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RICHMOND NEWSPAPERS AND THE FIRST AMENDMENT
RIGHT OF ACCESS

by

GEORGE W. KELLY*

FOR SOME YEARS a number of scholars have proposed the existence of a right of access to governmental information. They claim that the people possess a constitutional right to know of their government's activities. Although the Constitution does not explicitly define this right, commentators have suggested the first amendment implicitly guarantees it.

The issue of public access is basic to a system of government. Denying access establishes the government as a body independent of the people, and with a right to its own privacy. Acceptance of the right requires the government to act as an extension of the people, without authority of its own. Proponents of access note that the foundation of the American constitutional system of government is the assumption that all governmental power originates in the people. The government possesses only that authority which the people have given to it.

It is difficult to conceive how there could be no right of access to at least some information. Surely, the government could not refuse to publicize the winners of a presidential election, the passage of a constitutional amendment, or a declaration of war. Yet such results are possible in the absence of a right of access. The question is not whether the right exists, but to what extent it is guaranteed.

The Supreme Court partially accepted the right in Richmond Newspapers, Inc. v. Virginia. In Richmond, the Court declared a first amendment right of access to criminal trials. The Court upheld access largely because it furthers the purposes of the trial and because trials historically have been

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2The Constitution clearly does not enumerate all rights that the people possess. The Supreme Court has recognized a number of guarantees that the Constitution does not define explicitly. See, e.g., Estelle v. Williams, 425 U.S. 501 (1976) (presumption of innocence); Shapiro v. Thompson, 394 U.S. 618 (1969) (right to interstate travel); Griswold v. Connecticut, 381 U.S. 479 (1965) (right to privacy); NAACP v. Alabama, 357 U.S. 449 (1958) (right of association).

3A literal interpretation of the first amendment would restrict its guarantees to only the protection of speech and of the press. But free speech can hardly exist if the state denies access to its activities. The first amendment does not exist to give the public the freedom to discuss the weather or the latest sports events. The public has no need for protection of this kind. The amendment was passed "to protect the free discussion of governmental affairs." Mills v. Alabama, 384 U.S. 214, 218 (1966). No public criticism of government can take place if the government controls the information about itself.


448 U.S. 555 (1980).
Although the Court appears to be split on whether the right covers both trials and information, the rationale used by the majority can be extended equally well to either. This paper argues that the Court's reasoning in Richmond provides a basis for a first amendment right to governmental information. Just as openness benefits the trial process, it further enhances the operation of government. To the extent that history justifies trial access, it also provides support for open information. As the Supreme Court has yet to decide the exact nature of the public's right of access to trials, this paper makes no effort to define precisely the extent of the right to information. It simply assumes that enough similarities exists between the two allowing a valid comparison. And it suggests that what the Court has done for one, it also should do for the other.

I. THE RIGHT OF ACCESS BEFORE RICHMOND

Before Richmond, there were no Supreme Court cases directly recognizing a first amendment right of access to governmental information. Dictum might have allowed either conclusion. On the one hand, are remarks by Chief Justice Warren, who wrote that the first amendment "does not carry with it the unrestrained right to gather information." On the other hand, is a series of cases suggesting a right to "receive information." As the Court stated in Red Lion Broadcasting Co. v. FCC:

It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . . . [T]he right of the public to receive suitable access to social, political, esthetic, moral, and other ideas . . . . [M]ay not constitutionally be abridged . . . .

The most relevant decisions dealt with access to prisons, but even these did not specifically address the first amendment issue. In each case the government had imposed only a restriction on access, not a complete ban. Thus, the
constitutionality of total exclusion never was addressed. Instead, the Court rested its decisions largely on the availability of alternative means of access.\(^\text{12}\)

*Houchins v. KOED, Inc.*\(^\text{13}\) is the most recent of these cases. At issue was a request by the media to bring sound recording equipment and cameras into a county jail. Regularly scheduled tours already were available, but prison officials had prohibited the use of photographic equipment and tape recorders. In a 4-3 vote,\(^\text{14}\) the Court denied access. It noted that the press was free to interview former inmates, visitors to the prison, public officials, institutional personnel, and those giving legal assistance to the prisoners. Three members of the Court found “no discernible basis for a constitutional duty to disclose.”\(^\text{15}\) An equal number of dissenters reached the opposite conclusion by stating, “Without some protection for the acquisition of information, . . . the process of self-governance contemplated by the Framers would be stripped of its substance.”\(^\text{16}\)

Dictum aside, the prison cases make one point clear. The government has no duty to grant the particular kind of access that the public may desire. If the public has at least one reasonable means of learning of prison conditions, it may not demand another. This result is hardly surprising. The Court has long accepted the government’s power to regulate the “time, place and manner”\(^\text{17}\) of public speech. One can assume that information would receive the same treatment.\(^\text{18}\)

**II. RICHMOND AND ITS AFTERMATH**

The issue in *Richmond* was whether the first amendment guarantees the public access to a criminal trial. The sixth amendment right, which according to the Court does not inhere in the public\(^\text{19}\) was not in dispute; the defendant himself had requested the public’s exclusion. Seven of the Justices recognized the existence of a first amendment right. An eighth undoubtedly would have concurred had he participated in the decision.\(^\text{20}\) Beyond a mere statement of

\(\text{\textsuperscript{12}}\)For a more complete discussion of these cases see Note, *Press Access to Government-Controlled Information and the Alternative Means Test*, 59 Tex. L. Rev. 1279 (1981).

