Like Mackerel in the Moonlight: Some Reflections on Richmond Newspapers

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In Richmond Newspapers, Inc. v. Virginia, the Supreme Court of the United States held that the right of the public and the press to attend criminal trials is guaranteed under the first and fourteenth amendments. Notwithstanding Chief Justice Burger's characterization of the case as presenting a "narrow question," Richmond Newspapers may well signal the arrival of an expansive new first amendment doctrine: According to Justice Stevens, the Court "for the first time . . . unequivocally [held] that an arbitrary interference with access to important information is an abridgement of the freedoms of speech and of the press." Justice Stevens' statement may be neither a fair reading of the holding nor an accurate accounting of

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2. Id. at 580 (Burger, C.J., joined by White and Stevens, JJ.).
3. Id. at 583 (Stevens, J., concurring).
4. Justice Stevens' rendition of the holding seems considerably broader than Chief Justice Burger's statement: "We hold that the right to attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and 'of the press could be
the noses of his brethren. Still, Richmond Newspapers unquestionably breathed new life into the claim that, as a corollary to its almost unlimited protection of the freedom to speak and publish regarding the affairs of government, the Constitution embodies a judicially enforceable "right of access" or "right to gather information" in contexts other than trials.

Though commentators have noted a number of flaws in the series of opinions, many have nevertheless explicitly endorsed the result of the case. This comment offers a more skeptical, less forgiving eviscerated." Id. at 580 (citation omitted)(footnotes omitted). One student commentator concluded that "there is no support in [Chief Justice Burger's] opinion for Justice Stevens' extension." Comment, First Amendment—Constitutional Right of Access to Criminal Trials, 71 J. CRIM. L. & CRIMINOLOGY 547, 550 (1980).

5. Of the seven Justices who voted for the Richmond Newspapers result, four had previously allied themselves with a proposition contrary to that expressed by Justice Stevens. In Houchins v. KQED, Inc., 438 U.S. 1 (1978), Justices White and Rehnquist joined Chief Justice Burger's opinion, which stated that "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." Id. at 15 (Burger, C.J., joined by White and Rehnquist, JJ.). In that same case, Justice Stewart announced his view that "the First and Fourteenth Amendments do not guarantee the public a right of access to information generated or controlled by government." Id. at 16 (Stewart, J., concurring in the judgment). The Richmond Newspapers opinions of these three Justices do not explicitly contradict their prior views. Thus, it seems as likely that they would vote not to extend the right of access in contexts other than trials as that they would join Justice Stevens' confident expansion. Of course, since Justice Stewart will no longer be on the Court to decide future cases, it will be the vote of his successor that will count.

The fifth Justice in the Richmond Newspapers majority, Justice Blackmun, did not participate in Houchins. In Saxbe v. Washington Post Co., 417 U.S. 843 (1974), however, he joined Justice Stewart's opinion, id. (Stewart, J., joined by Burger, C.J., and White, Blackmun, and Rehnquist, JJ.), rather than ally himself with the dissent of Justice Powell, in which a constitutional right of access was adumbrated in terms plainly echoed by Justice Stevens in Richmond Newspapers. See 417 U.S. at 860 (Powell, J., joined by Brennan and Marshall, JJ., dissenting). Justice Blackmun's Richmond Newspapers concurrence does not explain the extent to which the Justice would agree with Justice Powell's first amendment reasoning in contexts other than trials. See 448 U.S. at 601 (Blackmun, J., concurring in the judgment).

6. Cf. 448 U.S. at 576 (whether right to attend criminal trials described as "right of access" or "right to gather information" said by Chief Justice Burger to be "not crucial")


8. See, e.g., Cox, supra note 7, at 23 (recognition of right of access "may well be essential if the first amendment is to continue to serve the basic function of keeping the people informed about their government"); The Supreme Court, 1979 Term, 94 HARV. L. REV. 75, 149 (1980) (decision "should lead to a significant and salutary recasting of much first amendment doctrine"); Note, Public Trials and a First Amendment Right of Access: A Presumption
assessment of certain aspects of the opinions, particularly those of Chief Justice Burger\(^9\) and Justice Brennan.\(^{10}\) This skepticism stems not from an inclination to devalue the contribution that open trials and an informed citizenry make to the proper functioning of our democratic institutions. It is rooted, rather, in the conviction that the Court is appropriately held accountable for more than the results of individual cases. When the result in a particular case portends significant new doctrinal developments that will necessarily expand the Court's power to review the actions of other governmental branches, both state and federal, it is fair to demand that its preferred rationales sustain a particularly heavy burden of justification.

Despite the near unanimity of the result in *Richmond Newspapers*, the Court was unable to present even the facade of a unifying rationale. Eight Justices participated in the decision;\(^{11}\) only Justice Rehnquist dissented.\(^{12}\) Of the seven Justices who voted for the result, six wrote separately.\(^{13}\) Justice Marshall alone was content to join without comment in the opinion of one of his brethren.\(^{14}\) Only he (in joining Justice Brennan) and Justices White and Stevens (in announcing their adherence to the opinion of Chief Justice Burger)\(^{15}\) were willing to join at all in the opinion of a colleague. Finally, Justice Stevens' separate concurrence,\(^{16}\) because it embraced a rationale different from that of the Chief Justice, suggests that his agreement with the Chief Justice is less than total.

Such a cacophony of judicial voices alone implies both the absence of a consensus and the presence of considerable individual intransigence among the members of the Court concerning the access question. In addition, the opinions of the Justices evidenced a disinclination either to join issue with one another on the matters that divided them or to explicate their own premises in ways responsive to

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\(^{9}\) Of Openness, 60 Neb. L. Rev. 169, 198 (1981) (Court "should be applauded" for its decision).
\(^{10}\) 448 U.S. at 558.
\(^{11}\) Id. at 584 (Brennan, J., joined by Marshall, J., concurring in the judgment).
\(^{12}\) Justice Powell did not participate. Id. at 581.
\(^{13}\) Id. at 604 (Rehnquist, J., dissenting).
\(^{14}\) Id. at 581 (White, J., concurring); id. at 582 (Stevens, J., concurring); id. at 584 (Brennan, J., joined by Marshall, J., concurring in the judgment); id. at 598 (Stewart, J., concurring in the judgment); id. at 601 (Blackmun, J., concurring in the judgment). Justices White and Stevens also joined in the opinion of the Court written by Chief Justice Burger. Id. at 558.
\(^{15}\) Id. at 584 (Brennan, J., joined by Marshall, J., concurring in the judgment).
\(^{16}\) Id. at 558.
\(^{16}\) Id. at 582 (Stevens, J., concurring).
points of view their brethren publicly found persuasive. Such disparity, while it may be justified partially by the difficulty of the question confronting the Court, generates intractable problems of interpretation and prediction for the Court's entire constituency. It thereby warrants an exploration of the various rationales offered in support of the result.

What has become, and what I refer to in these pages as, the standard rationale for a first amendment right of access to government information and facilities was first adumbrated by Justice Powell in dissent in *Saxbe v. Washington Post Co.*, and was echoed by Justice Stevens in his *Houchins v. KQED, Inc.* dissent. It proceeds essentially along the following lines: The core value protected by the first amendment is the right to participate in the process of republican self-government. Accordingly, the first amendment protects at least freedom to discuss government affairs, policies, and personnel; the freedom to discuss political issues, however, can be rendered meaningless unless discussion is based on accurate information about what government is doing, for "public debate must not only be unfettered, it must also be informed." Therefore, the first amendment includes the right of public access to governmental information and, for the purpose of acquiring information, to governmental facilities.

