Amendment's protections in cases involving government censorship of speech, it has been less solicitous of claims that the First Amendment encompasses a right to acquire information. One of the first cases to reach the Supreme Court testing whether such a right exists was *Zemel v. Rusk*, which involved the U.S. government's imposition of a travel ban to Cuba in 1961.⁸⁰ In challenging the ban, the plaintiff in *Zemel* argued that the restriction on travel interfered with "the First Amendment rights of citizens to travel abroad so that they might acquaint themselves at first hand with the effects abroad of our Government's policies."⁸¹ While Chief Justice Warren, writing for a 6-3 majority, conceded that the travel ban "render[ed] less than wholly free the flow of information concerning [Cuba],"⁸² he nevertheless concluded that this did not raise First Amendment concerns, writing that "[t]he right to speak and publish does not carry with it the unrestrained right to gather information."⁸³

Seven years later, however, the Court suggested in *Branzburg v. Hayes* that there may be some government restrictions on the gathering of information that would trigger First Amendment scrutiny.⁸⁴ *Branzburg* involved the consolidation of four cases brought by journalists who claimed that the First Amendment protected them from having to identify their confidential sources before a grand jury. The journalists argued that compelling their testimony would deter their sources from providing information "to the detriment of the free flow of information protected by the First Amendment."⁸⁵ In a 5-4 decision, Justice White declined to recognize a privilege for journalists in the context of grand jury investigations, noting that even those who gather the news must comply with civil and criminal statutes of general applicability.⁸⁶ Citing *Zemel*, White wrote

⁸⁰ 381 U.S. 1 (1965).

⁸¹ *Id.* at 16.

⁸² *Id.*

⁸³ *Id.* at 17. Burger also concluded that the government's prohibition on travel did not implicate the First Amendment because it was merely "an inhibition of action." *Id.* at 16.

⁸⁴ 408 U.S. 665 (1972).

⁸⁵ *Id.* at 680.

⁸⁶ *Id.* at 682 ("[N]either the First Amendment nor any other constitutional provision protects the average citizen from disclosing to a grand jury information that he has received in confidence.").

that “[i]t has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally.”⁸⁷ Nonetheless, White remarked that there might be a limit on the government’s ability to restrict access to information: “We do not question the significance of free speech, press, or assembly to the country’s welfare. Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated.”⁸⁸

White’s observation that the First Amendment might provide some protection for seeking out the news, however, did not presage an immediate change in the Court’s receptivity to a constitutional right to gather information. Shortly after *Branzburg*, the Court issued a series of three decisions rejecting a right on behalf of the press to access prisons that continue to have an outsized influence on the debate over whether the First Amendment includes a right of access to government information. In *Pell v. Procunier* and *Saxbe v. Washington Post Co.*, decided on the same day in 1974, a newspaper publisher and several reporters challenged prison regulations that restricted their ability to interview inmates who had not been made available by the prisons.⁸⁹ Although prison officials allowed press representatives to join public tours of the prisons, photograph prison facilities, and interview inmates selected at random by corrections officials, the news organizations argued that this access was insufficient for them to report on conditions in the prisons.⁹⁰ Invoking the First Amendment’s speech and press clauses, they asserted that they have a constitutional right to interview any inmate who is willing to speak to them unless the interview would create a “clear and present danger to prison security or to some other substantial interest served by the corrections system.”⁹¹

Justice Stewart, writing for 5-4 majorities in both cases, declined to recognize that the First Amendment provided the

⁸⁷ *Id.* at 684.

⁸⁸ *Id.* at 707. Returning to this idea at the end of its decision, White again wrote that “news gathering is not without its First Amendment protections, and grand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment.” *Id.* at 707.

⁸⁹ See 417 U.S. 817 (1974); 417 U.S. 843 (1974).

⁹⁰ *Pell*, 417 U.S. at 829–30; *Saxbe*, 417 U.S. at 844–47.

⁹¹ *Pell*, 417 U.S. at 829.

press with a special right of access to the requested information.⁹² Although Stewart acknowledged that the Court had suggested in *Branzburg* that newsgathering was entitled to some First Amendment protection,⁹³ he wrote that he saw the issue in *Pell* and *Saxbe* as whether the press had a right of access that was *greater than that afforded the general public*.⁹⁴ Without clarifying the extent of the public's right of access, Stewart rejected this superior access argument, stating that the First Amendment did not "require [the] government to accord the press special access to information not shared by members of the public generally."⁹⁵

Given Stewart's narrow characterization of the issue in *Pell* and *Saxbe* as involving special press access, the Court's decisions in those cases left open the possibility that the Constitution might be implicated if the government refused to provide any public access to the prisons.⁹⁶ Justice Powell emphasized this point in his dissent in both cases, writing in *Saxbe* that "[a]t some point official restraints on access to news sources, even though not directed solely at the press, may so undermine the function of the First Amendment that it is both appropriate and necessary to require the government to justify such regulations in terms more compelling than discretionary authority."⁹⁷

The question of a constitutional right of access to government information returned to the Court only a few years later in *Houchins v. KQED*.⁹⁸ In *Houchins*, a broadcasting company and members of the NAACP sued a sheriff who refused to provide media access to a portion of a county jail that had been

⁹² See *id.* at 833; *Saxbe*, 417 U.S. at 850.

⁹³ *Pell*, 417 U.S. at 833; *Saxbe*, 417 U.S. at 845.

⁹⁴ *Pell*, 417 U.S. at 834 (concluding that "newsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public"); *Saxbe*, 417 U.S. at 850 (writing that the case was "constitutionally indistinguishable from *Pell v. Proconier*").

⁹⁵ *Pell*, 417 U.S. at 834; see also *Saxbe*, 417 U.S. at 850.

⁹⁶ The Court concluded at the outset of its analysis in *Pell* that the government was not attempting to conceal prison conditions or to frustrate the press's investigation and reporting of those conditions because "both the press and the general public [were] accorded full opportunities to observe prison conditions." 417 U.S. at 830. The Court made similar observations in *Saxbe*:

The policies of the Federal Bureau of Prisons regarding visitations to prison inmates do not differ significantly from the California policies considered in *Pell v. Proconier*. . . . Indeed, journalists are given access to the prisons and to prison inmates that in significant respects exceeds that afforded to members of the general public.

417 U.S. at 846-47.

⁹⁷ *Saxbe*, 417 U.S. at 860 (Powell, J., dissenting).

⁹⁸ See 438 U.S. 1 (1978).

involved in a recent suicide by an inmate and was the subject of allegations of deplorable prison conditions.⁹⁹ Emphasizing the public interest at stake, the plaintiffs argued that the sheriff “had violated the First Amendment by refusing to permit media access and failing to provide any effective means by which the public could be informed of conditions prevailing in the [prison] facility or learn of the prisoners’ grievances.”¹⁰⁰ They further asserted that “[p]ublic access to such information was essential . . . in order for NAACP members to participate in the public debate on jail conditions in Alameda County.”¹⁰¹

The *Houchins* case was a bit of an oddity from the start. The Court was shorthanded with Justice Blackmun recovering from surgery and taking no part in the case and Justice Marshall recusing himself because of his prior work at the NAACP, leaving only seven justices to decide the case.¹⁰² In addition, shortly after the lawsuit was filed, prison officials instituted monthly tours that were open to the press and public, and the Court appears to have taken this new baseline of public access into account when assessing the government’s restrictions on media access.¹⁰³ Prior to the lawsuit, the prison had no formal policy on allowing public or press access.¹⁰⁴

In a 4-3 decision that failed to produce a majority opinion, the Court rejected the media companies’ First Amendment access claims.¹⁰⁵ Writing for a plurality of three justices, Chief Justice Burger phrased the question before the Court narrowly: “whether the news media have a constitutional right of access to a county jail, *over and above that of other persons*,

⁹⁹ See *id.* at 3–6.

¹⁰⁰ *Id.* at 4.

¹⁰¹ *Id.*

¹⁰² *Id.* at 2; see also Matthew L. Schafer, *Does Houchins v. KQED, Inc. Matter?*, 70 BUFF. L. REV. 1331, 1343 (2022).

¹⁰³ *Houchins*, 438 U.S. at 4–5. The media plaintiffs contended that the new monthly public tours failed to provide adequate access to the jail because:

- (a) once the scheduled tours had been filled, media representatives who had not signed up for them had no access and were unable to cover newsworthy events at the jail; (b) the prohibition on photography and tape recordings, the exclusion of portions of the jail from the tours, and the practice of keeping inmates generally removed from view substantially reduced the usefulness of the tours to the media.

Id. at 5.

¹⁰⁴ *Id.* at 4.

¹⁰⁵ *Id.* at 15–16 (plurality opinion). Chief Justice Burger’s plurality opinion of only three justices did not even command a majority of the seven justices who heard the case. Justice Stewart concurred in part and Justices Stevens, Brennan, and Powell dissented. *Id.* at 2–3.

to interview inmates and make sound recordings, films, and photographs for publication and broadcasting by newspapers, radio, and television.”¹⁰⁶ Burger’s characterization of the legal issue before the Court makes clear that the case was not about whether prison officials could fully exclude the public from the prison. In fact, at oral argument, counsel for Sheriff Houchins stated to the justices that he viewed the case as involving only the question of special rights for the press, not the “public’s rights.”¹⁰⁷ Justice Rehnquist followed up this statement by asking: “When you say the public right, are you talking about some term that has meaning in constitutional law?”¹⁰⁸ Houchins’ counsel replied: “Yes, I think I am. I think the public does have some rights of access.”¹⁰⁹ The following exchange then took place:

Justice William H. Rehnquist: Was not *Pell* really a decision that said whatever the public access is, the media access need to be no greater?

Kelvin H. Booty, Jr. [counsel to Houchins]: Indeed, that is exactly what the Court said. But I do not read the decision [in *Pell*] saying that means necessarily that the public access is zero. That is not resolved in any decision [of] this Court that I am aware of. It was not placed [in] issue in that case. That is my point.

Justice John Paul Stevens: But more specifically, Mr. Booty, you do not seriously contend that the whole problem could be solved by having zero access to public and press both?

Kelvin H. Booty, Jr.: Certainly not.¹¹⁰

In his plurality opinion, which was joined by Justices White and Rehnquist, Burger highlighted this interchange, noting

¹⁰⁶ *Id.* at 3 (emphasis added).

¹⁰⁷ Oral Argument at 12:10, *Houchins v. KQED Inc.*, 438 U.S. 1 (1978) (No. 76-1310), <https://www.oyez.org/cases/1977/76-1310> [<https://perma.cc/4Y7E-9AEW>].

¹⁰⁸ *Id.* at 12:16.

¹⁰⁹ *Id.* at 12:27.

¹¹⁰ *Id.* at 13:55. Leaving no doubt concerning his view that the *public’s* right of access was not before the Court, Booty responded to Justice Stevens’ later question asking whether he would “urge the court to take that extreme position” that the sheriff could foreclose all access to the prison:

No, I am not urging that. That is not our position . . . [I]t was not tried in the District Court. . . . KQED’s position in the District Court which the District Court adopted was that, we have to have special things for the media, *we tried it as a media access case, not a public access case*

Id. at 15:40 (emphasis added).

that on appeal the sheriff had “invoked the holding of *Pell v. Procunier*” and argued that “the District Court had departed from *Pell* and abused its discretion because it had ordered that he give the media *greater access* to the jail than he gave to the general public.”¹¹¹ Despite the narrow issue before the Court, Burger nevertheless reached out beyond the facts of the case and the arguments of the government to suggest that the *public* did not have any right of access to the prison, writing: “Neither the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government’s control.”¹¹² Although this language appears to be an outright rejection of any public right of access to the jail, the sentence that immediately follows it clarifies that Burger’s plurality opinion in *Houchins*, like the Court’s decisions in its previous prison access cases, was limited to special media access, not public access; that subsequent sentence reads: “Under our holdings in *Pell v. Procunier* and *Saxbe v. Washington Post Co.*, until the political branches decree otherwise, as they are free to do, *the media have no special right of access* to the Alameda County Jail different from or greater than that accorded the public generally.”¹¹³

The dissenting justices in *Houchins* were clearly concerned that Burger’s loose language could be read as rejecting a right of public access to the Alameda Jail. Justice Stevens, in an opinion joined by Justices Brennan and Powell, remarked that “the Court has never intimated that a nondiscriminatory policy of excluding entirely both the public and the press from access to information about prison conditions would avoid constitutional scrutiny.”¹¹⁴ “*Pell* itself strongly suggests the contrary,” Stevens pointed out.¹¹⁵ Echoing *Houchins*’ counsel’s statements at oral argument, Stevens wrote:

The decision in *Pell* . . . does not imply that a state policy of concealing prison conditions from the press . . . could have been justified simply by pointing to like concealment from, and denial to, the general public. If that were not true, there would have been no need to emphasize the substantial press and public access reflected in the record of that case.¹¹⁶

¹¹¹ *Houchins*, 438 U.S. at 7 (emphasis added).

¹¹² *Houchins*, 438 U.S. at 15.

¹¹³ *Id.* at 15–16 (emphasis added) (citations omitted).

¹¹⁴ *Id.* at 27–28 (Stevens, J., dissenting).

¹¹⁵ *Id.* at 28.

¹¹⁶ *Id.* at 29.

Stevens went on to observe that unlike in *Pell* and *Saxbe*, in *Houchins*, at least when the case was initially filed, “both the public and the press had been consistently denied any access” to the inner portions of the jail.¹¹⁷ These restrictions on access, Stevens concluded, offended the “core objective of the First Amendment” which is to preserve “the full and free flow of information to the general public.”¹¹⁸ Drawing on James Madison’s statements regarding self-governance, Stevens warned that “[w]ithout some protection for the acquisition of information about the operation of public institutions such as prisons by the public at large, the process of self-governance contemplated by the Framers would be stripped of its substance.”¹¹⁹

B. The Court’s Recognition of a Right to Know in the Judicial Context

If we were to end our analysis of the Supreme Court’s access case law, as many people do, with Chief Justice Burger’s one-sentence statement in *Houchins* that “[n]either the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government’s control,”¹²⁰ we might be justified in concluding that the question of whether the First Amendment provides a right of access to government information has already been definitively answered in the negative. However, as noted above, this sentence was followed by an important qualifier that made clear that *Houchins*, like *Pell* and *Saxbe*, was limited to a special right of media access, not public access.¹²¹ Moreover, in a parallel line of cases that came down only two years after *Houchins*, the Court stated that some information within the government’s control is subject to a public right of access under the First Amendment, namely information associated with criminal trials and pre-trial proceedings.

In the first of these cases, the Supreme Court held in *Richmond Newspapers v. Virginia* that the First Amendment

¹¹⁷ *Id.* at 38. Recall that after the case was filed, prison officials began offering monthly tours that were open to both the public and the press. *See supra* notes 103–104 and accompanying text.

¹¹⁸ *Houchins*, 438 U.S. at 30.

¹¹⁹ *Id.* at 32.

¹²⁰ *Id.* at 15.

¹²¹ *See supra* note 113 and accompanying text.

mandates a right of public access to criminal trials.¹²² In arriving at this conclusion, Chief Justice Burger acknowledged that the First Amendment does not explicitly require public access to the courts. Nevertheless, he concluded that the amendment's provisions implied that such a right exists: "In guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees."¹²³ The First Amendment, Burger wrote, "goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw."¹²⁴

Strangely, Burger did not discuss or even cite his plurality opinion in *Houchins*, let alone address his off-hand statement in that case that the First Amendment is not implicated when the government refuses to provide access to information in its control.¹²⁵ Justice Stevens, who dissented in *Houchins* and concurred in the judgment in *Richmond Newspapers*, commented on the tension between the two cases:

It is somewhat ironic that the Court should find more reason to recognize a right of access today than it did in *Houchins*. For *Houchins* involved the plight of a segment of society least able to protect itself, an attack on a longstanding policy of concealment, and an absence of any legitimate justification for abridging public access to information about how government operates. . . .