\(\text{\textsuperscript{13}}\)438 U.S. 1 (1978).

\(\text{\textsuperscript{14}}\)Houchins had no majority opinion. Justices Burger, White and Rehnquist joined in an opinion denying access. Justice Stewart, in a separate opinion, concurred in the judgment. Justices Stevens, Powell and Brennan dissented.

\(\text{\textsuperscript{15}}\)438 U.S. at 32.

\(\text{\textsuperscript{16}}\)Id. at 32 (Stevens, Brennan and Powell dissenting).

\(\text{\textsuperscript{17}}\)See, e.g., Grayned v. City of Rockford, 408 U.S. 104, 116 (1972); Cox v. Louisiana, 379 U.S. 559, 573 (1965).

\(\text{\textsuperscript{18}}\)This assumption finds specific support in Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978). In *Nixon*, a broadcaster sought copies of the Nixon White House Tapes. These had already been admitted as evidence and were accessible in transcript form. The Court found no first amendment right to the tapes themselves because the press already had access to their contents.


\(\text{\textsuperscript{20}}\)Justice Powell took no part in deciding *Richmond*. But he had previously indicated in Gannett Co. v.
the holding, a thorough analysis of *Richmond* is difficult because the Court gave no majority opinion. *Richmond* includes a plurality opinion, five concurrences and a dissent. The failure of the Court to write a majority opinion, and the apparent lack of agreement are misleading, however. Most of the Justices appear to have granted access for substantially the same reasons.

Social policy played a major role in the decision. The plurality\(^2\) claimed openness to be an “indispensable attribute”\(^2\) of a trial. They considered it a necessary check on misconduct and found it to promote fairness, honesty, and a lack of partiality. Perhaps more important is the decision’s therapeutic effect. A people that witnesses its government working will less likely question its actions. Secrecy encourages the public to take government into its own hands. “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.”\(^2\)

Justices Brennan and Marshall reach a similar conclusion in their concurring opinion. They thought openness furthered “the particular purposes of the trial,”\(^2\) including fairness and accurate factfinding. In line with the plurality, they felt openness operated as a check on the “possible abuse of judicial power.”\(^2\) They also stressed the importance of maintaining public confidence in the judicial system. “Closed trials breed suspicion of prejudice and arbitrariness, which in turn spawns disrespect for law.”\(^2\)

Justices Brennan and Marshall went well beyond access to trials, however in their discussion. They emphasized the “structural” role the first amendment plays in fostering self-government.\(^2\) According to this analysis, the first amendment is linked to the process of communication necessary for the survival of democracy. Implicit in this process is “the principle that debate on public issues should be uninhibited, robust, and wide-open.”\(^2\) But much more is at issue than free speech. The structural model entails solicitude for the conditions of meaningful communication. There can be no public debate unless the speaker is informed. This does not mean that information of every kind must be distributed to all who desire it. Some information has little to do with participation in self-government. “[W]hat is crucial in individual cases is whether access to a particular government process is important in terms of that very process.”\(^2\)

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\(^1\) DePasquale, 443 U.S. 368 (1979) that he considered the press to have a first amendment right of access to criminal trials. *Id.* at 397-98.

\(^2\) The plurality consisted of Justices Burger, Stevens, and White.

\(^2\) U.S. at 569.

\(^2\) *Id.* at 572.

\(^2\) *Id.* at 593.

\(^2\) *Id.* at 596 (quoting from In re Oliver, 333 U.S. 257, 270 (1948)).

\(^2\) *Id.* at 595.

\(^2\) *Id.* at 587.

\(^2\) *Id.* (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

\(^2\) *Id.* at 589.
The social benefits of access apparently influenced the concurrences of Justices Stewart and Blackmun as well. Stewart, who opposed access in *Houchins*, noted that the public's presence at trial "serves to assure the integrity of what goes on." Justice Blackmun elaborated further, "The public has an intense need and a deserved right to know about the administration of justice in general; . . . about the conduct of the judge, the prosecutor, defense counsel, police officers, other public servants, and all the actors in the judicial arena . . . ."