Surprisingly, in *Richmond Newspapers* only Justice Stevens clearly invoked this standard rationale in support of the decision. In part for this reason, and because the rationale's underlying premises and its implications have already been fully explored in the literature, but most importantly because its self-assigned task is less

17. For example, although Chief Justice Burger and Justice Brennan pursue different analytical routes to the result, neither opinion contains an explanation of the reasons why the other's premises are unacceptable. For another example, none of the six opinions in support of the result even acknowledge, much less attempt a coherent response to, the dissenting opinion of Justice Rehnquist. Professor Cox chides the Court in this regard for its failure to appreciate that "nurturing a coherent body of constitutional law is usually more important for members of the highest court than asserting individual views or staking out claims on the future." Cox, supra note 7, at 25.

18. Cf., e.g., United States v. Edwards, 430 A.2d 1321 (D.C. 1981) (first amendment provides right of access to pretrial proceedings as well as to trials, on theory that "principles that support a right of access to trials apply with equal force to pretrial proceedings," id. at 1344, but disputed by dissenting judges because "[n]o court in the land . . . has ever so ruled," id. at 1346 (Nebeker, J., concurring in part and dissenting in part)).

22. See 448 U.S. at 592 (Stevens, J., concurring).
23. See, e.g., BeVier, *An Informed Public, An Informing Press: The Search for a Con-
formidable, this article neither addresses the merits of Justice Stevens’ position nor attempts to reassess the full range of constitutional and policy issues posed by claims of access. Instead it focuses on the opinions of Chief Justice Burger and Justice Brennan. These two opinions rest on premises different both from one another and from the standard right of access rationale.

This article does not focus on the separate concurring opinions of Justices White, Blackmun, and Stewart, since none of these Justices attempted a sufficiently thorough articulation of their views to permit an informed assessment. Nor does it offer an analysis of the points raised in Justice Rehnquist’s brief dissent, except to note

24. 448 U.S. at 581-82. Justice White’s very brief opinion notes merely that, had Gannett Co. v. DePasquale, 443 U.S. 368 (1979), been decided in accordance with his views with respect to the sixth amendment, the Court would not have had to decide the first amendment issue. 448 U.S. at 581-82 (White, J., concurring). Justice Blackmun’s opinion makes a similar point, though at greater length and in a somewhat rancorous tone. The opinion refers, for example, to “the graffiti that marred the prevailing opinions in Gannett,” 448 U.S. at 601 (Blackmun, J., concurring in the judgment), and seems to chide Chief Justice Burger’s plurality opinion for invoking a “veritable potpourri” of the “other possible constitutional sources” for the public right to attend trials. Id. at 603 (Blackmun, J., concurring in the judgment). Justice Blackmun adopts the first amendment as a source of the right only as a “secondary position” and does not attempt an explanation of the rationale by which he was “driven to conclude...that the First Amendment must provide some measure of protection for public access to the trial.” Id. at 604 (Blackmun, J., concurring in the judgment). Justice Stewart, abandoning some of the implications of his Gannett opinion, see note 73 infra and accompanying text, deemed it relevant in Richmond Newspapers that “It has for centuries been a basic presupposition...that trials shall be public trials,” id. at 599 (Stewart, J., concurring), and implied his agreement with that aspect of the Chief Justice’s opinion which inferred a right to access from the fact that “a trial courtroom is a public place.” Id. (Stewart, J., concurring). The Stewart opinion, however, offers to reconcile his conclusion neither with those aspects of Gannett with which it was inconsistent nor with his own prior statement that “[t]here is no constitutional right to have access to particular government information, or to require openness from the bureaucracy.” Stewart, “Or of the Press,” 26 Hastings L.J. 631, 636 (1975).

25. Justice Rehnquist’s dissent makes three basic points. First, it implies that the opinions of Chief Justice Burger and Justice Brennan are mutually inconsistent and reflective of personal idiosyncrasies rather than legal principles. Second, it reasserts Justice Rehnquist’s view that neither the first, sixth, nor ninth amendment “requires that a State’s reasons for denying public access to a trial...are subject to any additional constitutional review.” 448 U.S. at 605 (Rehnquist, J., dissenting). Third, it chides the Court for undermining “a healthy pluralism” by assuming “all of the ultimate decisionmaking power over how justice shall be administered...in each of the 50 States”—“a task that no Court consisting of nine persons,
that one of its fundamental premises—that state autonomy is itself a value which the Court ought to have weighed in the constitutional balance—evoked no response whatsoever from any of his brethren.

**CHIEF JUSTICE BURGER’S OPINION—A FIRST LOOK**

Chief Justice Burger’s opinion, which attracted the most adherents, opens with a recitation of the history of the litigation. There had been three previous trials of one Stevenson for the March 1976 murder of a hotel manager. A fourth trial, which ended in an acquittal after the introduction of the Commonwealth’s evidence, was closed to the public on the unopposed motion of the defendant, “presumably” on the authority of a Virginia statute granting the trial judge discretion to “exclude from the trial any persons whose presence would impair the conduct of a fair trial.” Appellants, resisting the closure unsuccessfully in the trial court and in the Virginia Supreme Court, sought review in the United States Supreme Court of their asserted right to attend the trial.

Chief Justice Burger began his analysis by stressing his view that the case presented an issue of first impression. The Chief Justice then turned his attention to elaborating an historical proposition that became central to his analysis—“throughout its evolution, the trial has been open to all who cared to observe.” The elaboration consisted both of marshalling, in somewhat summary fashion, the historical evidence of a tradition of openness, and of declaiming on “the values of openness.” It described a “nexus between openness, fairness, and the perception of fairness,” discerned “significant community therapeutic” and educational value in public trials, and culminated in finding a “presumption of openness” inherent “in the very nature of a criminal trial under our system of justice.” After conceding that this presumption is not alone sufficient to meet the

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28. *Id.* at 606 (Rehnquist, J., dissenting).
29. *Id.* at 606 (Rehnquist, J., dissenting).
30. *Id.* at 560.
31. *Id.* at 606 (Rehnquist, J., dissenting).
32. *Id.* at 569.
33. *Id.* at 573.
34. *Id.* at 570.
35. *Id.* at 570.
36. *Id.* at 573.
Commonwealth's argument that "neither the Constitution nor the Bill of Rights contains any provision which by its terms guarantees to the public the right to attend criminal trials," Chief Justice Burger turned from historical exegesis to the more interesting and more difficult question of whether such a right can be found "absent an explicit provision."

The Chief Justice answered this question through a two-step analysis. The first step established a connection between the public right to attend criminal trials and the explicit guarantees of the first amendment. The second step conferred upon that connection constitutionally operative significance, if not legitimacy, by applying to it the doctrine of "unarticulated," "implicit," "fundamental" rights.

The opinion forges a dual connection between the explicit guarantees of the first amendment and the right to attend criminal trials. First, it takes note of the "common core purpose" of the amendment's "expressly guaranteed freedoms"—namely, that "of assuring freedom of communication on matters relating to the functioning of government." It states that the manner in which criminal trials are conducted is of high "concern and importance to the people" and that "[t]he Bill of Rights was enacted against the backdrop of the long history of trials being presumptively open." Based on these truisms the opinion infers that "[i]n 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." It concludes that "the First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time that Amendment was adopted."