In any event, for the reasons stated in Part II of my *Houchins* opinion, . . . as well as those stated by The Chief Justice today [in *Richmond Newspapers*], I agree that the First Amendment

¹²² 448 U.S. 555, 580 (1980) (plurality opinion). The plurality opinion was joined by Justices White and Stevens, both of whom also filed concurring opinions. Justice Brennan, joined by Justice Marshall, wrote a separate concurrence. *Id.* at 584.

¹²³ *Id.* at 575.

¹²⁴ *Id.* at 575–76 (quoting *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 783 (1978)).

¹²⁵ 438 U.S. at 15. Burger did, however, attempt to distinguish the Court's other prison access cases; he wrote:

[*Pell*] and *Saxbe* are distinguishable in the sense that they were concerned with penal institutions which, by definition, are not 'open' or public places. Penal institutions do not share the long tradition of openness, although traditionally there have been visiting committees of citizens, and there is no doubt that legislative committees could exercise plenary oversight and 'visitation rights.'

Richmond Newspapers, 448 U.S. at 576 n.11 (citations omitted).

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; given the total absence of any record justification for the closure order entered in this case, that order violated the First Amendment.¹²⁶

Over the next decade, the Supreme Court continued to issue decisions affirming that the First Amendment provides a right of access to the courts, moving the Court further away from the contrary suggestion in *Houchins*. The first of these cases was *Globe Newspaper Co. v. Superior Court*, which invalidated a Massachusetts statute that excluded the public from the courtroom during the testimony of a minor who was the victim of several sexual offenses.¹²⁷ In striking down the statute, Justice Brennan's 6-2 majority opinion affirmed that the First Amendment is "broad enough to encompass those rights that, while not unambiguously enumerated in the very terms of the Amendment, are nonetheless necessary to the enjoyment of other First Amendment rights."¹²⁸ Echoing Burger's plurality decision in *Richmond Newspapers*, Brennan concluded that public access to the courts helps to ensure that the "constitutionally protected 'discussion of governmental affairs' is an informed one."¹²⁹

Shortly after its decision in *Globe Newspaper*, the Court expanded the scope of the First Amendment right of public access to the courts. In *Press-Enterprise Co. v. Superior Court* ("*Press-Enterprise I*"), a unanimous court held that the right of access also extends to criminal *voir dire* proceedings.¹³⁰ Quoting from *Richmond Newspapers*, the Court wrote in *Press-Enterprise I* that "[p]eople in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing."¹³¹ "Closed proceedings," the Court went on to explain, "must be rare and only for cause shown that outweighs the

¹²⁶ *Richmond Newspapers*, 448 U.S. at 583-84 (Stevens, J., concurring) (citation omitted).

¹²⁷ See 457 U.S. 596 (1982).

¹²⁸ *Id.* at 604 (citing *Richmond Newspapers*, 448 U.S. at 579-80).

¹²⁹ *Id.* at 604-05.

¹³⁰ 464 U.S. 501, 501 (1984). The case involved the closure of *voir dire* proceedings involving the rape and murder of a teenage girl based on the stated belief that if the press were present in the courtroom, jurors "would lack the candor necessary to assure a fair trial." *Id.* at 503.

¹³¹ *Id.* at 509 (quoting *Richmond Newspapers*, 448 U.S. at 572).

value of openness.”¹³² Two years later, the Court held in the identically named *Press-Enterprise Co. v. Superior Court* (“*Press-Enterprise II*”) that the First Amendment right of access also applies to preliminary hearings, warning that “the proceedings 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.’”¹³³

In both *Press-Enterprise* cases, the Court did not just reverse the closure of the hearings; it also struck down the sealing of the transcripts of the proceedings. In *Press-Enterprise I*, the trial judge excluded the public from almost all jury voir dire in a murder trial and withheld the transcript after the trial ended.¹³⁴ The Supreme Court unanimously held that the First Amendment right of access applies to jury selection, and in reversing the closure orders the Court suggested that this right extends to the transcript as well:

[N]ot only was there a failure to articulate findings with the requisite specificity but there was also a failure to consider alternatives to closure *and to total suppression of the transcript*. The trial judge should seal only such parts of the transcript as necessary to preserve the anonymity of the individuals sought to be protected.¹³⁵

Two years later in *Press-Enterprise II*,¹³⁶ the Supreme Court faced this issue a second time when a magistrate judge excluded the public from a forty-one-day preliminary hearing and refused to release the transcript.¹³⁷ Again, the Court held that the First Amendment provided a right of access to the proceeding in question and intimated that the public had a right to access the transcript as well.¹³⁸ In fact, in reversing the lower court’s closure orders, the Court seemed to see the sealing of the transcript as an additional affront to the public’s right of access, writing that “[d]enying the transcript of a 41-day preliminary hearing would frustrate what we have characterized

¹³² *Id.*

¹³³ 478 U.S. 1, 13–14 (1986) (quoting *Press-Enterprise I*, 464 U.S. at 510. For a longer discussion of the Supreme Court’s judicial access cases, see David S. Ardia, *Court Transparency and the First Amendment*, 38 CARDOZO L. REV. 835, 851–56 (2017).

¹³⁴ 464 U.S. at 503–04.

¹³⁵ *Id.* at 513 (emphasis added).

¹³⁶ 478 U.S. 1 (1986).

¹³⁷ *Id.* at 4–5.

¹³⁸ *Id.* at 13.

as the ‘community therapeutic value’ of openness.”¹³⁹ In elaborating on the benefits of public access, the Court noted that “[t]he value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed.”¹⁴⁰

C. The Court’s Failure to Address the Conflict in Its Right to Know Cases

Given the Supreme Court’s repeated statements that the First Amendment mandates a right of access to criminal trials and pre-trial proceedings,¹⁴¹ what are we to make of the persistent claim that *Houchins v. KQED* set down a categorical rule rejecting any First Amendment right of access to information from or about the government? Unfortunately, the Court has never explained how to reconcile *Houchins* with its more recent judicial access cases. In fact, the justices rarely cite *Houchins*,¹⁴² and when they do mention the case, it serves to short circuit any analysis of the constitutional interests at stake when the public is denied access to government information.

Take, for example, Justice Rehnquist’s perfunctory use of *Houchins* in *Los Angeles Police Department v. United Reporting Publishing Corp.*,¹⁴³ which I quote in the Introduction. In *United Reporting*, a commercial data broker brought a facial challenge against a California statute that imposed restrictions on commercial uses of arrestee addresses collected by the Los Angeles Police Department.¹⁴⁴ In dismissing the publisher’s First Amendment claim, Justice Rehnquist wrote that the statute “merely require[d] that if respondent wishes to obtain the

¹³⁹ *Id.* (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 570 (1980)).

¹⁴⁰ *Id.* (quoting *Press-Enterprise I*, 464 U.S. at 508).

¹⁴¹ *Contrast* 438 U.S. 1, 15–16 (1978), with *Richmond Newspapers*, 448 U.S. at 580 (holding that First Amendment provides a right of public access to criminal trials); *Globe Newspaper*, 457 U.S. at 604–05 (same); *Press-Enterprise I*, 464 U.S. at 516 (Stevens, J., concurring) (explaining that right of access to jury voir dire is rooted in the First Amendment); *Press-Enterprise II*, 478 U.S. at 10 (holding that First Amendment provides a right of access to preliminary hearings).

¹⁴² Five Supreme Court opinions cite *Houchins*: *Gannett Co., Inc. v. Depasquale*, 443 U.S. 368, 391 (1979); *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 104 (1979); *Minneapolis Star & Trib. Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575, 580 (1983); *L.A. Police Dep’t v. United Reporting Publ’g Corp.*, 528 U.S. 32, 40 (1999); *McBurney v. Young*, 569 U.S. 221, 232 (2013). Only two of these cases discuss it in any depth: *United Reporting*, 528 U.S. at 40 and *McBurney*, 569 U.S. at 232.

¹⁴³ 528 U.S. at 40.

¹⁴⁴ *Id.* at 34–36.

addresses of arrestees it must qualify under the statute to do so.”¹⁴⁵ Because United Reporting “did not attempt to qualify and was therefore denied access to the addresses,” Rehnquist concluded that it could not bring a facial challenge in lieu of being denied access itself.¹⁴⁶ Noting that United Reporting had made other arguments for invalidating the statute, Rehnquist wrote that “they will remain open on remand if properly presented and preserved there.”¹⁴⁷

Despite disposing of the case on procedural grounds, Rehnquist went on to state, in loose language reminiscent of Burger’s broad pronouncement in *Houchins*, that “California could decide not to give out arrestee information at all without violating the First Amendment.”¹⁴⁸ For this remarkable proposition that the government could keep its exercise of police power secret from the public without triggering any First Amendment scrutiny, Rehnquist cited only *Houchins* and engaged in no further analysis of the issue.¹⁴⁹ Perhaps recognizing that the *Houchins* plurality opinion was weak precedent for the rejection of a First Amendment right of public access to arrestee information held by one of the largest police departments in the nation, Rehnquist cited *Houchins* with merely a “Cf.” designation.¹⁵⁰ Several decades later, in *Sorrell v. IMS Health Inc.*, the Court walked back from Rehnquist’s broad statement in *United Reporting*, explaining: “*United Reporting* is . . . a case about the availability of facial challenges. The Court did not rule on the merits of any First Amendment claim.”¹⁵¹

¹⁴⁵ *Id.* at 40.

¹⁴⁶ *Id.* Rehnquist also wrote:

To the extent that respondent’s “facial challenge” seeks to rely on the effect of the statute on parties not before the Court—its potential customers, for example—its claim does not fit within the case law allowing courts to entertain facial challenges. No threat of prosecution, for example, or cutoff of funds, hangs over their heads. They may seek access under the statute on their own just as respondent did, without incurring any burden other than the prospect that their request will be denied.

Id. at 40–41 (citations omitted).

¹⁴⁷ *Id.* at 41.

¹⁴⁸ *Id.* at 40 (citing *Houchins v. KQED, Inc.*, 438 U.S. 1, 14 (1978)).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* According to *The Bluebook*, “Cf.” signals that the “[c]ited authority supports a proposition different from the main proposition but sufficiently analogous to lend support.” THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 1.2(a), at 67 (Columbia L. Rev. Ass’n et al. eds., 22d ed. 2025).

¹⁵¹ 564 U.S. 552, 568 (2011).

Even more disturbing is Justice Alito's disingenuous treatment of the issue of public access to government information in *McBurney v. Young*.¹⁵² *McBurney* involved a challenge under the Privileges and Immunities Clause and dormant Commerce Clause to Virginia's requirement that only citizens of Virginia are allowed to request information under the state's Freedom of Information Act.¹⁵³ Citing the Court's meager precedent purporting to reject a right of public access to government information, namely *Houchins* and *United Reporting*,¹⁵⁴ Alito spurned what he called "petitioners' sweeping claim that [out of state residents have a] right to access public information on equal terms with citizens of the Commonwealth."¹⁵⁵ In coming to this conclusion, Alito asserted that "[n]o such right was recognized at common law" in England and that "[n]ineteenth-century American cases, while less uniform, certainly do not support the proposition that a broad-based right to access public information was widely recognized in the early Republic."¹⁵⁶

Alito's assertion that early American cases do not support a broad-based right to government information is patently incorrect.¹⁵⁷ The courts have long recognized a broad-based common law right of access to government information.¹⁵⁸ As a

¹⁵² See 569 U.S. 221 (2013).

¹⁵³ *Id.*

¹⁵⁴ Alito did not cite any of the Supreme Court's judicial access cases, but instead cited only *Houchins*, *United Reporting*, and Justice Breyer's dissent in *Sorrell*. See *id.* at 232. In *Sorrell*, Breyer stated that "until today, this Court has never found that the *First Amendment* prohibits the government from restricting the use of information gathered pursuant to a regulatory mandate," 564 U.S. at 588. Even a cursory reading of Breyer's statement makes clear that he is referring to restrictions on the "use" of government information, not restrictions on access to government information.

¹⁵⁵ *McBurney*, 569 U.S. at 232.

¹⁵⁶ *Id.* at 233.

¹⁵⁷ See *United States v. Criden*, 648 F.2d 814, 819 (3d Cir. 1981) ("The [common law] right to inspect and copy [judicial records], sometimes termed the right to access, antedates the Constitution."); see also Joe Regalia, *The Common Law Right to Information*, 18 RICH. J.L. & PUB. INT. 89, 96 (2015) ("[B]oth state and federal courts have long recognized the public's right 'to inspect public records and documents.' This right extends to every branch of government." (footnote omitted) (quoting *Ctr. for Nat'l Sec. Stud. v. U.S. Dep't of Just.*, 331 F.3d 918, 936 (D.C. Cir. 2003)).

¹⁵⁸ See, e.g., *Sloan Filter Co. v. El Paso Reduction Co.*, 117 F. 504, 506 (C.C.D. Colo. 1902) (finding a common law right of access to government records); *State ex rel. Colescott v. King*, 57 N.E. 535, 538 (Ind. 1900) (recognizing common law right of access to inspect the records of county auditor); *Nowack v. Fuller*, 219 N.W. 749, 752 (Mich. 1928) (holding that Michigan citizens have a common law right of access to the Michigan Auditor General's official records); *People ex rel. Gibson v. Peller*, 181 N.E.2d 376, 378 (Ill. App. Ct. 1962) (applying common law

federal judge noted in 1902, “the matter of inspecting and taking copies of public records is as old in the law as the records are old.”¹⁵⁹ In fact, demonstrating that a broad-based right to inspect government records was deeply ingrained in U.S. law by the end of the nineteenth century, Justice Morse of the Michigan Supreme Court wrote in 1889: “I do not think that any common law ever obtained in this free government that would deny to the people thereof the right of free access to, and public inspection of, public records.”¹⁶⁰

Moreover, the Supreme Court itself applied a common law right of access to government information in *Nixon v. Warner Communications*¹⁶¹—thirty-four years before Alito claimed in *McBurney* that no such broad-based right existed. In *Nixon*, the Court considered a request by several broadcast stations for access to the White House tapes that were introduced as evidence in the prosecution of the Watergate break-in.¹⁶² Although the Court ultimately denied the request, finding that the press had adequate access to the recordings in the courtroom, it extensively examined the historical underpinnings of the common law right to government information and

right of access to board of education’s financial records). A number of courts have even found a constitutional right of access to government records under their state constitutions. *See, e.g.*, *City of San Jose v. Superior Ct.*, 389 P.3d 848, 852 (Cal. 2017); *Billings Gazette v. City of Billings*, 313 P.3d 129, 133 (Mont. 2013); *Oberman v. Byrne*, 445 N.E.2d 374, 379 (Ill. App. Ct. 1983); *Hatfield v. Bush*, 572 So. 2d 588, 590 (La. Ct. App. 1990); *Media Gen. Convergence v. Chief Judge of the Thirteenth Jud. Cir.*, 840 So. 2d 1008, 1013 (Fla. 2003); *Forum Publ’g Co. v. City of Fargo*, 391 N.W.2d 169, 171 (N.D. 1986).

¹⁵⁹ *Sloan*, 117 F. at 506.

¹⁶⁰ *Burton v. Tuite*, 44 N.W. 282, 285 (Mich. 1889); *see also* *Commonwealth ex rel. Biddle v. Walton*, 6 Pa. D. 287, 287–88 (Pa. Ct. C.P. 1897) (stating that the right to access municipal documents was already “regarded as settled law in this country” and citing cases upholding similar common law rights in New York, New Jersey and Missouri). Not surprisingly, these early cases applying a common law right of access were driven by the need to ensure proper oversight over the government. *See, e.g.*, *Colescott*, 57 N.E. at 537 (concluding that a right of access was essential for an individual “to ascertain if the affairs of his county have been honestly and faithfully administered by the public officials charged with that duty”).

¹⁶¹ 435 U.S. 589 (1978).