Social policy was only one facet of the Court's rationale. The long history of open trials additionally influenced the Court. The plurality noted that openness was the normal practice in England even before the Norman Conquest, that it continued through the Middle Ages, and that the American colonists required it in their early constitutions. Because "trials both here and in England" have "long been presumptively open," there is a strong suggestion that the Constitution, at least implicitly, guarantees the right.

The concurring opinions are in agreement. Justices Brennan and Marshall discussed the history of guaranteeing the accused a public trial. They concluded that a public trial "has its roots in our English common law heritage" and was "inherited by the English settlers in America." Justice Stewart noted that "a basic presupposition of the Anglo-American legal system [is] that trials shall be public." And Justice Blackmun found it "gratifying . . . to see the Court . . . looking to and relying upon legal history."

Two years after *Richmond, Globe Newspaper Co. v. Superior Court*, gave the Supreme Court a second opportunity to address the issue. In dispute was the constitutionality of a Massachusetts statute requiring the closure of trials involving sexual crimes against minors. The Court, relying on *Richmond*, struck down the statute. While admitting that the state's interest in safeguarding the psychological well-being of a minor was compelling, it viewed mandatory closure to be unjustified. Instead, it insisted that the trial court review each case individually to determine whether exclusion of the public would actually prevent injury. Not all victims require trial closure, and the statute failed to distinguish among them.

*Id.* at 600.

*Id.* at 604. In his dissent in *Gannet Co. v. Despasquale*, 443 U.S. 368 (1979), Justice Blackmun gave a much lengthier appraisal of the merits of open trials.

448 U.S. at 564-69.

*Id.* at 569.

*Id.* at 589 (quoting *In re Oliver*, 337 U.S. 257, 266 (1948)).

*Id.* at 590.

*Id.* at 599.

*Id.* at 601. Justice Blackmun, in his dissent in *Gannet Co. v. Depasquale*, 443 U.S. 368, 406 (1979), also gave an extended historical discussion of trial access.

Globe does much to clarify Richmond. Unlike its predecessor, it has a majority opinion. As part of its decision, the Court gave a fresh statement of its reasoning in Richmond. It stated that trial access is guaranteed because it is necessary for the trial's functioning and because the government has always granted it. Moreover, the Court hinted at the possibility of extending the right of access to include information. It again noted the first amendment's role in fostering public discussion of government and emphasized the need for that discussion to be informed. It further stated:

[T]he Framers were concerned with broad principles, and wrote against a background of shared values and practices. The First Amendment is thus 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.

The holdings in Richmond and in Globe concerned only access to trials. But the reasoning of the Court in these two cases would seem applicable to other governmental processes. Justice Stevens, speaking of Richmond, said "[t]his is a watershed case." As such, it creates the possibility of a more expansive ruling. If governmental information reasonably can be likened to trials, there would appear to be grounds for an extension of Richmond. A comparison of the two is in order.

III. THE NEED FOR INFORMATION

A careful review of Richmond pinpoints three distinct policy arguments to support its granting of trial access. These are: furthering "the particular purposes of the trial"); serving to check the "possible abuse of . . . power"; and creating "public acceptance of both the process and its results." There is little doubt that open governmental information achieves much these same ends.

The "particular purpose" of democratic government is to enact those policies most beneficial to the people it represents. Government is not omniscient, and it is rarely self-evident what these policies are. Informed public discussion of governmental affairs is required to ensure that the people's representatives know the needs of their constituency. It is also needed to guarantee that they are not lax in carrying out that mandate. That such discussion might sometimes be critical serves only to underscore its importance. A

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9Id. at 605-66.
10Id. at 604.
11448 U.S. at 482 (concurring opinion).
12Id. at 593 (Brennan, J., concurring).
13Id. at 596 (quoting In re Oliver, 333 U.S. 257, 270 (1948)).
14Id. at 571.
15"Locke expressed this sentiment by noting that laws "ought to be designed for no other end ultimately but the good of the people." J. LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT 63 (L. DeKoster ed. 1978).
government is least likely to release potentially controversial, information and it is this very information that needs most to be publicized.

Much more is at stake than simply allowing criticism of some randomly selected governmental program. Wise policy is seldom formulated in a vacuum; public debate is an effective testing ground. One who seeks knowledge "must hear all sides of the question, consider all alternatives, test his judgment by exposing it to opposition, and make full use of different minds." This is comparable to the factfinding responsibilities of the trial court. We prefer not to trust the viewpoint of one judge, but defer to the collective opinion of twelve. Instead of following the policy advocated by a handful of governmental officials, it would seem wiser to seek the advice of the millions of concerned citizens.

In addition to aiding honest officials in formulating wise policy, open information helps prevent abuse by dishonest representatives uninterested in seeking the public good. The founding fathers were greatly concerned with the possibility of governmental corruption and set up a system of restraints to deal with it. As the ultimate check, they provided that both the executive and the legislative branches of government would continually have to seek reelection and would be potentially subject to impeachment proceedings. The first amendment clearly protects the right to reveal misconduct publicly, but the exercise of that right requires information. It is indeed a rare person who will willingly expose his own wrongdoing.