Second, from the traditional openness of trials, and because the Court has long protected the exercise of first amendment rights in places "traditionally open," the opinion infers an "affinity" be-

37. Id. at 575.
38. Id.
39. Id. at 579-80.
40. Id. at 575.
41. Id.
42. Id.
43. Id.
44. Id. (emphasis added).
45. Id. at 576.
46. Id. at 577.
47. Id.
tween the right of access to criminal trials—"assured by the amal-
gam of the First Amendment guarantees of speech and
press"—and the right of assembly. Citing a number of public-for-
rum cases, the opinion implies that public-forum doctrine repre-
sents an appropriate analogy: "[A] trial courtroom also is a public
place where the people generally—and representatives of the me-
da—have a right to be . . . ."50

Having thus established the connection between the right of access
to criminal trials and the explicit guarantees of the first amend-
ment, the opinion proceeds to the second and final step in its consti-
tutional analysis by invoking the doctrine that "fundamental rights,
even though not expressly guaranteed, have been recognized by the
Court as indispensable to the enjoyment of rights explicitly de-
defined."51 This step is taken in two sparse paragraphs which simply
affirm the notion that "certain unarticulated rights are implicit in
enumerated guarantees."52

The ninth amendment is described in a footnote as serving "to
foreclose application to the Bill of Rights [of] the maxim that the
affirmation of particular rights implies a negation of those not ex-
pressly defined."53 The conclusion that the right to attend criminal
trials is such an implicit right is announced. The indispensability of
such a right to the enjoyment of those explicit in the first amend-
ment is then assertively defended: "[W]ithout the freedom to attend
such trials, which people have exercised for centuries, important as-
pects of freedom of speech and 'of the press could be eviscerated.'"54

In the last paragraph of his opinion, Chief Justice Burger ex-
amined the trial closure order in the Richmond Newspapers case it-
self. By declining "to define the circumstances in which all or parts
of a criminal trial may be closed to the public,"55 and strongly im-
plying that it was incumbent upon a trial judge to explore and at-
tempt to implement alternatives to closure as means to insure the

48. Id.
49. Id. at 578. The cases cited are Cox v. Louisiana, 379 U.S. 559 (1965); Cox v. New
Hampshire, 312 U.S. 569 (1941); Hague v. CIO, 307 U.S. 496 (1939); DeJonge v. Oregon,
299 U.S. 353 (1937).
50. 448 U.S. at 578.
51. Id. at 580.
52. Id. at 579.
53. Id. n.15.
54. Id. at 580 (quoting Branzburg v. Hayes, 408 U.S. 665, 681 (1972)).
55. Id. at 581 n.18.
fairness of the trial, the Chief Justice fastened on the absence of “findings to support closure” as the key flaw in the order. “Absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public. Accordingly, the judgment under review [was] reversed.”

CHIEF JUSTICE BURGER’S OPINION—A CLOSER LOOK

Chief Justice Burger’s opinion invites analysis on several grounds. In general, the opinion’s most striking feature is its tone of utter conviction, its apparent imperviousness to countervailing pressures, and its air of inexorability. In terms of the Chief Justice’s own judicial philosophy, it is remarkable that a jurist once characterized as a strict constructionist would without hesitation lend a sympathetic ear either to sociological notions as vague as an asserted need for “community catharsis,” or to constitutional arguments grounded on the rather ephemeral shoals of the ninth amendment. On a more practical level, one might be bewildered about the scope of the right of access that the opinion arguably affirmed. One might also be perplexed about the nature of, the extent of, and the means short of closure that must be used to protect any “overriding interest” that a trial judge finds himself able to articulate in findings. For purposes of this article, however, three aspects of the opinion have been selected for more extended analysis: its treatment of precedent, its use of history, and its public-forum analysis.

56. Id. at 580-81.
57. Id. at 580.
58. Id. at 581.
59. This aspect of the opinion is particularly striking not only because the arguments advanced by Chief Justice Burger in favor of the right are problematic, see notes 64-128 infra and accompanying text, but also because it ignored the powerful arguments that have been advanced in favor of a different conclusion. See, e.g., Houchins v. KQED, Inc., 438 U.S. 1, 3-16 (1978)(opinion of Burger, C.J.); BeVier, supra note 23; O’Brien, supra note 23.
60. 448 U.S. at 571.
61. Cf. Van Loan, Natural Rights and the Ninth Amendment, 48 B.U.L. Rev. 1, 38 (1968) (“even assuming the propriety of a judicial exposition of unenumerated rights, the need for a resuscitation of the ninth amendment is not established”); Note, The Uncertain Renaissance of the Ninth Amendment, 33 U. Chi. L. Rev. 814, 815 (1966)(ninth amendment “only a rule of construction”).
62. Several commentators have remarked on the obscurity of the right affirmed in Richmond Newspapers. See, e.g., Reznek, supra note 7, at 125-28; Note, Richmond Newspapers, Inc. v. Virginia: A Demarcation of Access, 34 U. Miami L. Rev. 937, 951 (1980); Note, supra note 8, at 196; Comment, supra note 4, at 547.
63. Cf., e.g., The Supreme Court, 1979 Term, supra note 8, at 156 n.42 (showing required to close any part of trial “unclear”).
Treatment of Precedent

Chief Justice Burger’s opinion fails to make a sustained or satisfying effort to fit his new doctrine—however awkward that task must necessarily have proved—“into the body of [first amendment] precedent.”64 At one point in the opinion, the Chief Justice observed that “the precise issue presented here has not previously been before this Court for decision.”65 This observation seems designed to imply that the issue in Richmond Newspapers was somehow sui generis—so different in kind from prior cases that it left the Court unconstrained by apparently inconsistent precedents.

It is, of course, literally true that the Court had never decided the precise issue framed by Chief Justice Burger: “whether a criminal trial itself may be closed to the public upon the unopposed request of a defendant, without any demonstration that closure is required to protect the defendant’s superior right to a fair trial, or that some other overriding consideration requires closure.”66 But to say that Richmond Newspapers was literally unprecedented is not to affirm that it arose in a precedential void. To the contrary, Richmond Newspapers offered the Court an unexploited opportunity to confront and perhaps resolve a pervasive and mounting tension between prior cases which broadly, though in dicta, affirm the importance of the right of the public to be informed67 and those that deny or undermine the right in particular contexts.68 More specifically, the case invited careful comparison to a number of earlier holdings of closely analogous issues.

Just the previous term, for example, the Court had decided, in Gannett Co. v. DePasquale,69 that there was no sixth amendment right to attend pretrial hearings. Chief Justice Burger could hardly have ignored Gannett. He did indeed attempt to distinguish it, partly on the ground presaged in his Gannett concurring opinion—that “a

64. Cox, supra note 7, at 26.
65. 448 U.S. at 563-64.
66. Id. at 564.
pretrial suppression hearing... 'is not a trial' 70—and partly on the ground that the Court there had not decided the first amendment issue.71 Neither of these distinctions, however, sufficiently explains the different results in the two cases. Gannett rejected a claim of access to a pretrial proceeding rather than to a trial, and Justice Stewart's opinion in Gannett occasionally adverted to this fact.72 The burden of Justice Stewart's rationale did not, however, seem to rest on this distinction. Rather, his analysis affirmed two principles that apply equally to trials and to pretrial proceedings: first, that "the public trial-guarantee [is] one created for the benefit of the defendant,"73 and second, that the "public interest in the enforcement of Sixth Amendment guarantees . . . is fully protected by the participants in the litigation."74 In differentiating between pretrial proceedings and trials in his Gannett concurrence and in his Richmond Newspapers opinion, Chief Justice Burger does not respond convincingly to these aspects of Justice Stewart's Gannett rationale.

In terms of the distinction inherent in the argument that Richmond Newspapers proceeded along first rather than sixth amendment lines, Chief Justice Burger's analysis suggests that it is the history of openness of trials that buttresses the first amendment claim. It implies that the constitutional significance of this history is different for first amendment claims than for sixth amendment issues.75 In ascribing doctrinal significance to history in Richmond Newspapers, however, Chief Justice Burger's opinion does not explicate how he determined that the common law rule of open proceedings was incorporated in—rather than "rejected or left undisturbed by"76—the first amendment. Nor does the opinion acknowledge the need that Justice Stewart discerned in Gannett to "distinguish between what the Constitution permits and what it requires."77 Thus, Chief Justice Burger's Richmond Newspapers opinion, though not ignoring Gannett, is not a fully satisfying treatment of Gannett's implications.