¹⁶² *Id.* at 591. The Watergate break-in was part of a political scandal in the United States that occurred during the presidency of Richard Nixon; it began in 1972 when five men were caught breaking into the Democratic National Committee headquarters at the Watergate complex in Washington D.C. *See Watergate Scandal*, *supra* note 65. Over time, it was revealed that Nixon and members of his administration had engaged in illegal activities, including wiretapping and attempting to cover up the burglary, leading to Nixon’s resignation in 1974 and the indictment of several of his top advisors. *Id.* The scandal ultimately had far-reaching implications for American politics, leading to increased scrutiny of government actions and an erosion of public trust in political institutions. *Id.*

concluded: “[i]t is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.”¹⁶³ The Court in *Nixon* also observed that “[i]n contrast to the English practice, American decisions generally do not condition enforcement of this right on a proprietary interest in the document or upon a need for it as evidence in a lawsuit,”¹⁶⁴ and noted that the reason these cases had found a right of access was because of the public’s interest in “keep[ing] a watchful eye on the workings of public agencies.”¹⁶⁵

In addition to misrepresenting the history of public access to government information, Alito also asserted that public access to government information is “not basic to the maintenance or well-being of the Union.”¹⁶⁶ To support this highly contestable proposition, he cited only *Baldwin v. Fish and Game Commission of Montana*, which held that there is no constitutional right to hunt elk.¹⁶⁷ “FOIA laws are of relatively recent vintage,” Alito went on to note, and “[t]here is no contention that the Nation’s unity foundered in their absence, or that it is suffering now because of the citizens-only FOIA provisions that several States have enacted.”¹⁶⁸ Alito’s claim that the nation has not

¹⁶³ *Nixon*, 435 U.S. at 597 (footnote omitted). With regard to a general right of access to government records, the *Nixon* Court cited *McCoy v. Providence Journal Co.*, 190 F.2d 760, 765–766 (1st Cir. 1951); *Fayette County v. Martin*, 130 S.W.2d 838, 843 (Ky. 1939); *Nowack*, 219 N.W. at 750; *In re Egan*, 98 N.E. 467, 469 (N.Y. 1912); *State ex rel. Nevada Title Guaranty & Trust Co. v. Grimes*, 84 P. 1061, 1072–74 (Nev. 1906); *Brewer v. Watson*, 71 Ala. 299, 303–306 (1882); and *Gibson*, 181 N.E.2d at 378.

¹⁶⁴ *Nixon*, 435 U.S. at 597 (citation omitted).

¹⁶⁵ *Id.* at 597–98. The cases the Court cited in *Nixon* explicitly invoked the public’s interest in monitoring the government:

The interest necessary to support the issuance of a writ compelling access has been found, for example, in the citizen’s desire to keep a watchful eye on the workings of public agencies, *see, e. g.* *State ex rel. Colscott v. King* 57 N.E. 535, 536–538 (Ind. 1900); *State ex rel. Ferry v. Williams*, 41 N.J.L. 332, 336–339 (1879), and in a newspaper publisher’s intention to publish information concerning the operation of government, *see, e. g.* *State ex rel. Youmans v. Owens* 137 N.W.2d 470, 472 (Wis. 1965), modified on other grounds, 139 N.W.2d 241 (Wis. 1966). *But see* *Burton v. Reynolds*, 68 N.W. 217 (Mich. 1896).

Nixon, 435 U.S. at 597–98 (citations modified).

¹⁶⁶ *McBurney v. Young*, 569 U.S. 221, 234 (2013) (quoting *Baldwin v. Fish & Game Comm’n*, 436 U.S. 371, 388 (1978)).

¹⁶⁷ *Id.*; *Baldwin*, 436 U.S. at 388 (“Whatever rights or activities may be ‘fundamental’ under the Privileges and Immunities Clause, we are persuaded, and hold, that elk hunting by nonresidents in Montana is not one of them.”).

¹⁶⁸ *McBurney*, 569 U.S. at 234. As this language shows, *McBurney*, just like *Houchins*, *Pell*, and *Saxby*, did not involve a complete denial of public access to

suffered from a lack of access to government information is belied by history—and common sense.¹⁶⁹ And his suggestion that a right of access to information from the government is on par with asserting a right to hunt elk is laughable. Alito never mentions, let alone addresses, the Supreme Court’s own precedents that extol the First Amendment’s vital role in protecting the free discussion of governmental affairs,¹⁷⁰ the extensive work of scholars who have argued since at least the 1950s that public access to government information is a necessary predicate for self-government,¹⁷¹ or the overwhelming body of evidence that the founding generation viewed an informed public as integral to the structure of the American constitutional

government information because citizens of the Commonwealth of Virginia were entitled to request access to the information.

¹⁶⁹ There are, of course, many examples demonstrating this point, but the fallout from the Watergate break-in is illustrative. Frederick Schwarz, Jr., who served as chief counsel to the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, which was formed in 1975 to investigate the use of national intelligence agencies to carry out legally questionable domestic security operations, describes the committee’s findings:

What did we learn and disclose? Six Presidents, Democrats and Republicans, from Franklin Roosevelt through Richard Nixon, had abused the powers of their secret intelligence agencies and had hid behind secrecy in doing so.

As for the agencies themselves, just a few examples. Millions of law-abiding Americans were spied upon. The Federal Bureau of Investigation attempted to drive Martin Luther King to suicide, infiltrated many law-abiding organizations including the NAACP and those associated with the Women’s Liberation Movement, sought to break up marriages of civil rights workers, and incited beatings and even killings. The Central Intelligence Agency hired the Mafia to attempt to assassinate Fidel Castro, overthrew democratically elected governments, experimented with dangerous drugs on unwitting Americans, and violated its charter by spying on dissident Americans at home.

Frederick A. O. Schwarz, Jr., *Access to Government Information Is a Foundation of American Democracy—But the Courts Don’t Get It*, 65 OKLA. L. REV. 645, 645–46 (2013) (footnotes omitted).

¹⁷⁰ See, e.g., *Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596, 604 (1982) (“Underlying the First Amendment right of access to criminal trials is the common understanding that ‘a major purpose of that Amendment was to protect the free discussion of governmental affairs.’” (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966))); *U.S. Dep’t of Justice v. Reps. Comm. for Freedom of the Press*, 489 U.S. 749, 772–73 (1989) (“[A] democracy cannot function unless the people are permitted to know *what their government is up to.*”) (citation omitted); *Nat’l Archives and Recs. Admin. v. Favish*, 541 U.S. 157, 171–72 (2004) (noting that public access to government information “defines a structural necessity in a real democracy”).

¹⁷¹ See *supra* notes 69–71 and accompanying text.

system.¹⁷² Significantly, no such history of judicial, scholarly, or philosophical support exists for a right to hunt elk.

III

RECONCILING THE INCONSISTENCIES IN THE SUPREME COURT'S RIGHT TO KNOW CASES

For its part, the Supreme Court has never explained how to reconcile the apparent conflict between the plurality opinion in *Houchins v. KQED* and the Court's *Richmond Newspapers* line of cases. We should be skeptical, however, of the claim that *Houchins* set down a categorical rule that the First Amendment can never be implicated when the government refuses to provide access to information or sources of information within its control. First, *Houchins*, like the Court's other prison access cases, involved the issue of *special press access* rather than public access: the Court noted in each of these cases that government officials did not attempt to—or even argue that they were entitled to—cut off public access entirely.¹⁷³ Moreover, all three cases involved access to prisons, which raise particularly thorny challenges regarding appropriate media access, so it is perhaps not a surprise that the Court stated that “the media have no special right of access [to prisons] different from or greater than that accorded the public generally.”¹⁷⁴

Second, the Supreme Court's judicial access cases make clear that the First Amendment does limit the government's ability to restrict public access to information within its control. As Chief Justice Burger stated in *Richmond Newspapers v. Virginia*, “[t]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw.”¹⁷⁵ As the following sections will show, the constitutional values the Court relied upon in holding

¹⁷² See Ardia, *supra* note 27, at 6–18.

¹⁷³ See *supra* notes 106–111 and accompanying text.

¹⁷⁴ *Houchins v. KQED, Inc.*, 438 U.S. 1, 16–17 (1978); see also *Pell v. Procunier*, 417 U.S. 817, 834 (1974) (stating that the Constitution did not “require [the] government to accord the press special access to information not shared by members of the public generally”); *Saxbe v. Wash. Post. Co.*, 417 U.S. 843, 850 (1974).

¹⁷⁵ 448 U.S. 555, 575–76 (1980) (quoting *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 783 (1978)); see also, e.g., *Globe Newspaper*, 457 U.S. at 604–05 (“[T]o the extent that the First Amendment embraces a right of access to criminal trials, it is to ensure that this constitutionally protected “discussion of governmental affairs” is an informed one.”).

that the public has a right of access to the judicial branch apply to a broad range of governmental activities.

A. There Is No Rule Foreclosing a Right of Access to Government Information

When we look carefully at the Supreme Court's prison access cases, it is clear that the Court never intended to set down a categorical rule rejecting a First Amendment right of access to government information. Even as the ink was still drying on his plurality opinion in *Houchins*, Chief Justice Burger was already lining up his fellow justices to sign onto his *Richmond Newspapers* opinion granting a First Amendment right of public access to criminal trials. As some scholars at the time commented, it is "difficult to reconcile" Burger's putative rejection of a constitutional right of access in *Houchins* with his subsequent recognition of a right of access in *Richmond Newspapers*,¹⁷⁶ which came down a mere two years after *Houchins*. As Lillian BeVier remarked shortly after the Court's decision in *Richmond Newspapers*, "[t]here is much in the *Houchins* opinion that is discordant with Chief Justice Burger's opinion in *Richmond Newspapers*" and it, as well as the Court's other prison access cases, "fairly cry out for reconciliation."¹⁷⁷ Unfortunately, Burger did not even cite *Houchins* in his *Richmond Newspapers* opinion, let alone explain how to reconcile the two cases, suggesting that he did not see *Houchins* as rejecting a First Amendment right of public access to government information.¹⁷⁸

If *Houchins* did lay down a categorical rule rejecting any constitutional right of access to government information, then

¹⁷⁶ Lillian R. BeVier, *Like Mackerel in the Moonlight: Some Reflections on Richmond Newspapers*, 10 HOFSTRA L. REV. 311, 323 (1982) (remarking that the "governing premises [in *Houchins*] are particularly difficult to reconcile with the *Richmond Newspapers* result"); see also Mary M. Cheh, *Judicial Supervision of Executive Secrecy: Rethinking Freedom of Expression for Government Employees and the Public Right of Access to Government Information*, 69 CORN. L. REV. 690, 727 (1984) (stating that Justice Burger's reasoning for the different holdings in *Houchins* and *Richmond Newspapers* is "unpersuasive" because he failed to provide a principle that would limit a right of access to criminal trials).

¹⁷⁷ BeVier, *supra* note 176, at 322–23.

¹⁷⁸ Justice Stewart, who authored the majority opinions in *Pell* and *Saxbe* and concurred with the plurality in *Houchins*, also viewed *Houchins* as not foreclosing a constitutional right of access. In his concurring opinion in *Richmond Newspapers*, he wrote that whatever the ultimate answer is to the question of a First Amendment right of access to other judicial proceedings, "the First and Fourteenth Amendments clearly give the press and the public a right of access to trials themselves, civil as well as criminal." 448 U.S. at 599 (Stewart, J., concurring).

Burger's opinion in *Richmond Newspapers* (as well as *Globe Newspaper*, which Burger joined, and the two *Press-Enterprise* decisions, which Burger authored) would be directly in conflict with such a rule. In *Houchins*, Burger suggested that it was problematic that "there is no discernible basis for a constitutional duty to disclose,"¹⁷⁹ yet in *Richmond Newspapers* he expressly dismissed the absence of textual guidance for a right of access to the courts, remarking: "[w]e 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.'"¹⁸⁰

Even apart from Burger sidelining his *Houchins* opinion and his willingness in *Richmond Newspapers* to disavow the rationale he relied on in *Houchins* for rejecting a special media right of access to the prison, it is questionable whether the three-justice plurality opinion in *Houchins* should be relied upon as a sufficient basis for a categorical rule rejecting a First Amendment right of access to government information.¹⁸¹ Matthew Schafer points out that "as a prudential matter, a three-Justice plurality should not have purported to announce a new constitutional rule—let alone an absolute one—without a full complement of Justices."¹⁸² This is especially so when such a rule runs counter to the Court's repeated, and nearly contemporaneous, statements in *Richmond Newspapers*, *Globe Newspaper*, and the *Press-Enterprise* cases that the First Amendment mandates a public right of access to criminal trials and pretrial proceedings.¹⁸³

¹⁷⁹ 438 U.S. at 14.

¹⁸⁰ 448 U.S. at 580 (quoting *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972)); see also *id.* at 579 ("Notwithstanding the appropriate caution against reading into the Constitution rights not explicitly defined, the Court has acknowledged that certain unarticulated rights are implicit in enumerated guarantees."). Another indication of Burger's schizophrenic treatment of the issue of public access is his use in both cases of *Branzburg v. Hayes*. In *Houchins*, Burger wrote that *Branzburg's* "observation, in dictum, that 'news gathering is not without its First Amendment protections' . . . in no sense implied a constitutional right of access to news sources," 438 U.S. at 10 (quoting *Branzburg*, 408 U.S. at 707), but in *Richmond Newspapers*, he cited this very same language with approval, 448 U.S. at 580.

¹⁸¹ See Michael J. Hayes, Note, *What Ever Happened to "The Right to Know"?: Access to Government-Controlled Information Since Richmond Newspapers*, 73 VA. L. REV. 1111, 1138 (1987) (observing that "the *Houchins* approach has never been adopted by a majority of the Court").

¹⁸² Schafer, *supra* note 102, at 1334.

¹⁸³ See *supra* subpart II.B.

Moreover, several justices who participated in *Houchins* stated afterward that the question of a First Amendment right of access remained open after *Houchins*. For example, in *Gannett Co. v. DePasquale*, which came down a year after *Houchins* and before *Richmond Newspapers*, Justice Stewart wrote for the Court that he was reserving the question of whether the First Amendment provided the public a right of access to an evidentiary hearing in a murder case, explaining that even if a right of access existed, it was “given all appropriate deference” by the trial court.¹⁸⁴ Justice Powell, who concurred in the Court’s decision in *Gannett*, wrote that he was taking the opportunity in his concurrence to address the First Amendment question the Court had reserved, stating that “[b]ecause of the importance of the public’s having accurate information concerning the operation of its criminal justice system, I would hold explicitly that petitioner’s reporter had an interest protected by the First and Fourteenth Amendments in being present at the pretrial suppression hearing.”¹⁸⁵

Justice Stevens also made clear that he disagreed with the suggestion that *Houchins* had established a categorical rule rejecting a constitutional right of access to government information.¹⁸⁶ In a law review article that came out the same year as *Gannett*, Stevens questioned whether such a rule could be justified:

Is there indeed an unequivocal general rule that will require rejection of every attempt to find constitutional protection for a right of access to information? Or is this the kind of general rule that . . . may not mean exactly what it seems to imply in every conceivable situation? Are there situations in which a rule denying access to information about how the Government is serving its master is so plainly unsupported by any legitimate interests that it may be fairly characterized as an abridgment of free speech?¹⁸⁷

¹⁸⁴ 443 U.S. 368, 391–92 (1979) (observing that “[s]ome Members of the Court . . . took the position in [*Pell*, *Saxbe*, and *Houchins*] that the First and Fourteenth Amendments do guarantee to the public in general, or the press in particular, a right of access” but concluding that it was unnecessary to decide whether the Constitution “may guarantee such access in some situations” because even assuming a right of access existed in the present case, it was “given all appropriate deference” by the trial court) (citing *Saxbe v. Wash. Post Co.*, 417 U.S. 843, 850 (1974) (Powell, J., dissenting), *Houchins*, 438 U.S. at 19 (Stevens, J., dissenting); *id.* at 16 (Stewart, J., concurring)).