Publicity does far more than prevent the reelection of corrupt officials. It enables peer pressure to work. Observers have noted that "a witness may frequently depose that in private, which he will be ashamed to testify in a public and solemn tribunal." Similarly, fear of disgrace will prompt government to act. Perhaps this is why the Supreme Court has said that "informed public opinion is the most potent of all restraints upon misgovernment."

Public acceptance of the governmental process was the third of Richmond's concerns. Secrecy fosters suspicions of arbitrariness and abuse. Openness furthers understanding and encourages acquiescence. Free and informed debate also serves to direct societal unrest and dissension into an appropriate forum. Conflict within any society is inevitable, but it need not be destructive.

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4T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6-7 (1970). Emerson sees free expression as essential for advancing knowledge. Noting how frequently societal views prove to be erroneous, he argues that only through vigorous debate can society sift out that which is true, partially correct, or completely false. Thus, open discussion becomes crucial to the formulation of wise social policy.

46 Originally, resort was had not to a jury but to all the freemen in the community, who were required by law to attend. 448 U.S. at 565.


493 W. BLACKSTONE, COMMENTARIES 373 (1765), quoted in Richmond, 448 U.S. at 597 (Brennan, J., concurring).

"[S]uppression of discussion makes a rational judgment impossible, substituting force for reason.\(^5\) Discussion "attempts to avoid resort to force or violence by channeling this conflict into the area of expression and persuasion."\(^6\) A people that resolves disputes by persuasive means is more likely to achieve stability and cohesion. It may grow, evolve and ultimately profit from the diversity of ideas that dissenters provide. A society that restricts communication or information will stagnate. Moreover, dissidents may eventually turn to insurrection.\(^3\)

The founding fathers were not ignorant of the need to gain public acceptance of government. They had, after all, helped to ferment their own revolution. They undoubtedly were familiar with the role that arbitrariness and abuse of power have in creating unrest. But they were also aware of the need to be open about the governmental process. Thomas Jefferson, commenting upon Shays's Rebellion,\(^4\) wrote:

> The way to prevent these [errors] of the people is to give them full information of their affairs thro' [sic] the channel of the public papers, and to contrive that these papers should penetrate the whole mass of the people. The basis of our governments being the opinion of the people, the very first object should be to keep that right . . . .\(^5\)

That the people might be unwilling "to accept what they are prohibited from observing"\(^6\) is hardly surprising. Ours is a government that rightfully belongs to the citizenry; ever since the Declaration of Independence, it has derived its power "from the consent of the governed."\(^7\) It was "THE

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\(^{5}\) T. Emerson, supra note 46 at 7.

\(^{6}\) Id. at 11.

\(^{5}\) These views are more fully expounded in the writings of Thomas Emerson. See T. Emerson, supra note 46 at 6-7. Emerson does not seek to avoid conflict completely, but merely to direct it into the realm of discussion. He argues that to suppress conflict by artificial means will not eliminate it. Instead it may destroy the stability and cohesiveness of the community. Moreover, restrictions on communication promote inflexibility and stultification. Society will be unable to grow and to adjust to changing circumstances. At the same time, the real problems confronting the community may remain hidden. Free discussion thus allows conflict to promote positive change rather than destruction. See id. at 7.

\(^{4}\) Shays's Rebellion, which occurred in Massachusetts in 1786-87, was an armed uprising of debtor farmers. See S. Morison & H. Commager, The Growth of the American Republic 275-76 (4th ed. 1951).

\(^{5}\) Letter from Thomas Jefferson to Edward Carrington (Jan. 16, 1787), reprinted in The Papers of Thomas Jefferson 49 (J. Boyd ed. 1955). Similar sentiments are found elsewhere. James Madison wrote: "A popular government, without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy; or perhaps both. Knowledge will forever govern ignorance. And a people who mean to be their own governors, must arm themselves with the power which knowledge gives." Letter from James Madison to W.T. Barry (Aug. 4, 1822), reprinted in 9 The Writings of James Madison 103 (G. Hunt ed. 1910). Patrick Henry said:

> The liberties of a people never were, nor ever will be, secure, when the transactions of their rulers may be concealed from them . . . [T]o cover with the veil of secrecy the common routine of business, is an abomination in the eyes of every intelligent man, and every friend to his country.

3 Debates in the Several State Conventions on the Adoption of the Federal Constitution 170 (J. Elliot ed. 1901).

\(^{6}\) Richmond, 448 U.S. at 572.