70. 448 U.S. at 564 (citing Gannett Co. v. DePasquale, 443 U.S. 368, 394 (1979)(Burger, C.J., concurring)).
71. Id.
72. See, e.g., 443 U.S. at 385 ("the issue here is whether the Constitution requires that a pretrial proceeding . . . be opened to the public")(emphasis in original); id. at 387-88 (footnote omitted) ("pretrial proceedings . . . were never characterized by the same degree of openness as were actual trials").
73. Id. at 380.
74. Id. at 383-84.
75. 448 U.S. at 575-80.
76. 443 U.S. at 385.
77. Id.
Gannett, however, was not the only relevant precedent. Pell v. Procunier, Saxbe v. Washington Post, and Houchins v. KQED, Inc.—the prison access cases—fairly cry out for reconciliation. In those cases, the Court rejected claims of access, for information-gathering purposes, that were clearly premised on the notion that the first amendment protects, as a supplement or corollary to the right to publish and speak freely about governmental affairs, the right to gather information about them. Chief Justice Burger's opinion in Richmond Newspapers evinces considerable sympathy for such a premise, but the opinion does little to explain why it is an appropriate governing principle in this case when it was so unpersuasive in the prison-access context.

There are at least two obvious technical distinctions between the prison-access cases and Richmond Newspapers. First, in the prison-access cases it was possible to characterize the issue not as whether a public right of access (to government or facilities) exists, but as whether the press has a greater right than the general public. Indeed, the Court did so characterize the nature of the claims. The cases, therefore, are thought to stand for the narrow proposition that "[n]ewsmen have no constitutional right of access... beyond that afforded the general public," rather than for the broader proposition that the public itself enjoys no right of access. Since the appellants in Richmond Newspapers sought to vindicate the right of the general public rather than a special newsgatherer's right, the rejection of the access claims in Procunier, Saxbe, and Houchins was plainly not fatal. Nonetheless, the first amendment rationale for the claim of access in those cases was so similar to that advanced—or at least rhetorically invoked—by Chief Justice Burger in Richmond Newspapers that some recognition of the cases' affinity would at least have acknowledged the need for this particular distinction. None, however, was offered.

The other obvious distinction between the prison-access cases and Richmond Newspapers was drawn by Chief Justice Burger, but

81. As Professor Cox has perceptively noted, the Court in Richmond Newspapers might reasonably have been expected also to have attended to the implications of Snepp v. United States, 444 U.S. 507 (1980) (per curiam). Cox, supra note 7, at 26.
82. See BeVier, supra note 23, at 489-91.
83. See, e.g., 448 U.S. at 575-76.
84. Procunier, 417 U.S. at 834.
only in a footnote: "Procunier 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 . . . ."85 In this as in other contexts, however, the tradition of openness provides an apt distinction between trials and prisons only if it is truly relevant in terms of the first amendment rationale for access.86 But, as will be more fully explored below,87 the tradition of openness forges a tenuous link between the governmental activity to which access is sought and the first amendment's "core purpose . . . of communication on matters relating to the functioning of government."88

Conspicuously absent from Chief Justice Burger's opinion in Richmond Newspapers is any mention of his own opinion announcing the judgment of the Court in Houchins, an opinion whose governing premises are particularly difficult to reconcile with the Richmond Newspapers result. For although Houchins was a case involving press rather than public access, and although access was sought to a jail rather than to a criminal trial, Chief Justice Burger's inquiry in Houchins focused on the broad question of whether "the First Amendment [or] the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control."89 The analysis in that case, which led him to conclude that no such right of access existed, neither stressed that jails were traditionally closed nor appeared to rely on the "special press rights"90 aspect of the case.

There is much in the Houchins opinion that is discordant with Chief Justice Burger's opinion in Richmond Newspapers. For example, it weighed heavily against the claimed right in Houchins that

85. 448 U.S. at 576 n.11.
86. Professor Cox, for example, offers an account of the relevance of the history of openness to the first amendment analysis in Richmond Newspapers which arguably represents "the gist of the decision," Cox, supra note 7, at 23, but which is not explicitly articulated in the Chief Justice's opinion:
As the law matures, the rudimentary distinctions between action and inaction, right and privilege, or aggressive interference and withholding of benefit become too simple. Closing the door of a courtroom that has always been open can be realistically viewed as interference with observation and public reporting rather than as preservation of the confidentiality of one variety of official business.
Id. at 22.
87. See notes 107-112 infra and accompanying text.
88. 448 U.S. at 575.
89. 438 U.S. at 15.
90. Id. at 12.
the "Court has never intimated a First Amendment guarantee of a right of access to all sources of information within government control."91 The absence of precedent for the claimed right of access in Richmond Newspapers, however, was nearly inconsequential; indeed, Chief Justice Burger took pains to assert that the question presented was a first. It was deemed fatal in Houchins that "[t]here is no discernible basis for a constitutional duty to disclose, or for standards governing disclosure of or access to information."92 In Richmond Newspapers, on the other hand, the Chief Justice was only momentarily inconvenienced by realizing that "the Constitution nowhere spells out a guarantee for the right of the public to attend trials,"93 and he simply found that the case presented "no occasion"94 to delineate the standards by which that right was to be measured. In Houchins, the Chief Justice concluded that "[t]he public importance of conditions in penal facilities and the media's role of providing information afford no basis for reading into the Constitution a right of the public or the media to enter these institutions."95 In contrast, the public interest in trials carried considerable weight in Richmond Newspapers, for it was quite relevant to the Chief Justice that "[p]lainly it would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted."96 Finally, in Houchins the Chief Justice was unimpressed with the argument that Branzburg v. Hayes97 lent support to the access claim. He said of Branzburg that "[i]ts 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."98 The view he took of Branzburg in Richmond Newspapers, however, was considerably—though inexplicably—more sympathetic to its implications:

[W]e have recognized that "without some protection for seeking out the news, freedom of the press could be eviscerated." The explicit, guaranteed rights to speak and to publish concerning what takes place at a trial would lose much meaning if access to observe

91. Id. at 9.
92. Id. at 14.
93. 448 U.S. at 579.
94. Id. at 581 n.18.
95. 438 U.S. at 9.
96. 448 U.S. at 575.
98. 438 U.S. at 10 (quoting Branzburg, 408 U.S. at 707).
the trial could, as it was here, be foreclosed arbitrarily. 99

**Historical Discussion**

Chief Justice Burger's opinion suggests that the constitutional right of access to trials is somehow derived from the "presumption of openness" that he infers from historical practice. 100 Furthermore, the language affirming the right's first amendment protection seems pointedly to refer to historical openness as part of the right's definition and hence an indication of its limits: "[T]he First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time that Amendment was adopted." 101

The success of the Chief Justice's effort to derive the right of access from and concomitantly limit its applicability to situations in which there exists a historic tradition of openness is questionable for a number of reasons. First, the opinion itself merely invokes history: It gives no reasons why historical practice qua historical practice is the appropriate source of a constitutional right of access to criminal trials. In other words, the opinion delineates no necessary relationship between a presumption of openness and a constitutional command of openness. 102 Furthermore, as has previously been noted, 103 the opinion fails to explain why, simply because the analysis in *Richmond Newspapers* follows the first rather than the sixth amendment as did *Gannett*, the history demonstrates what it failed to demonstrate in *Gannett*—"more than the existence of a common-law rule of open civil and criminal proceedings." 104

Second, the opinion's historical analysis tends to affirm not the relevance of history but the virtues of openness—virtues that would seem to inhere in openness even absent an "unbroken, uncontra-

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99. 448 U.S. at 576-77 (quoting Branzburg, 408 U.S. at 681).
100. Id. at 573.
101. Id. at 576.
102. For example, although Chief Justice Burger noted that "[t]he Bill of Rights was enacted against the backdrop of the long history of trials being presumptively open," 448 U.S. at 575, he made no serious effort to establish the proposition that the framers intended to create a public right of access to trials. For a discussion of some of the uses and abuses of historical analysis, especially insofar as it invokes the "intention of the framers," see C. MILLER, THE SUPREME COURT AND THE USES OF HISTORY (1969).