¹⁸⁵ *Gannett*, 443 U.S. at 397 (Powell, J., concurring).

¹⁸⁶ John Paul Stevens, *Some Thoughts About a General Rule*, 21 ARIZ. L. REV. 599, 601–02 (1979).

¹⁸⁷ *Id.* at 604–05.

More than thirty years after *Houchins*, the Court again stated that the question of whether the First Amendment provides a public right of access to government information had not yet been decided when it declared in *Sorrell v. IMS Health* that its 1999 decision in *Los Angeles Police Department v. United Reporting Publishing* was merely a case about the availability of facial challenges and thus “[t]he Court did not rule on the merits of any First Amendment claim [in *United Reporting*].”¹⁸⁸

All of which is to say that the Supreme Court has never directly addressed the inconsistency in its right to know cases. The Court’s judicial access cases, which were the logical place to do this, completely ignored *Houchins*. The Court’s later decisions in *United Reporting* and *McBurney* are equally unhelpful because they failed to explain why *Houchins* applies outside the prison context (and to *public* access generally) and did not examine in any depth the constitutional interests at stake when the public is denied access to government information. When we step back, however, and consider *Houchins* in light of the Supreme Court’s judicial access cases,¹⁸⁹ the justices’ contemporaneous comments about the limited holding in *Houchins*,¹⁹⁰ and the Court’s repeated statements about the importance of an informed public,¹⁹¹ it becomes evident that *Houchins* did not set down a rule rejecting a First Amendment right of public access to government information. The Court’s subsequent judicial access cases did not carve out a limited exception to a general rule that the First Amendment imposes no limits on government secrecy. Nowhere in *Richmond Newspapers* nor any other case has the Court stated that only the judicial branch is subject to public oversight while the rest of the government can operate in secret without any constitutional constraints.

¹⁸⁸ 564 U.S. 552, 568 (2011) (citing *L.A. Police Dep’t v. United Reporting Publ’g Corp.*, 528 U.S. 32 (1999)) (rejecting a facial challenge by a commercial data broker arguing that the First Amendment provided a right of access to arrestee information). The *United Reporting* case is discussed *supra* in subpart II.C.

¹⁸⁹ See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (holding that the First Amendment provides a right of public access to criminal trials); *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596 (1982) (same); *Press-Enterprise I*, 464 U.S. 501 (1984) (finding right of access to jury voir dire); *Press-Enterprise II*, 478 U.S. 1 (1986) (holding that First Amendment provides a right of access to preliminary hearings).

¹⁹⁰ See *supra* notes 114–119 and accompanying text.

¹⁹¹ See *supra* notes 42–44 and accompanying text.

B. A Right of Access to Government Information Is Implicit in the First Amendment

The fact that the First Amendment does not expressly provide a right to know about the government does not foreclose recognition of such a right. When the Supreme Court held that the First Amendment mandates a public right to attend criminal trials, it emphasized that the absence of an explicit textual guarantee of access did not prevent the Constitution from protecting such a right. In *Richmond Newspapers v. Virginia*, Chief Justice Burger explained that “[n]otwithstanding the appropriate caution against reading into the Constitution rights not explicitly defined, the Court has acknowledged that certain unarticulated rights are implicit in enumerated guarantees.”¹⁹² Recognizing public access to criminal trials as one of these implicit rights, he warned that “without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and ‘of the press could be eviscerated.’”¹⁹³

Indeed, as Justice Brennan noted in *Globe Newspaper Co. v. Superior Court*, the Supreme Court has “long eschewed any ‘narrow, literal conception’ of the [First] Amendment’s terms, for the Framers were concerned with broad principles, and wrote against a background of shared values and practices.”¹⁹⁴ Brennan went on to emphasize that “[u]nderlying the First Amendment right of access to criminal trials is the common understanding that ‘a major purpose of that Amendment was to protect the free discussion of governmental affairs,’” and that “[b]y offering such protection, the First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government.”¹⁹⁵ Firmly linking the First Amendment’s purpose to its “structural role” of fostering self-government, Brennan wrote: “Implicit in this structural role is . . . the antecedent assumption that

¹⁹² 448 U.S. at 579–80 (plurality opinion).

¹⁹³ *Id.* (plurality opinion) (quoting *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972)). Two years later, the full Court signed onto this view, see *Globe Newspaper*, 457 U.S. 596 (1982), and today it is accepted dogma that the First Amendment mandates a right of access to the courts. See *infra* notes 240–244 and accompanying text.

¹⁹⁴ *Globe Newspaper*, 457 U.S. at 604 (quoting *NAACP v. Button*, 371 U.S. 415, 430 (1963)).

¹⁹⁵ *Globe Newspaper*, 457 U.S. at 604 (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)).

valuable public debate—as well as other civic behavior—must be informed.”¹⁹⁶

The Supreme Court’s instruction that the First Amendment is broad enough to encompass those rights that are “necessary to the enjoyment of other First Amendment rights,”¹⁹⁷ has been borne out in the growing number of federal courts of appeals that have held that individuals have a right to record police officers engaged in their official duties because such a right is a necessary prerequisite to ensure the right to speak about police conduct.¹⁹⁸ For instance, in *Glik v. Cunniffe*, the First Circuit held that the First Amendment provides a right to record police making an arrest, noting that “[g]athering information about government officials in a form that can readily be disseminated to others serves a cardinal First Amendment interest in protecting and promoting ‘the free discussion of governmental affairs.’”¹⁹⁹ The First Circuit explained that “[i]t is firmly established that the First Amendment’s aegis extends further than the text’s proscription on laws ‘abridging the freedom of speech, or of the press,’ and encompasses a range of conduct related to the gathering and dissemination of information.”²⁰⁰ Protecting the right to record police officials is especially important, the First Circuit reasoned, because the government has an “incentive to repress opposition and often

¹⁹⁶ *Richmond Newspapers*, 448 U.S. at 587–88 (Brennan, J., concurring); see also William J. Brennan, Jr., Assoc. Just. of the Sup. Ct. of the U.S., 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.”).

¹⁹⁷ *Globe Newspaper*, 457 U.S. at 604.

¹⁹⁸ See, e.g., *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 600 (7th Cir. 2012) (finding eavesdropping statute “burdens speech and press rights” because it “interferes with the gathering and dissemination of information about government officials performing their duties in public”); *Gericke v. Begin*, 753 F.3d 1, 7 (1st Cir. 2014) (concluding that it is “firmly established that the First Amendment protects ‘a range of conduct’ surrounding the gathering and dissemination of information” and that “the Constitution protects the right of individuals to videotape police officers performing their duties in public” (quoting *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011))); *Fields v. City of Philadelphia*, 862 F.3d 353, 359 (3d Cir. 2017) (“[R]ecording police activity in public falls squarely within the First Amendment right of access to information.”); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (recognizing a First Amendment “right to gather information about what public officials do on public property” and “to record matters of public interest”); *Irizarry v. Yehia*, 38 F.4th 1282, 1292 (10th Cir. 2022) (“Based on First Amendment principles and relevant precedents, we conclude there is a First Amendment right to film the police performing their duties in public.”).

¹⁹⁹ 655 F.3d at 82 (quoting *Mills*, 384 U.S. at 218).

²⁰⁰ *Id.*

wields a more effective power of suppression” when the public seeks to challenge the actions of police.²⁰¹

Courts have applied similar reasoning in recognizing implicit rights in other constitutional contexts.²⁰² In their treatise *Reading Law: The Interpretation of Legal Texts*, Antonin Scalia and Bryan Garner write that when “a text authorizes a certain act, it implicitly authorizes whatever is a necessary predicate of that act.”²⁰³ This “ancient” principle, they explain, is known as the “predicate-act canon.”²⁰⁴ The basic idea is that when a power is given by a statute or other legal text, any other action that is necessary to exercise that power is also given by implication.²⁰⁵ As Justice Thomas noted in *Luis v. United States*: “This logic equally applies to individual rights. After all, many rights are powers reserved to the People rather than delegated to the Government.”²⁰⁶

We have seen the application of this principle most recently in the Second Amendment context where, for example, the Fifth Circuit held in *Reese v. Bureau of Alcohol, Tobacco, Firearms, and Explosives* that “the right to ‘keep and bear arms’ surely implies the right to purchase them.”²⁰⁷ In his concurring opinion

²⁰¹ *Id.* (quoting *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 777 n.11 (1978)).

²⁰² *See, e.g.*, *Obergefell v. Hodges*, 576 U.S. 644, 667 (2015) (stating that a “basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education”); *Luis v. United States*, 578 U.S. 5, 27 (2016) (Thomas, J., concurring) (“Without constitutional protection for at least *some* of a defendant’s assets, the Government could nullify the right to counsel of choice.”); *Teixeira v. Cnty. of Alameda*, 873 F.3d 670, 677 (9th Cir. 2017) (“[T]he core Second Amendment right to keep and bear arms for self-defense ‘wouldn’t mean much’ without the ability to acquire arms.” (quoting *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011))); *Jordan v. Deery*, 778 N.E.2d 1264, 1271–72 (Ind. 2002) (holding that right to trial by jury includes the ancillary right to be present in the courtroom during both the liability and damage phases of the trial because “without the right to be present, the right to trial by jury becomes meaningless”).

²⁰³ ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 96 (2012).

²⁰⁴ *Id.* at 192.

²⁰⁵ *Id.* at 192–93.

²⁰⁶ 578 U.S. 5, 26 (2016) (holding statute that authorized the seizure of assets that are needed to retain counsel violated Sixth Amendment) (Thomas, J., concurring).

²⁰⁷ *Reese v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 127 F.4th 583, 590 (5th Cir. 2025); *see also* *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011) (concluding that the core right to possess firearms “wouldn’t mean much without the training and practice that make it effective”).

in *Luis*, Justice Thomas explained why it is necessary for the courts to recognize these predicate rights:

Constitutional rights . . . implicitly protect those closely related acts necessary to their exercise. . . . The right to keep and bear arms, for example, “implies a corresponding right to obtain the bullets necessary to use them,” and “to acquire and maintain proficiency in their use.” Without protection for these closely related rights, the Second Amendment would be toothless.²⁰⁸

Not unlike the importance of bullets to the exercise of the right to bear arms, access to information about the government is essential to the exercise of the right to speak about government affairs. Indeed, access to government information is indispensable for the public to understand the contours and operation of their government.²⁰⁹ Finding the First Amendment context analogous to the issue before the court in *Luis*, Thomas quoted Justice Scalia’s dissent in *Hill v. Colorado* for the proposition that “[t]here comes a point . . . at which the regulation of action intimately and unavoidably connected with [a right] is a regulation of [the right] itself.”²¹⁰ Thomas then goes on to warn that “the right to speak would be largely ineffective if it did not include the right to engage in [the predicate acts] that are the incidents of its exercise.”²¹¹

The Supreme Court has often gone beyond the express language of the First Amendment to identify closely related rights that the Court has said are “necessary to the enjoyment of other First Amendment rights.”²¹² This includes, the Court explained

²⁰⁸ *Luis v. United States*, 578 U.S. 5, 26–27 (2016) (Thomas, J., concurring) (citations omitted).

²⁰⁹ See, e.g., *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 492 (1975) (“[O]fficial records and documents open to the public are the basic data of governmental operations.”); *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 502 (1st Cir. 1989) (“The basis for this right is that without access to documents the public often would not have a ‘full understanding’ of the proceeding and therefore would not always be in a position to serve as an effective check on the system.” (citing *In re Globe Newspaper Co.*, 729 F.2d 47, 52 (1st Cir. 1984))).

²¹⁰ *Supra* note 208 (quoting *Hill v. Colorado*, 530 U.S. 703, 745 (2000) (Scalia, J., dissenting)) (alterations in original).

²¹¹ *Id.* at 26 (Thomas, J., concurring) (citations omitted).

²¹² *Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596, 604 (1982); see also *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958) (noting that although the First Amendment does not expressly provide a right of association, “[i]t is beyond debate that freedom to engage in association for the advancement of beliefs and ideas” is constitutionally protected); *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943) (“The right of freedom of speech and press has broad scope. . . . This freedom embraces the right to distribute literature . . . and necessarily

in *Richmond Newspapers v. Virginia*, “prohibit[ing] government from limiting the stock of information from which members of the public may draw.”²¹³

C. The Rationale for Recognizing a Right of Access to Government Information Applies Beyond the Courts

The conclusion that a right of access to government information is a necessary predicate to preserve the right to speak about government affairs follows both from common sense and the Supreme Court’s longstanding reliance on the First Amendment as a safeguard for self-government.²¹⁴ The Court has repeatedly emphasized that the First Amendment’s primary purpose is to support informed political discussion.²¹⁵ In *De Jonge v. Oregon*, for example, the Court warned about the

need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the

protects the right to receive it.”); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (“It is . . . well established that the Constitution protects the right to receive information and ideas.”); *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 867 (1982) (“[T]he right to receive ideas is a necessary predicate to the recipient’s meaningful exercise of his own rights of speech, press, and political freedom.”).

²¹³ 448 U.S. 555, 575–76 (1980) (quoting *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 783 (1978)).

²¹⁴ See *supra* Part I.

²¹⁵ See, e.g., *Stromberg v. California*, 283 U.S. 359, 369 (1931) (“The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people . . . is a fundamental principle of our constitutional system.”); *De Jonge v. Oregon*, 299 U.S. 353, 365 (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, 102, 104 (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.”); *Buckley v. Valeo*, 424 U.S. 1, 14–15 (1976) (per curiam) (“In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential”); *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.”); *Milkovich v. Lorain J. Co.*, 497 U.S. 1, 36 (1990) (“In a society which takes seriously the principle that government rests upon the consent of the governed, freedom of the press must be the most cherished tenet.” (quoting *Edwards v. Nat’l Audubon Soc., Inc.*, 556 F.2d 113, 115 (2d Cir. 1977))); *Knox v. Serv. Emps. Int’l Union, Local 1000*, 567 U.S. 298, 308 (2012) (“Our cases have often noted the close connection between

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.²¹⁶

Since *De Jonge*, the Court has continued to emphasize the importance of informed speech to self-government, noting that “the 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.”²¹⁷ As Justice Black observed in *Barr v. Matteo*, “[t]he effective functioning of a free government like ours depends largely on the force of an informed public opinion.”²¹⁸

The Supreme Court drew from this deep body of precedent when it held that the First Amendment implicitly guarantees a right of public access to criminal trials and pretrial proceedings. In doing so, the Court did not justify its holding solely on the benefits that public access provides to criminal trials or even to the administration of justice generally. Justice Stevens highlighted this point in his concurrence in *Press-Enterprise I*, writing that “it [is] appropriate to emphasize the fact that the underpinning of our holding today is not simply the interest in effective judicial administration; the First Amendment’s concerns are much broader.”²¹⁹ Stevens went on to explain that

[t]he ‘common core purpose of assuring freedom of communication on matters relating to the functioning of government’ that underlies the decision of cases of this kind provides protection to all members of the public ‘from abridgment of their rights of access to information about the operation of their government, including the Judicial Branch.’²²⁰

As I have written previously, “a just and effective court system is undoubtedly an important public good, [but] it is not a core First Amendment value.”²²¹

our Nation’s commitment to self-government and the rights protected by the First Amendment.”); *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207 (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.”).

²¹⁶ 299 U.S. at 365.

²¹⁷ *Walker*, 576 U.S. 200, 207 (2015); see also cases cited *supra* note 43.

²¹⁸ 360 U.S. 564, 577 (1959) (Black, J., concurring).

²¹⁹ 464 U.S. 501, 517 (1984).

²²⁰ *Id.* (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575, 584 (1980) (plurality opinion)).

²²¹ See *Ardia*, *supra* note 133, at 894.