\(^{7}\) The Declaration of Independence para. 2 (U.S. 1776). The idea that government derives its authority from the people is at least as old as John Locke. See J. Locke, supra note 45. According to Locke, all individuals
PEOPLE" who did "ordain and establish" the Constitution. Moreover, it was the people who reserved to themselves all "powers not delegated to the United States." Nowhere in the Constitution is the government given authority to withhold information. On the contrary, the first amendment suggests the opposite conclusion.

Governmental information thus belongs to those who formed the government. There can be no "right" to deny access, for the government, as the servant of the people, has no rights in and of itself. It properly has only duties and responsibilities. Benjamin Franklin stated it as follows:

The Administration of Government is nothing else but the Attendance to the Trustees of the People upon the Interest and Affairs of the People: And as it is the Part and Business of the People, for whose sake alone all publick Matters are, or ought to be transacted, so it is the Interest, and ought to be the Ambition, of all honest magistrates, to have their Deeds openly examined, and publicly scan'd [sic] . . .

IV. THE HISTORICAL OPENNESS OF INFORMATION

Just as the common law provided access to trials, so did it guarantee a right to inspect the public records. This right "antedates the Constitution," and has received explicit recognition by the Supreme Court. Originally, inspection was limited to those having a proprietary or evidentiary interest in a document. American decisions have since altered this rule. Sufficient inter-
est has been found, for example, in a citizen’s desire to keep track of county expenditures, or to ensure the uniform application of a town ordinance. Some courts have been satisfied with “motives of curiosity merely.” In any case, it seems apparent that wherever access is necessary for the people to participate effectively in self-government, the requisite degree of interest is present.

What is less clear is the scope of the “public records.” As a general rule, documents kept by officials pursuant to statute or even those “necessary and appropriate to the proper discharge of the duties of the office” are public. These have included the records of the governor’s office, of the town clerk, of a post-office, and of a county treasurer; poll books, books kept by a sheriff, by town selectmen, and by a militia company. Also considered public have been documents relating to the meetings of city councils, of county commissioners, of school directors, and of municipal boards. In more recent times, the definition often has been set out by statute. The Louisiana Public Records Act of 1940, for example, stated the following:

[All records, writings, accounts, letters and letter books, maps, drawings, memoranda and papers, and all copies or duplicates thereof and all photographs or other similar reproductions of the same, having been used, being in use, or prepared for the use in the conduct ... of any business ... under the authority ... of the State are hereby declared to be public.]

The common-law right of inspection was supplemented by constitutional and statutory provisions mandating access. Article one of the U.S. Constitution requires that Congress “keep a Journal of its Proceedings and from time to time publish the same.” It further specifies that Congress shall publish a

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6State v. King, 154 Ind. 621, 57 N.E. 535 (1900).
8O’Hara v. King, 51 Ill. 303, 305 (1869).
924 AMERICAN & ENGLISH ENCYCLOPEDIA OF LAW 170 (2d ed. 1903).
10State v. Peele, 125 Ind. 515, 24 N.E. 440 (1890).
14Phelps v. Schroder, 26 Ohio St. 549 (1875).
15Albrecht v. State, 62 Miss. 516 (1885).
16Thornton v. Campton, 18 N.H. 20 (1845).
17Thorn v. Case, 21 Me. 393 (1842).
18Weith v. Wilmington, 68 N.C. 34 (1873).
21Fruin-Bambrick Construction Co. v. Geist, 37 Mo. App. 509 (1889). The above list is far from complete. See 24 AMERICAN & ENGLISH ENCYCLOPEDIA OF LAW, supra note 68, at 170-75.
23U.S. CONST. art. I, § 5, cl. 3. The full quotation is as follows: “Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require
“regular Statement and Account of the Receipts and Expenditures of all Public Money.” In 1789, when the first congress sat, it controlled all but a few aspects of the new government. Publication of the congressional journals and expenditures disclosed a great deal of information. Even if the executive and judicial branches had chosen to keep their affairs secret, little government would have been hidden from the purview of the people.

Even before the adoption of the federal constitution, a number of states constitutionally granted access to the journals of their legislatures. Some states additionally required the opening of the legislature’s meetings. By 1819, over two-thirds of the state constitutions required some form of access to the legislative process. The Pennsylvania Constitution of 1776 contains a representative clause:

To the end that laws before they are enacted may be more maturely considered, and the inconvenience of hasty determinations as much as possible prevented, all bills of public nature shall be printed for the consideration of the people, and except on occasions of sudden necessity, shall not be passed into laws until the next session of assembly; and for the more perfect satisfaction of the public, the reasons and motives for making such laws shall be fully and clearly expressed in the preambles.

The U.S. Congress did not stop with the publication of its journals. In 1813, it enacted the following statute:

That of the public journals of the Senate and of the House of Representatives, of the present and every future congress, and of the documents published under the orders of the Senate and of the House of Representatives respectively . . . , there shall be printed two hundred copies beyond the number usually printed . . . , one copy to each university and college in each state . . . .