The discussion in text is meant to suggest not that historical practice is necessarily irrelevant in shaping constitutional doctrine but that the import of particular traditions ought to be specified with more care than is evident in Chief Justice Burger's opinion.

103. See notes 74-77 supra and accompanying text.
104. 443 U.S. at 384.
dicted history." Furthermore, much of the opinion’s first amendment discussion is as plainly pertinent to governmental activities that do not have a history of openness as to those that do. For example, the traditional openness of trials makes neither more nor less true the Chief Justice’s observation that “[t]he explicit, guaranteed rights to speak and to publish concerning what takes place at a trial would lose much meaning if access to observe the trial could, as it was here, be foreclosed arbitrarily.”

Indeed, the question raised by Chief Justice Burger's invocation of history can be most sharply focused in first amendment terms: What is the relevance of the historical fact of openness to the first amendment rationale that supposedly sustains the right-of-access claim? In his Richmond Newspapers opinion, Chief Justice Burger seemed to ally himself with standard right-of-access analysis when he referred to the first amendment’s expressly guaranteed freedoms’ “common core purpose of assuring freedom of communication on matters relating to the functioning of government,” and when he asserted that “[i]n 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.” The standard analysis, however, implies that the critical first amendment variable of the right of access is the relevance to public debate of the information to which access is sought. The connecting link between a claim of access and the first amendment’s core purpose is not furnished by the coincidence of traditional openness. Rather, it is furnished by the connection between the facility or information to which access is requested and the functioning of government. The characteristic of traditional openness is not even the functional equivalent of relevance in terms of its responsiveness to the first amendment’s core purposes: Because prisons “do not share the long tradition of openness” of trials, surely discussion of, and hence information about prisons do not fall outside the amendment’s core.

It must be remembered that the issue in Richmond Newspapers

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105. 448 U.S. at 573.
106. Id. at 576-77.
107. Id. at 575.
108. Id.
109. Id. at 576 n.11.
110. Cf. 448 U.S. at 583 (Stevens, J., concurring)(finding it ironic that “the Court should find more reason to recognize a right of access today than it did in Houchins”).
RICHMOND NEWSPAPERS

was not whether an acknowledged first amendment right to access for purposes of gathering information about a particular governmental function had been unduly infringed by a particular trial closure. Rather, the issue was whether a first amendment right of access for purposes of gathering information should be recognized at all. Of course, once it is conceded that a first amendment right of access to government information exists, the history of openness of a particular government facility might well be considered pertinent in calculating the weight to be accorded the government’s interest in denying access in a particular case. For example, to the extent that experience has demonstrated that openness is ordinarily compatible with the proper and regular performance of the particular governmental activity, it might be more difficult for the government to demonstrate its substantial or compelling interests in denying access. Conversely, a history of restrictions on access, of confidentiality, or of secrecy might permit the more ready inference that access would materially disrupt important functions and thus help the government to justify a particular access restriction.

Chief Justice Burger, however, invoked the history of openness not as a factor that might appropriately be considered in evaluating a particular government effort to deny access, nor as a factor that helped the Court to discern the appropriate level of protection for first amendment rights of access. He invoked it rather as the factor that permitted the Court to place the right within the amendment’s ambit. For such a purpose, the history of openness is not to the point, since it is unrelated to the value supposedly vindicated by the right.

This is not to say that there is no discernible purpose to be served by Chief Justice Burger’s strategy of reasoning from the history of openness. On the contrary, the strategy provided the Chief Justice both with a means of distinguishing the claim of access in Richmond Newspapers from those that had been rejected in prior cases, and with a rationale for refusing to extend first amendment

111. The assumption in text is that, once the “right of access [has been] found to exist, impingements on that right [would] be evaluated under the familiar standards applicable to governmental restrictions on speech.” The Supreme Court, 1979 Term, supra note 8, at 158.

112. The distinction between the ambit of first amendment protection and the level of protection recognizes that the question of what rights the first amendment includes is analytically separate from the issue of the appropriate scope of the amendment’s shield. See Kalven, The Reasonable Man and the First Amendment: Hill, Butts, and Walker, 1967 Sup. Cr. Rev. 267, 278, 290; cf. The Supreme Court, 1979 Term, supra note 8, at 157 (insisting that it is vital for courts to distinguish between questions of existence and proper scope of a right).
protection to any future access claim that is not propelled by the seeming momentum of historical practice. For two reasons, however, it seems unlikely that the Chief Justice will achieve a consensus on the Court for the proposition that the tradition of openness represents an appropriate limiting principle for right-of-access claims. First, several Justices have already gone on record to signal their disagreement. The concurring opinions of Justice Stevens and Justice Brennan in *Richmond Newspapers* itself, for example, clearly suggest those two Justices' unwillingness to be bound by such a limitation. Justice Stevens, even while joining the Chief Justice's opinion, announced his continued adherence to the more inclusive rationale that "the First Amendment protects the public and the press from abridgement of their rights of access to information about the operation of their government, including the Judicial Branch." And Justice Brennan's "structural model," while giving "special force" to a claim of access "drawn from an enduring and vital tradition of public entree," appeared to include within the First Amendment's ambit rights of access deemed important to particular governmental processes without regard to tradition.

The second reason to doubt that a consensus can be built around the tradition of openness as a limiting principle on the right of access is simply that the Court has rarely perceived historical practice as a significant constraint on its power to enlarge the scope of constitutional rights. In the face of a powerful and seductive First Amendment rationale encompassing citizens' rights to be informed about all aspects of their government, the idea that the Constitution protects only the right to be informed about processes that have been "traditionally open" seems unlikely to prevail.

**Public-Forum Analysis**

Chief Justice Burger posited, as part of the rationale for recognizing the right of access to criminal trials, an "affinity" between

113. 448 U.S. at 584 (Stevens, J., concurring).
114. *Id.* at 589 (Brennan, J., concurring in the judgment).
115. One example of the many instances of the Court's unwillingness to be bound by historical conceptions is that First Amendment doctrine represents an implicit repudiation of the idea that the Amendment's scope of protection is limited to the prevention of previous restraints upon speech or publication. *Cf.* Near v. Minnesota, 283 U.S. 697, 714-15 (1931) (immunity from previous restraint "cannot be deemed to exhaust the conception of the liberty guaranteed by state and federal constitutions ").
116. *Cf.* Note, supra note 8, at 198 (unlikely that right will be limited since it is "simply too powerful and far-reaching").
such a right and the right of assembly.\textsuperscript{117} The analysis that attempted to delineate the relevance of right-of-assembly and public-forum doctrines to the issue in \textit{Richmond Newspapers}, however, is highly problematic. It assumed rather than answered the central question posed by the case. It equated the traditional openness of criminal trials with the existence of a "right to be present"\textsuperscript{118} there, but it failed to fashion any convincing link between unbroken tradition and constitutional command.