Public access takes on First Amendment significance because it advances the First Amendment's structural purpose. To wit, public access is of constitutional significance because it makes self-government possible. By putting the structural goals of the First Amendment in the foreground, we can arrive at a much clearer understanding of the justifications for—and potential limits of—a First Amendment right of access.²²²

While public access to judicial proceedings provides important benefits to the courts themselves,²²³ it also supports “higher-order constitutional values,”²²⁴ including most critically the value of democratic legitimacy.²²⁵ Governments do not *ipse dixit* attain legitimacy merely by providing protections for speech and mechanisms for voting.²²⁶ Although the requirements for democratic legitimacy warrant a treatise in their own

²²² *Id.*

²²³ Among other benefits, public access to the courts helps to keep witnesses, judges, and trial participants honest, generates additional witnesses and evidence, and dissuades the government from engaging in unjust prosecution. See Ardia, *supra* note 133, at 895–96.

²²⁴ *Id.* at 894. These values include informing the public about the exercise of governmental power, educating individuals about the implementation and impact of the law, and fostering discussion about matters of public concern. See *id.* at 897.

²²⁵ See ROBERT C. POST, *DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE* 19 (2012) (“The public sphere can sustain democratic legitimation only insofar as it is beyond the grasp of comprehensive state managerial control”); HABERMAS, *supra* note 52, at 304 (“Deliberative politics acquires its legitimating force from the discursive structure of opinion-and will-formation that can fulfill its socially integrative function only because citizens expect its results to have a reasonable *quality*.”); Joseph E. Stiglitz, *On Liberty, the Right to Know, and Public Discourse: The Role of Transparency in Public Life*, in *GLOBALIZING RIGHTS: THE OXFORD AMNESTY LECTURES 1999*, at 115, 116 (Matthew J. Gibney ed., 2003) (“[S]ecrecy is corrosive: it is antithetical to democratic values, and it undermines democratic processes. It is based on a mistrust between those governing and those governed; at the same time, it exacerbates that mistrust.”).

²²⁶ See 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. But democracies do not solve all of the problems of legitimacy merely by being democracies. Political legitimacy requires *both* a well-functioning democracy *and* respect for the freedom and equality of the citizens who live under a democratic government.”); Mark D. Rosen, *The Structural Constitutional Principle of Republican Legitimacy*, 54 WM. & MARY L. REV. 371, 376 (2012) (“Representative democracy does not spontaneously occur by citizens gathering to choose laws. Instead, 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.”).

right,²²⁷ at a minimum the government cannot be permitted to decide for itself the scope of public oversight.²²⁸ The very notion of consent of the governed is a sham if government can dictate what the people know before they give their consent.²²⁹ As Hannah Arendt aptly put it, “[f]reedom of opinion is a farce unless factual information is guaranteed.”²³⁰

Not surprisingly, the conviction that an informed public is necessary for democratic legitimacy sits at the core of nearly all theories of self-government.²³¹ In *Buckley v. Valeo*, for example, the Court explained that “[i]n a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential.”²³² As I have argued elsewhere, “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.”²³³ Access to government information is

²²⁷ Robert Post, perhaps more than anyone, has engaged deeply with this issue. See, e.g., POST, *supra* note 225, at 15-25. According to Post, democratic legitimacy exists only when “citizens hav[e] the warranted belief that their government is responsive to their wishes,” see Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 7 (2000), “experience their state as an example of authentic self-determination,” see Post, *supra* note 38, at 2368, and “identify [the] government as their own,” see *id.* at 2367.

²²⁸ See, e.g., 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.”); Perry, *supra* note 75, at 1144 (“[B]oth the governmental accountability and the political participation propositions require that the principle of freedom of expression be understood to forbid government to interfere with either communication of or access to information or ideas useful in evaluating public policy or performance.”).

²²⁹ See Ardia, *supra* note 27, at 18 (“The principle that consent must be informed to be valid is . . . a fundamental tenet of democratic theory”); David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257, 286 (2010) (“By denying citizens the information they need to make rational and deliberate decisions about the institutions that govern them, secrecy undermines the basis for consent.”); Perry, *supra* note 75, at 1144 (“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.”).

²³⁰ HANNAH ARENDT, *BETWEEN PAST AND FUTURE* 238 (1968); see also Edward L. Bernays, *The Engineering of Consent*, 250 ANNALS AM. ACAD. POL. & SOC. SCI. 113, 114 (1947) (“The engineering of consent is the very essence of the democratic process, the freedom to persuade and suggest. The freedoms of speech, press, petition, and assembly, the freedoms which make the engineering of consent possible, are among the most cherished guarantees of the Constitution of the United States.”).

²³¹ See Ardia, *supra* note 13, at 300.

²³² 424 U.S. 1, 14-15 (1976) (per curiam).

²³³ See Ardia, *supra* note 27, at 12.

indispensable for citizens to understand their representatives' actions and to hold them accountable.²³⁴ By restricting public access to information held by the government—especially when that information relates to the activities of government itself—officials undermine their own legitimacy, rendering the promise of a government “of the people, by the people” a hollow shell.²³⁵

IV

A FIRST AMENDMENT RIGHT TO KNOW ABOUT THE GOVERNMENT

As the preceding discussion makes clear, the Supreme Court has not relied solely on the words of the First Amendment to determine its meaning. Instead, the Court often looks beyond the express language to identify constitutional values that it uses to resolve issues that the text does not directly address.²³⁶ As the Supreme Court explained in *Globe Newspaper Co. v. Superior Court*, the First Amendment is “broad enough to encompass those rights that, while not unambiguously enumerated in the very terms of the Amendment, are nonetheless necessary to the enjoyment of other First Amendment rights.”²³⁷ Chief among those rights, the Court wrote in *Globe Newspaper*, is the right to “effectively participate in and contribute to our republican system of self-government.”²³⁸

The Supreme Court's conclusion that the First Amendment implicitly provides a right of public access to criminal trials may have been a watershed event in 1980,²³⁹ but today judges and scholars no longer question that the First Amendment mandates a right of access to court proceedings. In the years following its decisions in *Richmond Newspapers* and

²³⁴ *Id.* at 16–21.

²³⁵ President Abraham Lincoln, Gettysburg Address (Nov. 19, 1863).

²³⁶ *See supra* notes 192–211.

²³⁷ 457 U.S. 596, 604 (1982).

²³⁸ *Id.*

²³⁹ *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). 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 (Stevens, J., concurring).

Globe Newspaper, the Court itself extended the right of access to jury voir dire proceedings²⁴⁰ and preliminary hearings.²⁴¹ Lower courts went even further, finding that the First Amendment provides a right of access to civil trials and civil pretrial proceedings,²⁴² as well as to records filed in criminal and civil cases.²⁴³ In doing so, these courts concluded that a broader right of access logically flows from the Supreme Court's decisions recognizing a First Amendment right of access to criminal trial proceedings.²⁴⁴

The following sections explain how the doctrinal framework the Supreme Court developed in its judicial access cases supports a general right to know about the government, including a right to know about the government's use of its police power. The test the Court articulated in its judicial access cases, rooted in the First Amendment's vital role supporting an informed citizenry, provides an obvious starting point for a broader First Amendment right to know about the government. In fact, many lower courts already apply this framework to public access disputes arising well beyond the judicial branch.²⁴⁵

A. The Court's Judicial Access Cases Provide a Framework for a First Amendment Right to Know About the Government

The Supreme Court's decisions in *Richmond Newspapers* and *Globe Newspaper* left unresolved the question of how far the First Amendment right of access to the courts extends. Both cases involved the closure of criminal trials. Yet the question of public access also arises in other types of judicial proceedings. Not surprisingly, the issue came back to the Court only a short time later, first in a case concerning the closure of criminal voir

²⁴⁰ *Press-Enterprise I*, 464 U.S. 505 (1984).

²⁴¹ *Press-Enterprise II*, 478 U.S. 1 (1986).

²⁴² See David S. Ardia, *Privacy and Court Records: Online Access and the Loss of Practical Obscurity*, 2017 U. ILL. L. REV. 1385, 1403 n.112 (2017) (citing cases).

²⁴³ See *id.* at 1405 n.122–124 (citing cases).

²⁴⁴ 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 judges have come to accept that a right of access to the judicial branch is of constitutional dimensions. 750 F.3d 776 (9th Cir. 2014). Public access to the courts, the Ninth Circuit wrote, "ensure[s] that the individual citizen can effectively participate in and contribute to our republican system of self-government" and access to civil proceedings and records "is an indispensable predicate to free expression about the workings of government." *Id.* at 785 (quoting *Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596, 604 (1982)).

²⁴⁵ See *infra* notes 261–286.

dire proceedings and then in a second case involving a preliminary hearing. In these cases, the Supreme Court developed what is now known as the “experience and logic” test for determining when the First Amendment grants the public a right of access.²⁴⁶

In the first of these cases, *Press-Enterprise I*,²⁴⁷ the trial judge closed nearly all of jury voir dire in a case involving the rape and murder of a teenage girl.²⁴⁸ In a unanimous decision, the Supreme Court held that the First Amendment right of access extends to jury voir dire proceedings and overturned the trial court’s closure order. The Court noted that public jury selection was the “common practice in America when the Constitution was adopted,” and emphasized that openness “enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.”²⁴⁹ Two years later, in the identically named *Press-Enterprise II*,²⁵⁰ the Supreme Court faced the question of whether the First Amendment right of access also applies to preliminary hearings.²⁵¹ In *Press-Enterprise II*, a magistrate judge excluded the public, pursuant to a California statute, from a forty-one day preliminary hearing in a high-profile murder prosecution.²⁵² At the conclusion of the hearing, the judge refused to release the transcript of the proceedings and sealed the record.²⁵³

Pulling the strands together from *Richmond Newspapers*, *Globe Newspaper*, and *Press-Enterprise I*, Chief Justice Burger wrote in *Press-Enterprise II* that “our decisions have emphasized two complementary considerations” when evaluating a claim of public access.²⁵⁴ First, a court is to consider

²⁴⁶ 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” developed in the Court’s judicial access cases (quoting *Press-Enterprise II*, 478 U.S. at 9)).

²⁴⁷ 464 U.S. 501 (1984).

²⁴⁸ *Id.* at 503–04. The voir dire took six weeks, and all but approximately three days were closed to the public. *Id.* at 503. Citing the jurors’ right to privacy, the judge also refused to release the transcript of the proceedings even after the trial began and continued to keep the transcript under seal post-conviction. *Id.* at 503–04.

²⁴⁹ *Id.* at 508 (citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569–71 (1980)).

²⁵⁰ 478 U.S. 1 (1986).

²⁵¹ *Id.* at 3.

²⁵² *Id.* at 3–4.

²⁵³ *Id.* at 4–5.

²⁵⁴ *Id.* at 8.

“whether the place and process have historically been open to the press and general public.”²⁵⁵ Second, a court must assess “whether public access plays a significant positive role in the functioning of the particular process in question.”²⁵⁶ When both prongs are met, a First Amendment right of access attaches to the proceeding in question, which can be denied only if the government’s justification for closure withstands strict scrutiny.²⁵⁷ As Burger explained, “[t]hese considerations of experience and logic are, of course, related, for history and experience shape the functioning of governmental processes.”²⁵⁸ Finding the test of experience and logic met with regard to the preliminary hearing in question, Burger held that a qualified First Amendment right of public access attached to the proceeding.²⁵⁹

Although the Supreme Court developed the experience and logic test in the context of public access to criminal proceedings, nearly all courts apply the test to civil proceedings and to court records in criminal and civil cases as well.²⁶⁰ A number of federal courts of appeal also have used the test to assess whether the public has a right of access to government information outside the judicial branch,²⁶¹ including

²⁵⁵ *Id.* (citing *Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596, 605 (1982) and *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 589 (1980) (Brennan, J., concurring in judgment)).

²⁵⁶ *Id.* (citing *Globe Newspaper*, 457 U.S. at 606).

²⁵⁷ *Id.* at 9.

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 13. Examining California’s and other states’ practices with regard to preliminary hearings, Burger concluded that such hearings have historically been open to the public and thus the “experience” prong was satisfied. *Id.* at 10–11. As to the “logic” prong, Burger wrote that preliminary hearings are “sufficiently like a trial to justify the . . . conclusion” that public access “is essential to the proper functioning of the criminal justice system.” *Id.* at 11–12.

²⁶⁰ See *Ardia*, *supra* note 242, at 1403 n.112 (citing cases).

²⁶¹ Several state courts have also done so. See *Uniontown Newspapers, Inc. v. Roberts*, 839 A.2d 185, 191, 194 (Pa. 2003) (applying experience and logic test to claim of public access to legislator’s telephone records, but concluding that public has no right of access to legislative records beyond the proceedings of the legislature); *Gerawan Farming, Inc. v. Agric. Lab. Rels. Bd.*, 40 Cal. App. 5th 241, 258–79 (2019) (applying test to constitutional right of public access to labor relations board proceedings, but finding that test was not met); *DTH Publ’g Corp. v. Univ. of N. C. at Chapel Hill*, 496 S.E.2d 8, 16 (N.C. Ct. App. 1998) (applying test to college disciplinary proceedings and concluding that they have not been historically open to the public).

the Second,²⁶² Third,²⁶³ Sixth,²⁶⁴ Ninth,²⁶⁵ and Eleventh Circuits.²⁶⁶

In *Whiteland Woods, L.P. v. Township of West Whiteland*, for example, the Third Circuit used the experience and logic test to determine whether a real estate developer had a First Amendment right to attend planning commission meetings.²⁶⁷ Finding the experience and logic test met, the court held that a First Amendment right of access extended to the meetings, writing that they “are precisely the type of public proceeding to which the First Amendment guarantees a public right of access.”²⁶⁸ Public access, the Third Circuit explained, allows the public to understand land use matters, enhances the perception of

²⁶² See *N.Y. C.L. Union v. N.Y.C. Transit Auth.*, 684 F.3d 286, 298–99 (2d Cir. 2012) (applying experience and logic test to claim of public access to transit authority proceedings and holding that First Amendment right of access existed); *Cyr v. Addison Rutland Supervisory Union*, 60 F. Supp. 3d 536, 544–46 (D. Vt. 2014) (applying test to school board meetings, but finding the experience prong “unsatisfied”).

²⁶³ See, e.g., *Del. Coal. for Open Gov’t, Inc. v. Strine*, 733 F.3d 510, 515–21 (3d Cir. 2013) (applying experience and logic test to claim of public access to state-sponsored arbitration proceedings and holding that a First Amendment right attaches); *N.J. Media Grp., Inc. v. Ashcroft*, 308 F.3d 198, 208–12 (3d Cir. 2002) (applying test to deportation proceedings, but concluding that deportation hearings do not have a “tradition of openness sufficient to satisfy *Richmond Newspapers*”); *Whiteland Woods, L.P. v. Twp. of W. Whiteland*, 193 F.3d 177, 180–81 (3d Cir. 1999) (applying test to planning commission meetings and finding right of access existed).

²⁶⁴ See *In re Search of Fair Fin.*, 692 F.3d 424, 430 (6th Cir. 2012) (applying experience and logic test to claim of public access to documents involved with issuance and execution of search warrant, but finding test not satisfied); *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 700 (6th Cir. 2002) (applying test to deportation proceedings and finding right of access); *United States v. Miami Univ.*, 294 F.3d 797, 823–24 (6th Cir. 2002) (applying test to records in university disciplinary hearings, but finding that right of access did not exist); *Cincinnati Enquirer v. Cincinnati Bd. of Educ.*, 249 F. Supp. 2d 911, 915–17 (S.D. Ohio 2003) (applying test to school board records, but finding no right of access); *Hicks v. Crowley*, No. 2:22-CV-2204, 2023 WL 348229, at *11–12 (S.D. Ohio Jan. 20, 2023) (applying test to tax appeal hearings and finding right of access). *But see Phillips v. DeWine*, 841 F.3d 405, 419 (6th Cir. 2016) (rejecting use of the experience and logic test to information regarding lethal injections).