This unobtrusive act permitted public access to the long series of documents and reports that Congress has published to this day. From the beginning, these have revealed a surprising amount of information. A sampling from some of the earlier documents includes diplomatic

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correspondence, the proceedings of courts-martial, statistics on fortifications, the annual report of the Commissioner of the General Land Office, and a statement of commercial regulations with Prussia. Though published by Congress, these documents have contained much information otherwise under the control of the executive departments. While Congress admittedly has sometimes refused to publish documents requiring secrecy, the congressional record of publication goes a long way towards establishing a presumption of open government.

In addition to requiring publication of information, Congress has statutorily decreed that the government keep certain records open. Such statutes have grown more numerous with the expansion of government and have culminated in the 1966 Freedom of Information Act. That statutes do not cover all records does not mean the government has denied the public access to them. More likely, it is a reflection on the lack of public demand for the records or on their unquestioned availability. When Congress has intended to deny access to fulfill some important state objective, it has generally done so explicitly.

Just as the federal government opened itself up further than the Constitution mandates, so did the state governments. Statutes disclosing various kinds of records are numerous, are found in every state, and span every decade. Typical of these is the 1799 Pennsylvania law providing for the publication of county expenditures, the 1824 Illinois act requiring the printing of public accounts in the newspapers, or the 1851 Massachusetts statute opening all city and county records. As government has increased in size, the degree of access has grown correspondingly. State agencies, where much of the growth in

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91H.R. Doc. No. 150, 18th Cong., 1st Sess. 2 (1824).
93S. Doc. No. 1, 19th Cong., 2d Sess. 2 (1827).

1001824-25 Ill. Laws 70.
1011851 Mass. Acts 656. There are many more examples. The following is a list of some from the nineteenth century: 1804 Ohio Laws 344 (surveys public); 1825 Mo. Laws 683 (accounts of sheriffs, clerks and others open for inspection); 1838-39 Iowa Acts 108 (county accounts published in newspaper); 1849-54 N.H. Laws 816 (meetings of city's common council open); 1851 Cal. Stat. 322 (books of county supervisors open); 1858
government has taken place, now permit access to their meetings in every state in the union.\textsuperscript{102}

Admittedly, the common law, the constitutions, and federal and state statutes have not granted access to all governmental information throughout American history. But \textit{Richmond} did not require a tradition of openness without exceptions. The plurality spoke in terms of a "presumption of openness."\textsuperscript{103} Just as government has sometimes withheld information, so has it barred the public from attendance at trials. Judges have closed their courtroom doors to keep order,\textsuperscript{104} to avoid embarrassing a witness,\textsuperscript{105} or to limit the audience to the expected recitation of "sordid" testimony.\textsuperscript{106} Some states have constitutionally\textsuperscript{107} or statutorily\textsuperscript{108} allowed the closure of trials for specified crimes. At least two states have permitted exclusion of the general public in any criminal proceeding.\textsuperscript{109} Where parties have questioned closure, courts generally have concerned themselves only with upholding the sixth amendment's protection of the accused.\textsuperscript{110} They have not always mentioned the right of the public; sometimes they have openly denied it.\textsuperscript{111}

The Supreme Court is not ignorant of these exceptions. \textit{Globe} involved a rape trial, and that is precisely the kind of trial that historically has been closed. Despite the dissenting argument of Justices Burger and Rehnquist, that

\textsuperscript{102}Minn. Gen. Laws 205 (county board of supervisors to hold open meetings); Iowa Code § 698 (1860) (all public records open); 1861 Ill. Laws 238 (books of county supervisors open); 1863-64 Idaho Sess. Laws 525 (books of county commissioners open); 1872 Cal. Stat. \textit{reprinted in} Cal. Civ. Proc. Code § 1892 (West 1955) (all public records open); Arizona statute of 1877, \textit{reprinted in} \textit{THE COMPILED LAWS OF THE TERRITORY OF ARIZONA}, 1864-77, 65 (J. Hoyt 1877) (books of county supervisors open); 1881 N.Y. Laws 710 (all county and city records open); Nebraska Stat., \textit{reprinted in} State v. Meeker, 19 Neb. 105, 26 N.W. 620 (1886) (all public records open).

\textsuperscript{103}See J. ADAMS, \textit{STATE OPEN MEETINGS LAWS: AN OVERVIEW} 14 (1974). Adams claims access exists in all states except Mississippi, New York, and West Virginia. In 1974, these states had no open meetings law of any kind. Since then, all three have passed such legislation.

\textsuperscript{104}448 U.S. at 573.

\textsuperscript{105}Stone v. The People, 2 Scammon 326 (Ill. 1840) (courtroom cleared and doors locked because of noise); State v. Scruggs, 165 La. 842, 116 So. 206 (1928) (courtroom cleared on account of disorder).

\textsuperscript{106}Grimmett v. State, 22 Tex. Crim. 36, 2 S.W. 631 (1886) (courtroom cleared because of laughter).