A second flaw in the right-of-assembly analysis is more subtle. It resides in the tendency of the analysis to blur the important distinction between the kind of first amendment activity—and hence the nature of the first amendment right—that has traditionally been protected and that was vindicated by the cited public-forum cases, and the kind of first amendment activity involved in \textit{Richmond Newspapers}. In one sense, both the public-forum cases and \textit{Richmond Newspapers} involved claims of access to government facilities for the purpose of exercising first amendment rights. It is worth noting, however, that the rights traditionally exercised in the public fora to which Chief Justice Burger compared courtrooms—namely "streets, sidewalks, and parks . . . places traditionally open"\textsuperscript{119}—were explicitly guaranteed by, and doctrinally well-entrenched in, the first amendment: the right to speak, to publish, to assemble, and to petition for redress of grievances. The first amendment right the appellants in \textit{Richmond Newspapers} sought to exercise, on the other hand, was neither explicitly guaranteed nor doctrinally secure: They sought access not to speak, publish, assemble, or petition but rather to observe and to acquire information. Chief Justice Burger seemed to suggest that the public-forum analogy is apt, despite the different purpose for which access was sought, simply because "[p]eople assemble in public places not only to speak or to take action, but also to listen, observe, and learn."\textsuperscript{120} This analogy, however, obscured rather than clarified the difficult first amendment issue inherent in the claim of a right to access in order to "listen, observe, and learn."\textsuperscript{121}

The Chief Justice's blurring of the important distinction be-

\begin{itemize}
\item \textsuperscript{117} 448 U.S. at 577-78.
\item \textsuperscript{118} Cf. Comment, \textit{supra} note 4, at 554. ("Only by assuming that a courtroom was a public place was Burger able to argue that people had a right to assemble there").
\item \textsuperscript{119} 448 U.S. at 578.
\item \textsuperscript{120} \textit{Id.}
\item \textsuperscript{121} \textit{Id.}
\end{itemize}
tween traditional, textually protected first amendment rights and the right to access claimed in *Richmond Newspapers* becomes apparent when examining an aspect of public-forum doctrine the analysis fails to address. In *Cox v. Louisiana*, the Court sustained a statute specifically prohibiting the exercise of traditional first amendment rights near the courthouse. A fortiori, the Court would have sustained a prohibition of such activity in the courtroom itself. Justice Goldberg's opinion in *Cox* noted that "the unhindered and untrammeled functioning of our courts is part of the very foundation of our constitutional democracy." He concluded that, because it was "necessary and appropriate to assure that the administration of justice at all stages is free from outside control and influence," courts could be protected by statute from becoming the location (as opposed, of course, to the subject) of the exercise of rights of public discussion and active political participation. Admittedly, there is ambiguity in the *Cox* rule that "you cannot picket the courthouse." This does not, however, undermine the validity of the central insight: Although trial courtrooms have been traditionally open, like streets and parks, it simply cannot be said of courtrooms what was said of streets and parks in *Hague v. CIO*. In that case, Justice Roberts stated that streets and parks have "immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." Thus, if *Richmond Newspapers* had been just

123. *Id.* at 562.
124. *Id.*
125. H. Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, in *The Negro and the First Amendment* 173 (1966). Professor Kalven, with his inimitable cogency, posed some of the relevant questions inherent in the *Cox* rule:

Would this same protest . . . have been permissible if moved a few blocks away? Could one, for example, distribute leaflets highly critical of the court near the courthouse? Is there pressure and intimidation in the protest in front of the courthouse that ceases to be present when it is in front of the state house? Or is the principle that it is all right to intimidate legislatures but not courts? Is the vice in the picketing not so much in the time, place, and manner as in the message addressed to the court, and, if this is the vice, how can the result be squared with the insistent line of precedents on contempt by publication? And, is it that in the courthouse situation the Court finally perceives the reality behind the gesture, so that *Cox* is a harbinger of increasingly stringent restrictions on protests? Or is the point the precise opposite, that only the special sensitivity of the law to the decorum of court proceedings makes the conduct bad?

*Id.* at 211-12 (footnotes omitted).
126. 307 U.S. 496 (1939).
127. *Id.* at 515 (emphasis added); cf. Patterson v. Colorado, 205 U.S. 454, 462 (1907)
another public-forum case, its result would have been foreclosed by Cox. Only by ignoring this crucial distinction could Chief Justice Burger invoke the right of assembly in support of the Richmond Newspapers outcome.\textsuperscript{128}

\textbf{JUSTICE BRENNAN'S OPINION—A FIRST LOOK}

Justice Brennan's concurring opinion offers an alternative rationale for the right of access that differs significantly from Chief Justice Burger's. The Brennan opinion begins by briefly discounting, in two ways, whatever constraint the Court's prior-access cases might otherwise have imposed upon its freedom of decision. First, Justice Brennan insisted that "[t]hese cases neither comprehensively nor absolutely deny that public access to information may at times be implied by the First Amendment."\textsuperscript{129} Second, he implied that the cases can be read to have actually recognized a right of access, their seemingly contrary holdings representing nothing more than sensitivity to the "special nature"\textsuperscript{130} of the right.

More significant and far more suggestive than Justice Brennan's treatment of right-of-access precedents, however, is his adumbration of the theoretical underpinnings of the right itself. Justice Brennan posited what he described as a "structural role" for the first amendment in "securing and fostering our republican system of self-government."\textsuperscript{131} The right of access is implicit in this structural role since the structural role entails an "assumption that valuable public debate—as well as other civic behavior—must be informed,"\textsuperscript{132} an idea Justice Brennan credited Justice Powell's Saxbe dissent for having "foreshadowed."\textsuperscript{133} In Justice Brennan's formulation, "[t]he

\textsuperscript{128} One commentator, in the context of analyzing Justice Brennan's structural model of the first amendment, has suggested that public-forum cases offered an appropriate analogy to Richmond Newspapers on the theory that "the case implicated precisely the concerns that gave rise to the original public forum doctrine. In both instances, the Court was asked to rule that government could not completely foreclose the use of resources indispensable to informed discussion about government." The Supreme Court, 1979 Term, supra note 8, at 155. For a brief discussion of some of the implications of this view, see notes 157-158 infra and accompanying text.

\textsuperscript{129} 448 U.S. at 586 (Brennan, J., concurring in the judgment).
\textsuperscript{130} Id. (Brennan, J., concurring in the judgment).
\textsuperscript{131} Id. at 587 (Brennan, J., concurring in the judgment).
\textsuperscript{132} Id. (Brennan, J., concurring in the judgment).
\textsuperscript{133} Id. n.3 (Brennan, J., concurring in the judgment).
structural model links the First Amendment to that process of communication necessary for a democracy to survive, and thus entails solicitude not only for communication itself, but also for the indispensable conditions of meaningful communication.\footnote{134}

Acknowledging the "theoretically endless"\footnote{135} scope of the right, Justice Brennan counselled "sensitivity to practical necessities,"\footnote{136} and sketched "two helpful principles"\footnote{137} to limit the scope of right-of-access claims in the future. One principle is that "the case for a right of access has special force when drawn from an enduring and vital tradition of public entree to particular proceedings or information."\footnote{138} Since open trials are a matter of "virtually immemorial custom,"\footnote{139} a claimed right of access to trials has the requisite "special force." The other "helpful principle" of limitation is that "the value of access must be measured in specifics,"\footnote{140} the question in each case being "whether access to a particular government process is important in terms of that very process."\footnote{141} Applying this second principle to the question of access to trials, Justice Brennan reasoned that access is important to the trial process because it contributes to the "demonstrative purpose"\footnote{142} of trials; it restrains judicial abuse of political power by subjecting the "governmental proceeding"\footnote{143} of a trial to the forum of public opinion, and it aids accurate factfinding. Justice Brennan concluded that "our ingrained tradition of public trials and the importance of public access to the broader purposes of the trial process, tip the balance strongly toward the rule that trials be open."\footnote{144}

The Brennan opinion does not address the question of what countervailing interests might be invoked to support closure of trials. Justice Brennan deemed such inquiry inappropriate since "the statute at stake here authorizes trial closures at the unfettered discretion of the judge and parties."\footnote{145} Thus, Justice Brennan shared the Chief Justice's unwillingness to speculate about the nature of potentially

\footnotesize{134. Id. at 587-88 (Brennan, J., concurring in the judgment) (footnote omitted).}
\footnotesize{135. Id. at 588 (Brennan, J., concurring in the judgment).}
\footnotesize{136. Id. (Brennan, J., concurring in the judgment).}
\footnotesize{137. Id. at 589 (Brennan, J., concurring in the judgment).}
\footnotesize{138. Id. (Brennan, J., concurring in the judgment).}
\footnotesize{139. Id. at 593 (Brennan, J., concurring in the judgment).}
\footnotesize{140. Id. at 589 (Brennan, J., concurring in the judgment).}
\footnotesize{141. Id. (Brennan, J., concurring in the judgment).}
\footnotesize{142. Id. at 595 (Brennan, J., concurring in the judgment).}
\footnotesize{143. Id. at 596 (Brennan, J., concurring in the judgment).}
\footnotesize{144. Id. at 598 (Brennan, J., concurring in the judgment) (footnote omitted).}
\footnotesize{145. Id. (Brennan, J., concurring in the judgment) (footnote omitted).}
successful arguments for future trial closures, but implicitly disagreed with the Chief Justice about the propriety of ruling on the facial validity of the underlying state statute.\textsuperscript{146}