²⁶⁵ See *Index Newspapers LLC v. U.S. Marshals Serv.*, 977 F.3d 817, 829 (9th Cir. 2020) (using experience and logic test to find right of public access to observe street protests); *Leigh v. Salazar*, 677 F.3d 892, 898 (9th Cir. 2012) (horse round-ups on federal land); *Cal. First Amend. Coal. v. Woodford*, 299 F.3d 868, 877 (9th Cir. 2002) (executions); *Cal-Almond, Inc. v. U.S. Dep’t of Agric.*, 960 F.2d 105, 109 (9th Cir. 1992) (voter lists). *But see Boardman v. Inslie*, 978 F.3d 1092, 1105 (9th Cir. 2020) (rejecting use of test to state agency records).

²⁶⁶ See *Wellons v. Comm’r, Ga. Dep’t of Corr.*, 754 F.3d 1260, 1266 (11th Cir. 2014) (applying experience and logic test to claim of public access to executions).

²⁶⁷ 193 F.3d at 180.

²⁶⁸ *Id.* at 181.

fairness, and puts government officials “on notice that their actions will be evaluated by the community.”²⁶⁹

In *Detroit Free Press v. Ashcroft*, the Sixth Circuit applied the experience and logic test to deportation hearings held by the Executive Branch.²⁷⁰ Concluding that a First Amendment right of access existed, the Sixth Circuit stated that the experience and logic test is a test of general applicability.²⁷¹ In applying the test outside the judicial branch, the Sixth Circuit expressly rejected the idea that *Houchins v. KQED* had foreclosed a general First Amendment right of access to government information: “We do not agree that the standard articulated in *Houchins* is the applicable standard for reviewing First Amendment claims of access to administrative proceedings.”²⁷² The Sixth Circuit noted that the issue before the Supreme Court in *Houchins* was limited to “whether the news media have a constitutional right of access to a county jail, *over and above that of other persons*.”²⁷³

The Sixth Circuit’s opinion is especially instructive on the question of whether the *Richmond Newspapers* line of cases supplanted *Houchins*. On this point, the Sixth Circuit wrote that “we question the vitality of the standard articulated in *Houchins*,” explaining that “[t]he *Richmond Newspapers*’s 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.”²⁷⁴ Leaving little doubt as to whether the experience and logic test could be applied to access claims arising outside the judicial branch, the Sixth Circuit noted that the Supreme Court had repeatedly applied the test “to assess the merits of cases claiming First Amendment access rights to different government proceedings” and that “it is clear that the Court has since moved away from its position in *Houchins* and recognizes that there is a limited constitutional right to some government information.”²⁷⁵

The Ninth Circuit took a similar approach in *Index Newspapers v. United States Marshals Service*, a case mentioned

269 *Id.*

270 303 F.3d 681, 694 (6th Cir. 2002).

271 *Id.* (“*Richmond Newspapers is a Test of General Applicability.*”).

272 *Id.*

273 *Id.* (quoting *Houchins v. KQED, Inc.*, 438 U.S. 1, 3 (1978)).

274 *Id.* at 694–95.

275 *Id.* at 695.

in the Introduction that addressed whether journalists and legal observers had a right of access to the sidewalks and streets of Portland to observe whether the government was conducting unlawful police activities.²⁷⁶ In the summer of 2020, when BLM protesters were taking to the streets in many American cities, President Donald Trump announced that the U.S. Department of Justice would send a “surge of federal law enforcement” to stop the protests.²⁷⁷ In Portland, dozens of federal officers in camouflage and tactical gear deployed from the federal courthouse and began firing “flash grenades and welt-inducing marble-size balls filled with caustic chemicals.”²⁷⁸ Government agents also teargassed, struck, and arrested journalists covering the events.²⁷⁹

In response to these actions, a group of journalists and legal observers sued the U.S. Department of Homeland Security, U.S. Marshals Service, and several other state and federal agencies for excluding them from documenting the government’s efforts to break up the protests, arguing that their newsgathering activity was “constitutionally protected acts of speech and expressive conduct.”²⁸⁰ In evaluating the plaintiffs’ request for injunctive relief, the district court noted that the plaintiffs, in seeking access to the public streets of Portland, were acting as “surrogates for the public” and commented that “[w]ithout journalists and legal observers, there is only the government’s side of the story to explain why a ‘riot’ was declared and the public streets were ‘closed’ and whether law enforcement acted properly in effectuating that order.”²⁸¹ The district

²⁷⁶ 977 F.3d 817 (9th Cir. 2020).

²⁷⁷ See Lowry et al., *supra* note 9.

²⁷⁸ Mike Baker, Thomas Fuller & Sergio Olmos, *Federal Agents Push into Portland Streets, Stretching Limits of Their Authority*, N.Y. TIMES (July 25, 2020), <https://www.nytimes.com/2020/07/25/us/portland-federal-legal-jurisdiction-courts.html> [<https://perma.cc/UZP2-K6R2>].

²⁷⁹ See Rebecca Ellis, *Police Keep Injuring Journalists Covering Portland Protests*, OR. PUB. BROAD. (June 16, 2020), <https://www.opb.org/news/article/portland-journalists-harmed-covering-george-floyd-blm-protests/> [<https://perma.cc/M9FB-3FCG>]; see also Courtney Douglas, *Amid Black Lives Matter Protests, a Crushing Moment for Journalists Facing Record Attacks, Arrests at the Hands of Law Enforcement*, REPS. COMM. FOR FREEDOM OF THE PRESS (Sep. 4, 2020), <https://www.rcfp.org/black-lives-matter-press-freedom/> [<https://perma.cc/V8NZ-49CQ>].

²⁸⁰ Second Amended Complaint at 45, *Index Newspapers LLC. v. City of Portland* (D. Or. 2020) (No. 3:20-cv-1035).

²⁸¹ *Index Newspapers LLC v. City of Portland*, 480 F.Supp.3d 1120, 1146 (D. Or. 2020). The district court quoted *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980), for its characterization of the plaintiffs’ role as “surrogates for the public.” *Index Newspapers*, 480 F.Supp.3d at 1146. The use of military personnel for domestic purposes, including for law enforcement, could be a violation

court then issued an injunction ordering that the journalists and legal observers “shall not be subject to arrest for not dispersing following the issuance of an order to disperse.”²⁸²

The government appealed the injunction and claimed, relying in part on *Houchins*, that journalists, as well as the public generally, have no right of access to the sidewalks and streets of Portland to observe whether the government is conducting unlawful police activities.²⁸³ The Ninth Circuit found this argument unpersuasive. Citing extensively to the Supreme Court’s judicial access cases, especially *Press-Enterprise II*, the Ninth Circuit held that the plaintiffs had demonstrated a likelihood of success on the merits of their right-of-access claims.²⁸⁴

of the Posse Comitatus Act, 18 U.S.C. § 1385, which prohibits the use of federal military forces for police functions unless otherwise authorized by law. See Jim Golby, *The Role of the US Military in Quelling Domestic Protests*, U.S. STUD. CTR. (June 12, 2020), <https://www.ussc.edu.au/explainer-us-military-use-to-quell-protests> [<https://perma.cc/NQU7-48VZ>]. On June 1, 2020, President Trump threatened to use the Insurrection Act to justify the deployment of military forces to end the protests. See Caitlin Oprysko, *Trump Threatens to End Protests with Military*, POLITICO (June 1, 2020), <https://www.politico.com/news/2020/06/01/trump-slams-governors-as-weak-crackdown-on-protests-294023> [<https://perma.cc/98VW-NV2G>].

²⁸² *Index Newspapers*, 480 F.Supp.3d at 1156. The district court’s order detailed several of the dozens of declarations, photos, and video clips introduced into evidence to support plaintiffs’ contention that at least some of the federal officers had intentionally targeted journalists and legal observers in retaliation for their news-reporting efforts. *Id.* at 1129–37.

²⁸³ See Rebuttal Argument of Sopan Joshi on Behalf of the Defendants-Appellants, *supra* note 11. The government also cited *Pell v. Procunier*, 417 U.S. 817 (1974), and *Saxbe v. Wash. Post Co.*, 417 U.S. 843, 850 (1974), among other cases, in support of its argument that the public did not have a First Amendment right of access. Rebuttal Argument of Sopan Joshi on Behalf of the Defendants-Appellants, *supra* note 11.

²⁸⁴ *Index Newspapers LLC v. U.S. Marshals Serv.*, 977 F.3d 817, 831 (9th Cir. 2020) (citing *Press-Enterprise II*, 478 U.S. 1, 9 (1986)). Judge O’Scannlain, who dissented, argued that the district court’s analysis was conceptually flawed “because government restrictions on First Amendment activity in such locations are usually evaluated under ‘public forum analysis,’ which has been more extensively developed in the case law and provides more guidance regarding the policing of protest events,” rather than the *Press-Enterprise II* framework. *Id.* at 849 n.8 (O’Scannlain, J., dissenting). It seems unlikely, however, that the outcome would have been any different given that the public forum doctrine protects the rights of members of the public to access traditional public forums. See, e.g., *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983) (“In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed.”). Protests occurring on public streets, like those in Portland, would likely be entitled to full First Amendment protection under the public forum test because public streets have been called the “quintessential traditional public fora,” see *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 676 (1992), which along with sidewalks and parks “have immemorially been held in trust for the use

Holding that the First Amendment guarantees the public a right of access to observe and record the government's response to the protests, the Ninth Circuit warned that "[w]ithout the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally."²⁸⁵

Careful to ground its decision in a *public* right of access, not a special right of access for the media, the Ninth Circuit made a point of noting that it had not overlooked that the case before it did not involve public access to court proceedings:

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.²⁸⁶

Although some courts have rejected the use of the experience and logic test outside the judicial context²⁸⁷—and those that have used the test have not always found it satisfied—its application by a significant number of courts to access claims in non-judicial settings underscores the test's broad applicability.²⁸⁸ For example, in applying a public right of access to

of the public and . . . used for purposes of assembly, communicating thoughts between citizens, and discussing public questions," *Perry Educ. Ass'n*, 460 U.S. at 45.

²⁸⁵ *Index Newspapers*, 977 F.3d at 830 (quoting *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 492 (1975)).

²⁸⁶ *Id.* at 830 n.8 (citing *Leigh v. Salazar*, 677 F.3d 892, 899 n.5 (9th Cir. 2012) (collecting cases)).

²⁸⁷ See, e.g., *Ctr. for Nat'l Sec. Stud. v. U.S. Dep't of Just.*, 331 F.3d 918, 935–36 (D.C. Cir. 2003) (rejecting use of experience and logic test to non-judicial documents that are not part of a criminal trial); *Calder v. IRS*, 890 F.2d 781, 783 (5th Cir. 1989) (declining to extend the reasoning of *Richmond Newspapers* beyond criminal proceedings to other government information); *Smith v. Plati*, 258 F.3d 1167, 1178 n.10 (10th Cir. 2001) (stating that experience and logic test is limited to trial proceedings); *El Dia, Inc. v. Hernandez Colon*, 963 F.2d 488, 495 (1st Cir. 1992) (questioning whether *Richmond Newspapers* and its progeny apply outside the criminal justice system).

²⁸⁸ Although I have criticized how courts have applied the experience and logic test in the context of court records, see *Ardia*, *supra* note 133, at 861–66 (arguing that the experience and logic test focuses too narrowly on history and the impact of access on a specific judicial proceeding and that courts should instead

transit authority hearings, the Second Circuit explained that the Supreme Court's judicial access cases did not rest on "formalistic descriptions of the government proceeding but on the kind of work the proceeding actually does and on the First Amendment principles at stake."²⁸⁹ The court further noted that "[i]n extending the right of public access from the criminal trial to its components and on to civil trials, the Supreme Court and the circuits have emphasized the importance of access to public participation and to government accountability—values, the courts have emphasized, that are central to democracy."²⁹⁰

As decisions in the Second, Third, Sixth, Ninth, and Eleventh Circuits affirm, the constitutional values that dictate a First Amendment right of public access to government information are not confined to the courtroom but extend to other governmental functions that benefit from public oversight and bear on self-government.²⁹¹

B. Experience and Logic Support a Right to Know About the Government's Use of Its Police Power

This final Part explores how the experience and logic test might apply to claims of public access to information about the government's exercise of its police power, with a particular focus on arrests. Although a First Amendment right of access would extend beyond this specific context, disputes over access to information about arrests provide a particularly instructive lens for evaluating how courts can apply a broader right to know about the government. As the following sections will show, access to information about arrests is not only consistent with the public's historical role in overseeing the criminal justice system but is also vital for holding the government accountable for its use of force and coercion.

The experience and logic test requires courts to consider two questions: (1) whether the place and process have historically

use history merely as a guide and focus on the role that public access plays in supporting self-government more generally), the test provides a principled means for courts to delineate the scope of a right to know about the government. As the Sixth Circuit remarked in *Detroit Free Press v. Ashcroft*, "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).

²⁸⁹ N.Y. C.L. Union v. N.Y.C. Transit Auth., 684 F.3d 286, 299 (2d Cir. 2012) (applying the experience and logic test to transit authority proceedings).

²⁹⁰ *Id.*

²⁹¹ See *supra* notes 264–266 and accompanying text.

been open to the press and public (the “experience” prong); and (2) whether public access plays a significant positive role in the functioning of that government process (the “logic” prong).²⁹² The Supreme Court explained that these prongs are interrelated, as “history and experience shape the functioning of governmental processes.”²⁹³ Although lower courts have not been uniform in their application of the test, with some courts relying exclusively on the experience prong while others focus predominately on the logic prong, most courts treat the experience and logic test as a two-part test and require that both prongs be established before a First Amendment right of access attaches to a particular record or governmental function.²⁹⁴

1. *The Extensive History of Public Access to Information About Arrests*

The public has long been deeply involved in all aspects of the criminal justice system, from arrest through trial to punishment.²⁹⁵ Although public participation in arrests has evolved over time, the investigative and arrest functions that we now associate with formal “police powers” were, for much of history, responsibilities carried out by the community at large.²⁹⁶ Consequently, when evaluating whether information about arrests has historically been open to public scrutiny, it is important to recognize that, until relatively recently, members of the public had little need to formally request access to such information because they were already directly involved in the arrest and detention of offenders.

For centuries, the public played a central role in the apprehension of wrongdoers. In medieval England, for instance, maintaining order was a communal responsibility and citizens were expected to join a “hue and cry” to pursue and capture suspected criminals.²⁹⁷ Failure to do so could result in legal consequences, including criminal liability.²⁹⁸ Because the community at large was tasked with making an arrest, those who

²⁹² *Press-Enterprise II*, 478 U.S. 1, 8 (1986).

²⁹³ *Id.* at 9.

²⁹⁴ See Ardia, *supra* note 133, at 858–61.

²⁹⁵ SAMUEL WALKER, *POPULAR JUSTICE: A HISTORY OF AMERICAN CRIMINAL JUSTICE* 2–5 (2d. ed. 1998).

²⁹⁶ *Id.* at 13–16.

²⁹⁷ Horace L. Wilgus, *Arrest Without a Warrant*, 22 MICH. L. REV. 541, 545 (1924).

²⁹⁸ *Id.* at 547–48.

captured the person were legally protected even if the person was innocent.²⁹⁹ Public participation in detaining wrongdoers was considered so fundamental that in 1215 the Magna Carta enshrined protections against arbitrary detention, declaring that no person could be “taken or imprisoned . . . unless by the lawful judgment of his peers, or by the law of the land.”³⁰⁰

The American criminal justice system borrowed extensively from English law, but as the historian Samuel Walker notes, the “English colonists were selective about which parts of their criminal justice heritage they brought to the new world.”³⁰¹ Some of the changes they made were the result of practical necessity. As the colonists settled new territory, they were compelled to rely on themselves. With few if any government institutions in place in North America, they developed what Walker describes as “a distinctly American style of criminal justice: informal, often rough, and highly democratic.”³⁰² In fact, in Colonial America individuals who violated social norms were more likely to be subjected to rebuke and public punishment by their church or neighbors than to be prosecuted in a court of law.³⁰³ The historian Edward Ayers writes that the church congregation was the “police and court[] of first resort.”³⁰⁴ Members of the Congregational Churches of New England, for example, agreed “to submit to the order, discipline, and government of . . . the brotherly watch of fellow members.”³⁰⁵ Because members of the congregation were expected to monitor and report on their neighbors’ behavior, the intense surveillance by the community “made patrol by a public police unnecessary.”³⁰⁶ Walker writes that towns created watch patrols “only after they began to grow and the old mechanisms of informal control began to erode.”³⁰⁷

As American society grew more complex, the public’s direct role in law enforcement gradually diminished. By the end of the eighteenth century, community members had largely ceded their investigatory and arrest powers to government

299 *Id.*

300 MAGNA CARTA (1215).

301 WALKER, *supra* note 295, at 14.

302 *Id.* at 13.