\textsuperscript{107}People v. Swafford, 65 Cal. 223, 3 P. 809 (1884) (public excluded because case involved the abduction of a minor for purposes of prostitution); Benedict v. People, 23 Col. 126, 46 P. 637 (1896) (public excluded during sodomy trial); State v. Nyhus, 19 N.D. 326, 124 N.W. 71 (1909) (public excluded during a rape trial); In re United Press Ass'n v. Valente, 308 N.Y. 71, 123 N.E.2d 777 (1954) (public excluded during a trial for prostitution).

\textsuperscript{108}See, \textit{e.g.}, ALA. CONST. art. VI, § 169; MISS. CONST. art. III, § 26.

\textsuperscript{109}One listing includes statutes from Colorado, Georgia, Idaho, New York, North Dakota and Utah. See J. WIGMORE, \textit{A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW} § 1835 (3d ed. 1940).

\textsuperscript{110}J. WIGMORE, \textit{supra} note 107, mentions Iowa and Virginia.

\textsuperscript{111}Courts have not considered this violative of the accused's sixth amendment right where closure has not included those persons requested by the accused. \textit{See, \textit{e.g.}}, State v. Hyhus, 19 N.D. 326, 124 N.W. 71 (1909) (jurors, officers of the court, attorneys, witnesses and any other parties requested by the accused allowed to attend).

\textsuperscript{112}\textit{See, \textit{e.g.}}, Geise v. United States, 265 F.2d 659 (9th Cir.), \textit{cert. denied}, 361 U.S. 842 (1959); In re United Press Ass'n v. Valente, 308 N.Y. 71, 123 N.E.2d 777 (1954).
history allows closure," the Court found the general presumption of trial access sufficiently strong to strike down the Massachusetts statute.

The effect of *Globe* on access to information should not be overlooked. One need not demonstrate an unbroken history of free information, but only a tradition of customary openness. Historically, government has freely disclosed most of its information. To the extent that history supplies a rationale for open trials, it provides a similar basis for access to information.

V. ACCESS COMPARED TO OTHER CONSTITUTIONAL RIGHTS

Opponents of access will note that the constitution nowhere expressly creates a right to information; if the founding fathers had wanted open government, they would have stated it explicitly. While this argument undoubtedly has caused the Court to use caution, it has never forced it into a literalist interpretation of the Constitution. The ninth amendment, after all, warns that not all rights are enumerated; and the first amendment has been found to have a very wide penumbra.

In *Pierce v. Society of Sisters*, for instance, the Court held the first amendment to guarantee the right to educate one’s children as one chooses. By *Meyer v. Nebraska*, this right was extended to include the study of German in a public school. The rationale for these decisions was that the “spirit of the First Amendment” forbids a restriction on the availability of knowledge. Similarly, in *Martin v. Struthers*, freedom of speech and of the press was held to encompass the right to distribute, to receive, and to read; also covered was the freedom of inquiry and of thought, even the freedom of the university

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112457 U.S. at 613.
113Some commentators believe that the founding fathers would have spelled out a right of access more clearly if the right had not been so evident already. Francis Lieber wrote in 1853, “The principle of publicity so pervaded all the American politics, that the framers of our constitution probably never thought of it, or if they did, they did not think it worth while to provide for it in the constitution since no one had doubted it.” H. NELSON, supra note 1, at 381. Another commentator concluded:
By 1787 . . . there had developed in England the concept of a right in the people to know what their Government was doing. There can be no doubt that the framers of our Constitution recognized the existence of such a right . . . [B]ut the right to know, like many other fundamental rights, was taken so much for granted that it was deemed unnecessary to include it.
HENNINGS, supra note 1, at 668.
114See Richmond, 448 U.S. at 579.
115The full text reads, “The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.”
117268 U.S. 510 (1925).
118262 U.S. 390 (1923).
120319 U.S. 141, 143 (1943).
community. Finally, in *NAACP v. Alabama*, the Court discerned the right to associate without interference.

Each of these decisions to some extent works to protect communication, discussion and the dissemination of knowledge. Not one was dictated by the express provisions of the first amendment. They reflect a growing and evolving understanding of the Constitution. They concern themselves less with what the framers put into the document than with what they would have inserted had they lived today.

In 1789, government was comparatively small. The House of Representatives included 65 members, the Senate only 26. The executive consisted of George Washington, John Adams, Thomas Jefferson, Henry Knox and Alexander Hamilton; there were also a dozen clerks left over from the American Confederation. The federal judiciary was made up of the Supreme Court alone. Relative to today’s standards there was no governmental information of any consequence. Moreover, to publicize it was of limited use. Even the news of the Declaration of Independence took twenty-nine days to reach South Carolina. It is hardly surprising that the framers did not explicitly provide for the publication of much more than the journals of Congress.