\textbf{JUSTICE BRENNAN'S OPINION—A CLOSER LOOK}

Justice Brennan's structural model plainly derives from,\textsuperscript{147} and significantly extends,\textsuperscript{148} what may be described as a new orthodoxy of the first amendment. In recent years, a consensus has emerged about the implications of the basic insight, amounting almost to a tautology, that the Constitution's promise of self-government is an empty one unless citizens are free to speak and to publish facts, views, and opinions about government. The emergent consensus is that, because freedom of speech and of the press are essential to democracy, the core value or purpose of the speech and press clauses is to protect the processes of representative democracy established by the Constitution.\textsuperscript{149} When government regulations of speech or publication are at issue, this perception of the first amendment's core value can inform the Court's judgment about the nature and extent of constitutionally permissible restrictions on rights of expression, and can clarify the risks to relevant constitutional values that various kinds of prohibition on expressive activity might entail. The connection between democracy and the freedoms of speech and press offers a rationale for protecting speech and publication that is securely anchored both in the constitutional text and in the "structure of government that it prescribes."\textsuperscript{150} Reasoning from this connection thus renders first amendment rights of expression doctrinally secure and legitimizes the exercise of judicial power to invalidate particular restraints on speech or publication.\textsuperscript{151}

Justice Brennan's structural model of the first amendment is also premised on the connection between the amendment and democracy. This connection, however, serves not the limited purpose of refining or legitimating doctrine regarding direct restraints on speech

\textsuperscript{146} Id. at 562 n.4 (Brennan, J., concurring in the judgment).

\textsuperscript{147} See notes 149-155 infra and accompanying text.

\textsuperscript{148} See notes 156-159 infra and accompanying text.

\textsuperscript{149} Cf. Mills v. Alabama, 384 U.S. 214, 218 (1966) (noting "practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs").


or publication. Rather, it serves as the principal justification for extending the reach of the first amendment well beyond direct regulation of the printed or spoken word. From the widely accepted premise that freedom of speech and of the press are protected because they preserve the structure of government prescribed by the Constitution, Justice Brennan apparently reasons that "preserving the structure of constitutional government" is an appropriate function of the Court in the first amendment area. This at least seems to be

152. 448 U.S. at 587 (Brennan, J., concurring in the judgment).
153. In support of his structural role of the first amendment, id. (Brennan, J., concurring in the judgment), Justice Brennan cites the following: United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938); Grosjean v. American Press Co., 297 U.S. 233, 249-50 (1936); Stromberg v. California, 283 U.S. 359, 369 (1931); J. ELY, DEMOCRACY AND DIS-TRUST 93-94 (1980); T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 7 (1970); A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948); Bork, supra note 150, at 23; Brennan, Address, 32 Rutgers L. Rev. 173, 176-77 (1979). These authorities are not plainly off the mark, in that both the cited portions of the cases and the work of the various commentators affirm the existence of an integral relationship between democratic government and free political discussion. It must be said, however, that the authorities hardly provide unequivocal support for Justice Brennan's structural role in the context of the question presented by Richmond Newspapers, since they do not address that precise question. Stromberg, for example, held unconstitutional that part of a statute which could be read to prohibit peaceful and orderly opposition to organized government. Its support for "[t]he main-tenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people," 283 U.S. at 369, was therefore invoked in the context of a direct prohibition of expressive conduct rather than in connection with an indirect barrier to information gathering. A similar point can be made about Grosjean's reference to Judge Cooley's propounded "test": "The evils to be prevented were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens." 297 U.S. at 249-50. This statement was offered to support the Court's effort to compare a gross receipts tax on certain newspapers to traditional prior restraints rather than to defend a self-conscious expansion of the amendment's reach to include protection from indirect abridgement.

Along these same lines, with reference to the cited scholarship, Professor Ely's thesis that the "expression related provisions of the First Amendment . . . were centrally intended to help make our governmental processes work, to ensure the open and informed discussion of political issues," J. ELY, supra, at 93-94, was not offered as a focused response to the question whether the first amendment imposes an obligation on the Court to protect more than the rights to speak, publish, petition, and assemble. And, to the extent the thesis does support such an obligation, it is subject to the intractable difficulties that inhere because "it does nothing to tell the judge where he should look for guidance in rendering decisions within his commission." Cox, Book Review, 94 HARV. L. REV. 700, 714 (1981).

Professor Bork's remark that "the entire structure of the Constitution creates a representative democracy, a form of government that would be meaningless without freedom to discuss government and its policies," Bork, supra, at 23, is pertinent to his analysis of the kind of speech that the Constitution protects but does not necessarily inform analysis of the different question of what the first amendment protects in addition to speech. And Professor Meiklejohn's analysis, focused as it was entirely on issues of freedom, "did not specifically consider whether the Constitution confers a right to know on individual citizens." BeVier,
the meaning inherent in his assertions that the first amendment “has a structural role to play in securing and fostering our republican system of self-government” and that it “entails solicitude not only for communication itself, but also for the indispensable conditions of meaningful communication.”

Justice Brennan first outlined his structural model of the first amendment in an address he delivered at the dedication of the S. I. Newhouse Center for Law and Justice in Newark, New Jersey in 1979; but Richmond Newspapers provided him with his first opportunity to apply the model in the decision of an actual case. Because the scope of this article is limited to the Richmond Newspapers opinions and to their proferred rationales in the particular context of that case, it would unmanageably extend the reach of this discussion to attempt a full exploration of the theoretical foundations or the doctrinal implications of Justice Brennan’s structural model. It is appropriate to note, however, that the model is explicitly designed to overcome the limitations inherent in supposing that the “First Amendment protects only self-expression, only the right to speak out.” In addition, the model can justify its extension of the first amendment only by putting the connection between the first amendment and democracy to use in a legal context wholly different from that in which the connection was first invoked as an appropriate premise for first amendment decisionmaking.

It may well be, as Professor Cox has suggested, that “[a]s the law matures, the rudimentary distinctions between action and inaction, right and privilege, or aggressive interference and withholding of benefit become too simple.” Justice Brennan failed to explain, however, how an insight answering one, relatively well-focused question which took these distinctions quite for granted—why does the first amendment protect freedom of speech and of the press?—is alone powerful enough to erase such historically significant legal nuances. If the question in Richmond Newspapers had been—why does

supra note 23, at 504. That Justice Brennan’s citation to Professor Emerson’s book is similarly out of context is perhaps less troubling since Professor Emerson has in later work specifically addressed the “right to know” issue and resolved it in a fashion similar to that adopted by Justice Brennan. See Emerson, supra note 23.

154. 448 U.S. 587 (Brennan, J., concurring in the judgment) (emphasis in original).
155. Id. at 588 (Brennan, J., concurring in the judgment).
156. Brennan, supra note 153.
157. Id. at 176 (emphasis added).
158. For a discussion of this practice as used by Justice Brennan, see note 153 supra.
159. Cox, supra note 7, at 22.
the first amendment protect public access to trials?—then the Court could have invoked the structure of constitutional democracy as a rationalizing principle. But the question was not why, it was whether. In affirmatively resolving this more basic question, Justice Brennan's structural model invoked the framework of democracy to a much more ambitious end than that for which it was conceived. He put it to use not to rationalize doctrine but to create it, not to solidify textually secured rights against the government, but to expand textually unspecified governmental duties.