303 *Id.*

304 *Id.* at 13 n.2 (quoting EDWARD L. AYERS, VENGEANCE & JUSTICE: CRIME & PUNISHMENT IN THE NINETEENTH CENTURY AMERICAN SOUTH 181 (1984)).

305 *Id.* at 18.

306 *Id.*

307 *Id.*

authorities.³⁰⁸ Nevertheless, the public still retained oversight over arrests. During this period, an arrest could only be made under three circumstances: if the official possessed a warrant; personally witnessed the individual commit a felony; or received information from community members indicating that a crime had occurred, and they had probable cause to suspect the arrestee.³⁰⁹ Government officials were reluctant to arrest based solely on probable cause, however, as they could be held personally liable for false arrest if their suspicion proved unfounded.³¹⁰ As a result, officials largely relied on judicially issued warrants to apprehend suspected offenders.³¹¹ This system reinforced both community oversight and legal accountability of government officials.

Although by the end of the nineteenth century members of the public were less likely to be directly involved in arrests, the use of judicial warrants—which were public records—ensured that arrests remained subject to public scrutiny.³¹² Members of the community could simply go to the courthouse and review arrest warrants. There was no need for the courts to look to the Constitution to guarantee such access, as the public enjoyed a longstanding common law right of access to court records,³¹³ as

³⁰⁸ *Id.* at 44–45.

³⁰⁹ Wesley MacNeil Oliver, *The Neglected History of Criminal Procedure, 1850–1940*, 62 RUTGERS L. REV. 447, 451 (2010).

³¹⁰ *Id.* Further, even if a warrant had been issued to arrest a suspect, the official making the arrest was required to have the physical warrant present at the time the arrest was made, or else they would be liable for assault and false imprisonment. See Francis H. Bohlen & Harry Shulman, *Arrest With and Without a Warrant*, 75 U. PENN. L. REV. 485, 492 (1927).

³¹¹ Rocco Tresolini, Richard W. Taylor & Elliot B. Barnett, *Arrest Without Warrant: Extent and Social Implications*, 46 J. CRIM. L., CRIMINOLOGY, AND POLICE SCIENCE 187, 191 (1955).

³¹² See, e.g., *Newspapers, Inc. v. Breier*, 279 N.W.2d 179, 183–84 (Wis. 1979) (ordering police to provide public access to police blotter and stating “where common-law limitations on the right to examine records and papers have not been limited by express court decision or by statute, that presumptively public records and documents must be open for inspection”); *Commonwealth v. Fenstermaker*, 530 A.2d 414, 418 (Pa. 1987) (requiring release of arrest warrant affidavits and explaining that “[t]he tradition of keeping proceedings and records of the criminal justice system open to public observation is founded in common law right”).

³¹³ See, e.g., *Nixon v. Warner Commc'ns*, 435 U.S. 589, 597 (1978) (“It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.” (footnote omitted)); *Burton v. Tuite*, 44 N.W. 282, 285 (Mich. 1889) (“I do not think that any common law ever obtained in this free government that would deny to the people thereof the right of free access to and public inspection of public records.”).

well as many other government records.³¹⁴ As the Third Circuit noted in *United States v. Criden*,³¹⁵ the common law right to inspect judicial records “antedates the Constitution.”³¹⁶

The emergence of professional police agencies in the mid-nineteenth century further reduced the public’s active involvement in arrests.³¹⁷ The creation of military-style police forces during this period was met with strong opposition, however, as critics contended that such organizations undermined long-standing constraints on arrest and detention and represented an “express[] reject[ion]” of the Framing Era’s community-based model of law enforcement.³¹⁸ Samuel Walker posits that if those who drafted the Constitution were to return to the nation they helped to found, “they would be astonished and bewildered.”³¹⁹ He writes that “[n]othing in their experience would have prepared them for the modern criminal justice system” with its “big-city police departments” and “thousands of uniformed officers deployed in patrol cars laden with expensive communication equipment.”³²⁰

The twentieth century witnessed a further transformation of the American criminal justice system, marked by an expansion of law enforcement’s role and a corresponding reduction in public access to information about arrests.³²¹ A growing reliance on warrantless arrests meant that information about

³¹⁴ With roots in English common law, American courts have long recognized the right to inspect government records. See, e.g., *Herbert v. Ashburner* (1750) 95 Eng. Rep. 628, 628 (“These are public books which every body has a right to see”); *Sloan Filter Co. v. El Paso Reduction Co.*, 117 F. 504, 506 (C.C.D. Colo. 1902) (“[T]he matter of inspecting and taking copies of public records is as old in the law as the records are old.”); *State ex rel. Colescott v. King*, 57 N.E. 535, 538 (Ind. 1900) (recognizing a common law right of access to inspect the records of the county auditor); *Nowack v. Fuller*, 219 N.W. 749, 752 (Mich. 1928) (holding that Michigan citizens have a common law right of access to the Michigan Auditor General’s official records); *People ex. rel. Gibson v. Peller*, 181 N.E.2d 376, 378 (Ill. App. Ct. 1962) (applying a common law right of access to board of education’s financial records).

³¹⁵ 648 F.2d 814 (3d Cir. 1981).

³¹⁶ *Id.* at 819 (“The [common law] right to inspect and copy [judicial records], sometimes termed the right to access, antedates the Constitution.”).

³¹⁷ WALKER, *supra* note 295, at 51; Oliver, *supra* note 309, at 448.

³¹⁸ Oliver, *supra* note 309, at 448; see also George C. Thomas III, *Stumbling Toward History: The Framers’ Search and Seizure World*, 43 TEX. TECH L. REV. 199, 200 (2010) (“It is difficult to convey how different ‘law enforcement’ was in 1791 from today’s para-military investigative operation.”).

³¹⁹ WALKER, *supra* note 295, at 241.

³²⁰ *Id.* Of course, the Framers would be shocked by the size and complexity of nearly all parts of modern government.

³²¹ WALKER, *supra* note 295, at 112.

such actions increasingly had to be sought from police agencies, which were becoming more bureaucratic and less transparent.³²² Whereas open records laws in most states initially provided that arrest records were open to public inspection,³²³ in the 1980s many states enacted changes that restricted public access to law enforcement records, often influenced by police unions advocating for increased confidentiality.³²⁴ The inevitable consequence has been a more opaque system of policing, where current law enforcement practices are significantly less visible and accountable to the public.³²⁵

Not surprisingly, this has led to alarming instances of law enforcement agencies refusing to disclose information to the public about their arrest practices. For example, a statewide investigation in Connecticut revealed widespread noncompliance with the state's open records law, with numerous municipal and state police departments refusing to release even routine arrest logs.³²⁶ In one notable response, the New Haven

³²² The erosion of the warrant requirement in policing has been a gradual process over several decades, marked by expanding exceptions and a shift toward a "reasonableness" standard. *See, e.g.*, *Terry v. Ohio*, 392 U.S. 1, 8, 30, 35 (1968) (approving brief detentions and pat-downs based on a reasonable suspicion of criminal activity). Factors like increased mobility, the war on drugs, and terrorism concerns also contributed to this decline, leading to reduced judicial oversight over police and disparate impacts on minority communities. *See, e.g.*, ERWIN CHERMERINSKY, PRESUMED GUILTY: HOW THE SUPREME COURT EMPOWERED THE POLICE AND SUBVERTED CIVIL RIGHTS 111–12 (2021).

³²³ *See* REPS. COMM. FOR FREEDOM OF THE PRESS, POLICE RECORDS 3–4 (Winter 2008) (noting that most states provided for the release of information about arrests and criminal convictions unless a specific exemption allowed the government to deny access to the information).

³²⁴ *See* Zoë Robinson & Stephen Rushin, *The Law Enforcement Lobby*, 107 MINN. L. REV. 1965, 1994–96 (2023); Katherine J. Bies, Note, *Let the Sunshine in: Illuminating the Powerful Role Police Unions Play in Shielding Officer Misconduct*, 28 STAN. L. & POL'Y REV. 109, 123–26 (2017); Steve Zansberg & Dana Green, *The Myth of Police Officer Privacy*, 33 COMM'N. LAW. 1, 1–2 (Summer 2017); Dan Papsunc, *How Access to Public Records is Being Threatened by Police Union Contracts*, REPS. COMM. FOR FREEDOM OF THE PRESS (Mar. 4, 2020), [https://www.rcfp.org/police-unions-records-access/\[https://perma.cc/72X5-95NY\]](https://www.rcfp.org/police-unions-records-access/[https://perma.cc/72X5-95NY]).

³²⁵ *See, e.g.*, Koningsor, *supra* note 4, at 637 (“[L]aw enforcement agencies enjoy unusually pervasive secrecy protections. In some states, this tangle of exemptions is so robust that it virtually carves police departments out of the law’s oversight obligations altogether.”); Kallie Cox & William Freivogel, *Police Misconduct Records Secret, Difficult to Access*, PULITZER CTR. (Jan. 24, 2022), [https://pulitzercenter.org/stories/police-misconduct-records-secret-difficult-access\[https://perma.cc/443K-AF7V\]](https://pulitzercenter.org/stories/police-misconduct-records-secret-difficult-access[https://perma.cc/443K-AF7V]).

³²⁶ *See* Many Connecticut Police Departments Withhold Public Info, *Investigation Finds*, NEW HAVEN REG. (Mar. 19, 2014), [https://www.nhregister.com/connecticut/article/Many-Connecticut-police-departments-withhold-11724861.php\[https://perma.cc/64TP-98DX\]](https://www.nhregister.com/connecticut/article/Many-Connecticut-police-departments-withhold-11724861.php[https://perma.cc/64TP-98DX]).

police spokesperson declared, “You’ll never get [police] blotter from us, we are just too damn busy.”³²⁷ And in addition to the BLM protests discussed previously,³²⁸ during a recent federal crackdown on crime in the District of Columbia, journalists have been unable to get basic information about the more than 450 arrests that occurred in August 2025—such as who was arrested, where, and by which agency.³²⁹ *The Washington Post* reports that “Federal officers have been seen around the District wearing masks while making arrests and driving off in unmarked cars—making it difficult to discern which agency could provide information about who was arrested, where they were taken and why.”³³⁰

The long history of public involvement and monitoring of arrests undoubtedly satisfies the first prong of the experience and logic test. As the Supreme Court observed in *Press-Enterprise II*, “a tradition of accessibility implies the favorable judgment of experience.”³³¹ As the next section will demonstrate, this historical practice is reinforced by compelling logic: access to arrest information is indispensable to ensuring transparency, accountability, and public confidence in the fair administration of justice.

2. *The Compelling Logic Behind Providing Public Access to Information About Arrests*

Public access to arrest information serves vital functions in a democracy, foremost by allowing the public to oversee the

³²⁷ *Id.*

³²⁸ See *supra* notes 276–279 and accompanying text.

³²⁹ See Olivia George & Emma Uber, *On Trump’s Order, Dozens Arrested Daily in D.C.: The Details Are Hidden.*, WASH. POST (Aug. 19, 2025), <https://www.washingtonpost.com/dc-md-va/2025/08/19/trump-crime-arrest-reports-hidden> [<https://perma.cc/NR2W-TM3T>].

³³⁰ *Id.*

³³¹ *Press-Enterprise II*, 478 U.S. 1, 8 (1986) (quoting *Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596, 605 (1982)). But even if the courts had never recognized a right of access to arrest information, one might question why the lack of history of access should be determinative of whether there is a constitutional right of access. 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, 236 (Geoffrey Stone & Lee Bollinger eds., 2021) (“The Court has rarely used historical practice as a litmus test for First Amendment rights.”). Indeed, the Supreme Court long ago abandoned the notion that First Amendment rights are defined solely by history. See, e.g., *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 714–15 (1931) (writing that freedom from prior restraints “cannot be deemed to exhaust the conception of liberty guaranteed by state and federal constitutions”). Nevertheless, in this instance there is clearly an established tradition of public access to arrest information.

exercise of police power and hold government actors accountable for its misuse. Transparency in the arrest process is essential for ensuring that law enforcement operates within the bounds of law and respects individual rights. When the public can obtain basic facts—such as the identity of the arrestee, the specific charges, the time and location of the arrest, and the names of the involved officers—it is equipped to scrutinize police conduct, expose potential misconduct, and deter abuses of power. In the absence of this information, the dangers of unchecked government action, wrongful detentions, and abuse increase, threatening public trust in law enforcement and weakening democratic governance.³³²

The government's ability to arrest represents one of its most direct exercises of power over individual liberty.³³³ Public access to information about arrests serves as a safeguard against secret detentions, a practice that is antithetical to American democracy.³³⁴ When arrests are conducted in the light of public scrutiny, it becomes more difficult for the government to engage in extrajudicial detentions or to hold individuals without due process.³³⁵ Public access to arrest information serves as a crucial check on such abuses of power and helps to ensure that the rights of the accused are respected from the moment of arrest. As the Hawaii Supreme Court explained, access to

³³² See Koningisor, *supra* note 4, at 674–76; Bloch-Wehba, *supra* note 4, at 929; Luna, *supra* note 4, at 1166; Bell, *supra* note 4, at 2144.

³³³ See Luna, *supra* note 4, at 1166 (“The power to deprive liberty and self-autonomy through the criminal process is unparalleled, attended by a considerable toll on scarce resources and human capital.”).

³³⁴ See, e.g., *In re Application of U.S. for Material Witness Warrant*, 214 F. Supp. 2d 356, 364 (S.D.N.Y. 2002) (“[N]o free society can long tolerate secret arrests.”); *Morrow v. District of Columbia*, 417 F.2d 728, 741–42 (D.C. Cir. 1969) (“The requirement that arrest books be open to the public is to prevent any ‘secret arrests,’ a concept odious to a democratic society.” (quoting H.R. REP. NO. 83-2332, at 1 (1954))). In the *Federalist No. 84*, Alexander Hamilton commented on the vileness of secret arrests:

To bereave a man of life . . . or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole nation; but confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government.

THE FEDERALIST NO. 84 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001) (quoting BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND (1765)).

³³⁵ See Luna, *supra* note 4, at 1145 (noting that “police frequently used the power to detain and arrest as a means of harassing suspects without any intention of invoking the formal criminal process”).

arrest records is the principal means by which the public can oversee law enforcement conduct:

Police officers are entrusted with the right to use force—even deadly force in some circumstances—and this right can be subject to abuse. Public oversight minimizes the possibility of abuse by ensuring that police departments and officers are held accountable for their actions. The press’s access to records such as those at issue here is one of the primary channels through which such public oversight can operate.³³⁶

Access to arrest information can also help individuals who believe they have been wrongfully arrested or mistreated by law enforcement gather evidence of patterns of abuse and pursue legal remedies. This acts as a deterrent against police misconduct because officers are more likely to act professionally and within established protocols when they know their actions are subject to public review.³³⁷ As the Supreme Court has recognized, “[t]he public . . . has a strong interest in exposing substantial allegations of police misconduct to the salutary effects of public scrutiny.”³³⁸ And even apart from allegations of misconduct, “the conduct of a policeman on duty is legitimately and necessarily an area upon which public interest may and should be focused.”³³⁹

The ability to scrutinize arrests also functions as a check on systemic problems within the criminal justice system. In *Press-Enterprise I*, the Supreme Court highlighted the important benefits that public access to criminal proceedings provides, writing that it “enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.”³⁴⁰ Access to arrest information equips news organizations, researchers, and advocates with the means to investigate patterns of police activity, uncover disparities in enforcement, and identify potential criminal justice reforms.³⁴¹

³³⁶ *Peer News LLC v. City & Cnty. of Honolulu*, 376 P.3d 1, 22 (Haw. 2016).