The incredible growth in government that has occurred in two centuries enormously complicates constitutional interpretation. Just as one cannot look to the Constitution to find the framers’ views on the use of contraception or of a blood-alcohol test, one can only guess at how much access they would grant to a government they never foresaw. The first amendment must be construed in light of present realities. At no previous time in history has government had as much impact on the life of the average citizen. Yet never before have the growth in modern communication systems and in education so enabled the people to participate actively and productively in government. Certainly the Court could summarily dismiss the right to information, for the Constitution does not expressly provide for it. But that tack would seem to contradict the course set out in *Richmond*. Moreover, it would deny a right that would seem to have at least as much basis as so many others the Court has recognized.

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125These five filled the offices of president, vice-president, and secretaries of state, war and the treasury, respectively.
1261 S. MORISON & H. COMMAGER, supra note 54 at 324.
127Id. at 304.
VI. LIMITS ON THE RIGHT

Constitutional rights are never absolute, and neither are the guarantees of the first amendment. Traditionally, the Court has always allowed government to regulate the "time, place and manner" of speech. There is no reason to think that access would receive different treatment. One may thus assume that any right to information will be influenced by administrative exigencies. Within reasonable limitations government might determine the time at which information is released, the place at which it is collected, and the medium in which it is published. Looking to the precedent established in the prison cases, it seems reasonable to conclude that whenever government has granted access in one form, it is under no duty to allow it in another.

A second limitation arises directly out of Richmond. The Court permitted trial access partly because of its role in furthering the proper functioning of government. This paper has argued that information is similarly situated. But not all information bears upon public issues. Certainly the people have no need to learn the details of the president's private life or of the personal information found in personnel files. As Justices Brennan and Marshall stated: "What is crucial in individual cases is whether access to a particular government process is important in terms of that very process." An invasion of privacy is certainly not necessary for self-government.

A third restriction concerns information important to participation in government but whose release would be harmful. In the past, abridgment of the first amendment has been deemed proper whenever the state demonstrates a "compelling interest." Globe indicated that this same test is appropriate to an evaluation of the right of access. It is not really the government's requirements that are at issue, for the government has no rights independent of the people. Rather it is the people who must benefit from nondisclosure. But so strong is their interest in obtaining information, that the need for secrecy should indeed be compelling.

It is readily apparent that some information will require withholding. There may well be a compelling interest in concealing military secrets or the details of a criminal investigation still in progress. At times, governmental officials will be faced with delicate and difficult decisions, and they will need

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130 Richmond, 448 U.S. at 600 (Stewart, J., concurring). See text accompanying note 17 supra.
131 See supra note 11.
132 Richmond, 448 U.S. at 589.
134 457 U.S. at 606-07.
135 See supra text accompanying notes 57-60.
freedom from press coverage until such time as they are ready to publicize their conclusions. It is in the best interests of the people that government function competently, and openness at times is more destructive than it is useful. What is important is that restrictions on access not be taken lightly, for they deny to the people that which is rightfully theirs.

Access guaranteed by the Constitution is a different matter from that given by the government. Public officials may generally be responsive to the rights of the people, but they inevitably will be influenced by their own interests. One who works daily with governmental information may be more ready to perceive a compelling interest in concealment than a disinterested party. By giving the right of access constitutional status, the evaluation of what constitutes compelling need is transferred to the courts. These are necessarily more objective.

The courts have always been able to weigh need with respect to other constitutional rights. There is every reason to believe they would be capable of it when dealing with information. In fact, to a limited extent, they are already involved in this kind of evaluation. The Freedom of Information Act requires the release of all federal information not explicitly excepted by it. Courts have long had to decide whether a given exception applies. Often this has been done through an in camera inspection of the material at issue. In this way the process of reviewing a governmental classification does not of itself publicize documents that rightly should be withheld.

VII. CONCLUSION

This paper has attempted to demonstrate that the same reasoning that established access to trials is equally applicable to information. Openness furthered good government, and it has done so throughout recent history. It matters not what governmental process is involved. The first amendment has never been restricted to its express terms. Rather, the Court has interpreted it to protect that communication necessary to the people's participation in self-government. There clearly are times when access must be restricted, and Richmond has not held otherwise. But such withholding should come only as an exception, for government is merely the trustee of the people. To assert its right to secrete information arbitrarily is to seek a return to the age of kings and divine right.

127  Documents falling under the exemptions include those classified by executive order, those related solely to internal personnel rules, and those exempted by statute; also within this category are trade secrets, certain agency memoranda, geological data, personnel files, and certain investigatory records. See 5 U.S.C. § 552(b)(1-9)(1976 & Supp. V 1981).
128 See, e.g., Colby v. Halperin, 656 F.2d 70 (4th Cir. 1981); Sears v. Dann, 606 F.2d 1215 (D.C. Cir. 1979).