Justice Brennan's structural model is a more expansive rendition of the implications of the perceived connection between freedom of speech and democracy than is the standard right-of-access rationale. Pursuant to the standard rationale, the connection has expansive implications because it is invoked, as Justice Brennan invoked it, not merely as a means to confer coherence and legitimacy on the effort to make the first amendment an effective shield against government regulation of speech or the press. It serves also as a sword by which to impose on the government an affirmative duty to provide citizens with information about or access to governmental processes. Pursuant to Justice Brennan's rationale, however, the connection opens additional doctrinal vistas; it becomes, in effect, a mandate to the Court to establish (albeit of necessity only in particular cases as they arise) "the indispensable conditions of meaningful communication."160

If it is implicitly more expansive than the standard right-of-access rationale, Justice Brennan's structural model is explicitly less inclusive, at least insofar as it is elaborated in Richmond Newspapers. The standard chain of reasoning, which links the right of access to the core value of representative self-government via the contribution that information about government necessarily makes to intelligent communication among citizens, does not readily yield a principle by which access to information relevant to self-government might be denied. Indeed, the rationale plainly suggests that, at least for purposes of evaluating the first amendment side of any access question, all such information is included because all of it is relevant. All of it should, therefore, be accessible to citizens. Justice Brennan's structural model disparages the analytical power of such "rhetorical statements that all information bears upon public issues."161 In order

160. 448 U.S. at 588 (Brennan, J., concurring in the judgment).
161. Id. at 589 (Brennan, J., concurring in the judgment).
to determine whether a particular claim of access ought to come within the ambit of the first amendment and thus to limit the "theoretically endless"162 reach of the right, he would replace "relevance to self-government" as the critical first amendment variable with two quite different inquiries. First, he would ask whether there exists "an enduring and vital tradition of public entree,"163 and second, "whether access to a particular government process is important in terms of that very process."164 Justice Brennan's opinion, unfortunately, does not construct a very sturdy bridge between these inquiries and the ultimate issue of first amendment interpretation that they supposedly address.

Justice Brennan's justification for looking to history as one potential limit on the right of access is worth examining. A tradition of public entree, he said, "commands respect in part because the Constitution carries the gloss of history. More importantly, a tradition of accessibility implies the favorable judgment of experience."165 But the Constitution's "gloss of history" and the "favorable judgment of experience" are not in themselves sufficient to establish the proposition that tradition is a viable limiting principle with reference to the right of access. They must be shown to bear with unique and special relevance on this particular first amendment question,166 a showing not made in Justice Brennan's opinion.

But Justice Brennan does not rely solely on history to limit the right of access. He offers a second limiting principle—the inquiry into "whether access to a particular government process is important in terms of that very process"167—which apparently elaborates upon his structural model of the first amendment. The precise nature of the inquiry's relationship to "that process of communication necessary for a democracy to survive,"168 and the exact way in which an answer to the inquiry might illuminate the content of "the indispensable conditions of meaningful communication"169 are not, however, explained.

Although offered as part of his effort to restrain the "theoretically endless" reach of the right, he would replace "relevance to self-government" as the critical first amendment variable with two quite different inquiries. First, he would ask whether there exists "an enduring and vital tradition of public entree," and second, "whether access to a particular government process is important in terms of that very process." Justice Brennan's opinion, unfortunately, does not construct a very sturdy bridge between these inquiries and the ultimate issue of first amendment interpretation that they supposedly address.

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cally endless"\textsuperscript{170} stretch of the right to gather information, the inquiry into whether access to a particular governmental process is important in terms of the process fails to focus first amendment analysis. To the contrary, the inquiry attenuates the connection between the right of access and the objective of informed public debate upon which the right has usually been premised. For example, the several virtues cited by Justice Brennan in his analysis of "the importance of public access to the trial process itself"\textsuperscript{171} suggest that the full range of instrumental goals thought to be served by access under his structural model are not fully captured merely by equating information about the judicial process with meaningful communication about government.\textsuperscript{172} Implicit in Justice Brennan's notion that access to trials aids the "demonstrative" purpose of trials,\textsuperscript{173} restrains the abuse of political power by judges in the course of litigation, and advances accurate factfinding, is the conclusion that the implications of his structural model are not confined to those fore-shadowed in Justice Powell's assertion that "public debate must not only be unfettered: it must also be informed."\textsuperscript{174} These goals, which Justice Brennan found well served by access to trials, may be worthy and might even be thought necessary to the ultimate preservation of our democracy. They have, however, only a tenuous connection to the idea that citizens require information if their speech is to be truly free.

Moreover, at least as elaborated by Justice Brennan, the principle that would limit access to cases where it is deemed important in terms of the process to which it is sought does not provide meaningful guidance concerning the most significant and controlling question of how to discern whether access is important. Although the opinion cautions that "the value of access must be measured in specifics,"\textsuperscript{175} much of Justice Brennan's analysis takes the form of generalities. For example, the analysis of the virtues of access concerning the trial process accords constitutional significance to the "pivotal role" of a trial "in the entire judicial process, and, by extension, in our form of

\textsuperscript{170} Id. (Brennan, J., concurring in the judgment)(citation omitted).
\textsuperscript{171} Id. at 589 (Brennan, J., concurring in the judgment).
\textsuperscript{172} Cf. The Supreme Court, 1979 Term, supra note 8, at 154 (implications of Justice Brennan's structural analysis "extend far beyond the creation of a novel constitutional right of access to governmental proceedings").
\textsuperscript{173} 448 U.S. at 595 (Brennan, J., concurring in the judgment).
\textsuperscript{174} Saxbe v.,Washington Post Co., 417 U.S. at 862-63 (Powell, J., dissenting).
\textsuperscript{175} 448 U.S. at 589 (Brennan, J., concurring in the judgment).
The trial is a “genuine governmental proceeding,” from which fact it seems, without more, to follow that “the conduct of the trial is pre-eminently a matter of public interest,” and that “public access to trials acts as an important check, akin in purpose to the other checks and balances that infuse our system of government.” But surely it can be said about nearly every governmental process that it plays a “pivotal role . . . in our form of government.” And is not any process a “genuine governmental proceeding” and thus “pre-eminently a matter of public interest”? Precisely because generalizations such as these can be so universally invoked, they provide no discernible criteria by which to decide when access to a particular process is important and when it is not. Thus, Justice Brennan’s second “helpful principle” for limiting the “theoretically endless” stretch of the right of access proves on examination to be neither particularly helpful nor in reality a principle.

CONCLUSION

This article makes two explicit points. First, it demonstrates that Chief Justice Burger’s conclusions in Richmond Newspapers depended on a rationale that failed adequately to account for even the most obviously relevant precedents. The opinion conveyed the impression, but did not defend the proposition, that the result was ordained by historical practice, and blurred the distinction between the right of access and textually guaranteed first amendment rights. Second, this article documents certain possibly untoward aspects of Justice Brennan’s alternative rationale, especially its somewhat attenuated first amendment focus and its failure to specify meaningful criteria for the resolution of future access claims. The implicit message of the article’s analysis is readily stated: A result supported by constitutional rationales that are either patently infirm or demonstrably unmanageable perhaps may not have earned the praise it has received. Since Richmond Newspapers gave rise to such doctrinal confusion, it is difficult to be sanguine about the Court’s ability to

176. Id. at 595 (Brennan, J., concurring in the judgment).
177. Id. at 596 (Brennan, J., concurring in the judgment).
178. Id. (Brennan, J., concurring in the judgment).
179. Id. (Brennan, J., concurring in the judgment).
180. Id. at 595 (Brennan, J., concurring in the judgment).
181. Id. at 596 (Brennan, J., concurring in the judgment).
182. Id. (Brennan, J., concurring in the judgment).
183. Id. at 589 (Brennan, J., concurring in the judgment).
184. Id. at 588 (Brennan, J., concurring in the judgment)(citation omitted).
take the measure of the more controversial access issues that seem bound to arise in the future.