³³⁷ *See, e.g., Rivera v. Union Cnty. Prosecutor’s Off.*, 270 A.3d 362, 375 (N.J. 2022) (finding common law right to police internal affairs reports and noting “the public has an interest in the disclosure of internal affairs reports in order to hold officers accountable, to deter misconduct, to assess whether the internal affairs process is working properly, and to foster trust in law enforcement”).

³³⁸ *Waller v. Georgia*, 467 U.S. 39, 47 (1984).

³³⁹ *Cassidy v. ABC*, 377 N.E.2d 126, 132 (Ill. Ct. App. 1978).

³⁴⁰ 464 U.S. 501, 508 (1984) (citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569–71 (1980)).

³⁴¹ *See Luna, supra* note 4, at 1170 (“Mandatory record-keeping by law enforcement offers one method of increasing systematic transparency.”).

By shedding light on the realities of policing, public access to arrest information empowers citizens to participate meaningfully in debates about crime, justice, and the appropriate balance between individual rights and public safety.

Public access to arrest information is thus indispensable for informed public discourse about policing and the broader justice system.³⁴² This form of oversight is fundamental to a healthy democracy, empowering the public to shape law enforcement policy and to hold elected officials accountable for police conduct.³⁴³ “Freedom of expression has particular significance with respect to government,” the Supreme Court instructed in *First National Bank of Boston v. Bellotti*, “because [i]t is here that the state has a special incentive to repress opposition and often wields a more effective power of suppression.”³⁴⁴ This principle is especially salient in the context of law enforcement agencies, which wield significant, and sometimes unchecked, authority. As the First Circuit observed in *Glik v. Cunniffe*, the need for public oversight over the government “is particularly true of law enforcement officials, who are granted substantial discretion that may be misused to deprive individuals of their liberties.”³⁴⁵

When police can operate in secret, it undermines self-government by preventing the public from understanding and evaluating how their government exercises one of its most fearsome powers. Historical examples repeatedly demonstrate that secrecy in arrest practices often correlates with expanded police power and diminished civil liberties.³⁴⁶ Christina Koningsor

³⁴² See, e.g., *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1035 (1991) (“[T]he press . . . guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.” (quoting *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966))).

³⁴³ See Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1848 (2015) (“Transparency is critical to accountability—the people cannot supervise their officials unless they know what the officials are up to.”). Of course, access to arrest information by itself is not sufficient to ensure democratic control of police. See, e.g., Bloch-Wehba, *supra* note 4, at 969 (“[T]ransparency does not provide an adequate substitute for more robust and meaningful accountability obligations.”).

³⁴⁴ 435 U.S. 765, 777 n.11 (1978) (quoting THOMAS EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* 9 (1966)).

³⁴⁵ 655 F.3d 78, 82 (1st Cir. 2011) (holding that the First Amendment provides a right to record the police); see also *id.* at 82–83 (“Ensuring the public’s right to gather information about their officials not only aids in the uncovering of abuses, but also may have a salutary effect on the functioning of government more generally.”) (citations omitted).

³⁴⁶ See, e.g., ROBERT JUSTIN GOLDSTEIN, *POLITICAL REPRESSION IN MODERN AMERICA: FROM 1870 TO 1976* (2001) (recounting civil liberties violations by law enforcement

writes that police secrecy imposes substantial societal costs that “stem from the unique role that law enforcement agencies play in a liberal democracy,” noting that police secrecy “often exacerbates existing power imbalances between the government and its citizens” and “amplifies the risk of coercion and abuse of power by government officials.”³⁴⁷ While she acknowledges that such risks exist in all government settings, “they are heightened in the context of police secrecy.”³⁴⁸ As the frontline of government power, law enforcement agencies pose a unique threat to civil liberties, and police are increasingly using sophisticated technologies to secretly surveil and predict the behavior of Americans.³⁴⁹ Koningisor and others have argued that secrecy around the use of these technologies has allowed law enforcement to largely circumvent constitutional limits on their investigative practices, which raises profound questions about privacy, personal freedom, and potential abuse.³⁵⁰

Public access to information about arrests can also benefit law enforcement agencies themselves.³⁵¹ When the public has confidence in the transparency and accountability of police operations, it can lead to increased trust between communities and law enforcement.³⁵² This trust is essential for effective

directed at political dissidents including efforts to suppress the early labor movement; the Haymarket affair; “little red scares” in 1908, 1935, and 1938-41; the repression of opposition to World War I; the 1919 “great red scare”; and the McCarthy period); Schwarz, Jr., *supra* note 169, at 646 (describing how the FBI attempted to drive Martin Luther King to suicide and infiltrated many law-abiding organizations including the NAACP and those associated with the Women’s Liberation Movement).

³⁴⁷ Koningisor, *supra* note 4, at 675.

³⁴⁸ *Id.*

³⁴⁹ See Jonathan Manes, *Secrecy & Evasion in Police Surveillance Technology*, 34 BERKELEY TECH. L.J. 503, 505–06 (2019) (noting that “police and private vendors have harnessed technological innovations to create new and previously unimaginable investigative tools”).

³⁵⁰ See Koningisor, *supra* note 4, at 675 (“Police secrecy exceptionalism makes it difficult for the public to learn about whether and how police are using new surveillance devices and techniques.”); Manes, *supra* note 349, at 535 (noting that there is evidence that secrecy is enabling aggressive and troubling uses of novel technologies). As Christina Koningisor points out, the public’s lack of access to this information also has important democratic implications: “[i]t allows the police to shape initial policies around the technology, before a more inclusive and adversarial public debate can set the terms of its use.” Koningisor, *supra* note 4, at 675.

³⁵¹ See *Press-Enterprise II*, 478 U.S. 1, 8 (1986) (noting that “many governmental processes operate best under public scrutiny”).

³⁵² See, e.g., *ACLU of Oregon, Inc. v. City of Eugene*, 380 P.3d 281, 298 (Or. 2016) (ordering release of civilian review board’s review alleged police misconduct in arresting protester and commenting that “[w]ithout mutual trust, the

policing, as it encourages cooperation from the public in reporting crimes and assisting with investigations.³⁵³ For instance, the Police Data Initiative, launched in 2015, has demonstrated that increased transparency can lead to improved community relations and more efficient policing practices.³⁵⁴

The Supreme Court has long recognized that public oversight of the criminal justice system is fundamental to maintaining democratic accountability.³⁵⁵ Its observation that “people in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing”³⁵⁶ carries particular weight in the context of arrests, which serve as the gateway to the entire criminal process.³⁵⁷ Because arrests represent the moment when

police cannot do their work effectively and the public cannot feel safe”); LORRAINE MAZEROLLE ET AL., *CAMPBELL COLLABORATION, LEGITIMACY IN POLICING: A SYSTEMATIC REVIEW* 4–5 (2013) (discussing the need to build trust between law enforcement and the public).

³⁵³ See Luna, *supra* note 4, at 1159–60 (writing that “mistrust of government undermines the perceived legitimacy of the law, which in turn reduces public compliance with legal commands”).

³⁵⁴ Barack Obama, *The President’s Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 850 (2017) (“Participating agencies describe this transparency as helping to improve relations with the community, making the data more accurate, and reducing costs related to public-records requests. As expected, outside organizations are using this newly released data to better understand police activities and the impact those activities are having on different communities.”).

³⁵⁵ See, e.g., *Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596, 604 (1982).

³⁵⁶ *Press-Enterprise I*, 464 U.S. at 509 (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980)).

³⁵⁷ This has long been the view of many state courts. See, e.g., *Bos. Globe Media Partners, LLC v. Dep’t of Crim. Just. Info. Servs.*, 140 N.E.3d 923, 934 (Mass. 2020) (“By assuming their unique position of power and authority in our communities, police officers ‘must comport themselves in accordance with the laws that they are sworn to enforce and behave in a manner that brings honor and respect for rather than public distrust of law enforcement personnel.’” (quoting *Police Comm’r of Bos. v. Civ. Serv. Comm’n*, 494 N.E.2d 27, 32 (Mass. App. Ct. 1986))); *Caledonian Rec. Pub. Co. v. Walton*, 573 A.2d 296, 301 (Vt. 1990) (ordering disclosure of names of persons cited or arrested and charges against those persons and stating “we have recognized a broad common law right of access to public records ‘when not detrimental to the public interest’” (quoting *Matte v. City of Winooski*, 271 A.2d 830, 831 (Vt. 1970))); *Houston Chron. Pub. Co. v. City of Houston*, 531 S.W.2d 177, 186 (Tex. Civ. App. 1975) (finding right of access to arrest sheets and stating that “the press and the public have a constitutional right of access to information concerning crime in the community, and to information relating to activities of law enforcement agencies”). The Supreme Court of Pennsylvania explained some of the policy reasons for requiring public access to arrest warrants and their supporting affidavits:

[F]rom a policy standpoint, public inspection of arrest warrant affidavits would serve to discourage perjury in such affidavits, would enhance the performance of police and prosecutors by encouraging

government power is first brought to bear on individual liberty, transparency at this stage functions not only as an accountability mechanism but also as a safeguard of constitutional rights. As the Alaska Supreme Court aptly remarked, “There is perhaps no more compelling justification for public access to documents regarding citizen complaints against police officers than preserving democratic values and fostering the public’s trust in those charged with enforcing the law.”³⁵⁸

To be sure, the scope of a First Amendment right of access to information about arrests will need to be worked out. The public cannot have access to every record maintained in a police department’s files, nor can it demand transparency for every action taken by law enforcement officers. Decisions about when and how the public may observe or receive information about law enforcement operations, including arrests and investigative practices will require careful calibration. The implementation of a right to know must account for legitimate concerns about privacy, safety, and effective law enforcement.

Like all constitutional rights, a First Amendment right to know would be limited in scope and subject to exceptions where secrecy interests are sufficiently weighty.³⁵⁹ Drawing these lines will sometimes be challenging, but it is not a novel or insurmountable task. Courts have been doing it for more than forty years in adjudicating First Amendment access claims to judicial proceedings and records.³⁶⁰ Indeed, the Supreme Court’s

them to establish sufficient cause before an affidavit is filed, would act as a public check on discretion of issuing authorities thus discouraging erroneous decisions and decisions based on partiality, and would promote a public perception of fairness in the arrest warrant process.

Commonwealth v. Fenstermaker, 530 A.2d 414, 418 (Pa. 1987).

³⁵⁸ Jones v. Jennings, 788 P.2d 732, 738 (Alaska 1990).

³⁵⁹ I have written extensively about the vast amount of private and sensitive information in court 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 records); Ardia, *supra* note 133, at 912–16 (describing how courts evaluate privacy interests in the context of disputes over public access to court proceedings and records); Ardia, *supra* note 242, at 1390–1400 (examining privacy interests raised by online access to courts records).

³⁶⁰ See Ardia, *supra* note 133, at 851–80. Courts could also look to litigation over the Freedom of Information Act (FOIA) as a guide, particularly its nine categories of exemptions, including those for records compiled for law enforcement purposes. 5 U.S.C. § 552(b)(1)–(9). FOIA’s long history of litigation provides a substantial body of case law that courts can draw on in shaping and applying exceptions to a First Amendment right to know. See Ardia, *supra* note 242, at 1408–41

judicial access cases already provide a principled framework, requiring that restrictions on access be “essential to preserve higher values”³⁶¹ or “necessitated by a compelling governmental interest.”³⁶² In practice, these formulations amount to strict scrutiny—a familiar and well-tested standard for evaluating the government’s asserted need for secrecy.

As the preceding discussion has demonstrated, the experience and logic test strongly supports the recognition of a First Amendment right of access to arrest information. Although this is only one illustration of how the experience and logic test can be applied, it shows that the test provides a principled and workable framework for extending the First Amendment right of access beyond judicial proceedings. It also shows that the constitutional principles supporting a First Amendment right of access are not limited to the courtroom. Rather, they extend to a broad range of governmental functions that benefit from public oversight and are integral to self-government.³⁶³

CONCLUSION

The claim that the First Amendment imposes no limits on government secrecy, as suggested in *Houchins v. KQED* and *Los Angeles Police Department v. United Reporting Publishing Corp.*, poses a grave threat to our democracy. The government’s attempt to invoke these precedents to hide its actions in response to BLM protests underscores the urgency of addressing this misreading of the Supreme Court’s First Amendment jurisprudence. A close examination of these cases reveals that the Court never intended to establish a categorical rule foreclosing a First Amendment right of access to government information. On the contrary, the Court’s access jurisprudence—particularly the recognition of a First Amendment right to attend criminal proceedings—confirms that government secrecy can implicate

(discussing how courts have addressed privacy issues in the context of public access to court records).

³⁶¹ 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. at 510)).

³⁶² *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.”).

³⁶³ See *supra* notes 264–266 and accompanying text.

core constitutional values when the state seeks to shield its actions from public view.

The logic of the Supreme Court's judicial access cases extends well beyond the courtroom to support a broader First Amendment right to know about the government. This right is particularly important in the context of law enforcement, where transparency is necessary to hold the government accountable for the exercise of its police power and to prevent abuses of other constitutional rights. A right of access to information about arrests, including basic facts such as the identity of the arrestee, the specific charges, the time and location of the arrest, and the names of the involved officers, aligns with the long history of public participation in the criminal justice system and empowers citizens to scrutinize and evaluate the state's use of force and coercion.

Some will argue that recognizing a First Amendment right to know about the government is both inadvisable and unworkable, contending that government transparency presents an intractable political question; that judges lack the competence to evaluate competing claims of transparency and secrecy; and that such recognition would paralyze government operations, rendering them incapable of functioning efficiently.³⁶⁴ It is important to note, however, that many of these arguments were advanced in opposition to the Freedom of Information Act (FOIA) when it was first enacted.³⁶⁵ Yet, history has demonstrated that public access to government information has not brought government to its knees. On the contrary, transparency has produced significant benefits, including enhanced governmental accountability, more informed and effective policymaking, increased government efficiency, and reduced corruption.³⁶⁶

³⁶⁴ See Ardia, *supra* note 27, at 30–50 (discussing the primary criticisms of a constitutional right to know).

³⁶⁵ 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 Att’y Gen. of the United States) (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”).

³⁶⁶ See Ardia, *supra* note 27, at 49–50.

Anchoring a right of access to government information in the First Amendment would not only reinforce these benefits but, most importantly, would help restore public confidence in American democracy by affirming that the people maintain ultimate authority over their government and that government actions are subject to meaningful public scrutiny.

Recognizing a right to know about law enforcement practices is not a novel expansion of First Amendment protections but rather a reaffirmation of the longstanding tradition of transparency and accountability in policing and the criminal justice system generally. Without access to information about arrests, citizens are denied the information they need to evaluate the government's use of force, detect arbitrary or discriminatory policing, and hold their government to the promise of equal justice under the law. A democracy cannot function if the people are kept in the dark about how their most powerful officials exercise their authority. Recognizing a First Amendment right to know about policing practices is not only consistent with constitutional principles, it is essential to preserving them.

Public access to arrest information is just one example of how a right to know can extend beyond judicial proceedings, but it demonstrates that the Supreme Court's experience and logic test provides a principled and workable framework for recognizing a broader First Amendment right of access to government information. My aim here is not to resolve every question that may arise in implementing such a right, but rather to clear away the doctrinal obstacles that have for too long obscured the core values of the First Amendment. By doing so, I hope to provide courts and scholars with a foundation for developing a principled body of precedent supporting the public's right to know about their government. Rejecting the claim that the First Amendment imposes no limits on government secrecy is a critical first step.