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PUBLIC TRIAL AND PUBLIC RIGHT: THE MISSING BOTTOM LINE

Louis Lusky*

THE PROBLEM

The past quarter-century has witnessed explosive increase in control of our government by courts. Led by the United States Supreme Court, they have invalidated actions by other governmental organs in one new field after another. This they purport to do in the name of fidelity to our eighteenth-century Constitution and its twenty-six amendments. The Supreme Court does not formally claim authority to disapprove statutes or other official acts simply because (in the Justices' opinion) they offend some fundamental national policy. It is now clear, however, that for some time the Court has in fact been doing exactly that. If constitutional rulings that cannot rest on rational interpretation of constitutional provisions were few and far between, one might explain them as occasional mistaken lapses; but they have become far too frequent for that to be plausible.¹

Many legal scholars—and probably most nonlawyers—would say that, in the foregoing lines, I have already alleged a prima facie case against the legitimacy of dozens if not hundreds of recent Supreme Court decisions. That is, they would say that if I can prove these assertions, the Court will stand condemned for usurping power that does not rightfully belong to it. I disagree. I think I have stated only the starting point for appraising the legitimacy of the Court's constitutional decisions—have done no more than

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¹ The term "interpretation" is used here in its usually accepted sense: attribution to language of the meaning intended by those who made it a part of the law.
say why there is a problem serious enough to warrant further exploration.

A preliminary question must precede any such exploration. The original and traditional justification for judicial review—decision by a court as to whether or not the action of some public organ, agency, or official (federal or state) is unconstitutional—is that lawsuits must be decided according to the most authoritative law available; that our Constitution (unlike many) is not merely a statement of exhortations or aspirations but a source of judicially enforceable law; and that, if the questioned official action conflicts with the text of the Constitution as interpreted by the courts, the action is unconstitutional. That is the orthodox doctrine announced in *Marbury v. Madison.*

Now, the preliminary question I speak of is this: If it is shown that the Supreme Court has held various statutes and other official acts unconstitutional even though they cannot be shown to conflict with any rational interpretation of a written provision of the Constitution, why does this not settle the matter? How is it possible that such exercises of judicial review may nevertheless be legitimate? Why explore further?

The answer is that the orthodox *Marbury v. Madison* doctrine may be (and, in my opinion, plainly is) too narrow. It is at least conceivable that judicial review is legitimate in some cases not covered by the text of the Constitution. For reasons to be stated presently, I believe that the Supreme Court in recent years has quietly broadened its conception of judicial review beyond the orthodox doctrine. After explaining why I believe this, I shall explain why I also believe that the Court's virtual failure to articulate the basis for its broadened conception impairs the quality of its performance. It will be helpful to bring these ideas into focus by examining a recent case that shows some of the remarkable results of that failure.

**THE GANNETT CASE**

*The Facts and the Decision*

On July 2, 1979, the Supreme Court announced its decision in *Gannett Co. v. De Pasquale.* The occasion was a murder prosecution in Seneca County, New York, near Rochester. Wayne Clapp and two companions named Kyle Greathouse and David Jones went fishing on Lake Seneca in Clapp's boat. The companions re-

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2. 5 U.S. (1 Cranch) 137, 177-80 (1803).
turned alone and drove off in Clapp's pickup truck. Bulletholes were found in the boat. The companions were run to ground in Michigan, and Greathouse, under questioning, revealed where Clapp's gun was buried nearby. They were returned to New York State and were prosecuted for Clapp's murder. They made a pretrial motion to prevent use of the gun, or of the incriminating statement revealing knowledge of it, in evidence at the trial. The ground of the motion was that the statement was obtained through unlawful coercion. Then arose the issue that later reached the Supreme Court:

At this hearing, defense attorneys argued that the unabated buildup of adverse publicity had jeopardized the ability of the defendants to receive a fair trial. They thus requested that the public and the press be excluded from the hearing. The district attorney did not oppose the motion. Although Carol Ritter, a reporter employed by the petitioner, was present in the courtroom, no objection was made at the time of the closure motion. The trial judge granted the motion.

The "petitioner" was Gannett Co., publisher of morning and evening Rochester newspapers that had some circulation in nearby Seneca County. A subsequent motion by Gannett to vacate the exclusionary order and to secure a copy of the transcript was denied. The trial court ruled that freedom of the press, guaranteed by the first amendment, did give Gannett standing to claim admission to the hearing or immediate access to a transcript of the evidence given there. It also ruled, however, that present publication of that evidence might prevent a fair trial by making it impossible to impanel a jury that did not include someone who knew how the police had located Clapp's gun—even if the trial judge had held that the incriminating statement of its whereabouts was involuntary and therefore inadmissible. The trial court held that the right to a fair trial outweighed the claim of press freedom, so that Gannett's reporter had rightly been excluded from the hearing. It also decided to keep the pretrial evidence secret until its publication could no longer affect the trial.

The murder charges were later settled by a bargained plea of guilty to lesser offenses, but Gannett appealed the denial of its

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4. Id. at 2901-02.
5. Id. at 2903.
6. Id.
7. Id.
motion. The highest New York state court upheld the trial court. The United States Supreme Court did likewise by a vote of five to four. There were five opinions.

The Opinions

As will appear, the Court's views were so fragmented that the five opinions might well have been left unwritten; they are virtually useless for guidance to lower courts and lawyers, or for anything else. I think it possible, and even likely, that this fragmentation—an increasingly familiar phenomenon—is attributable to the Justices' failure to achieve agreement among themselves on a justification for the broadened judicial review that has replaced the orthodox Marbury v. Madison conception. Or, to state the same point differently, it is attributable to the Justices' failure to reach consensus on the Court's proper role in the governmental scheme. That is why the Justices, overworked though they are, write hundreds of careful pages each year that are largely wasted because not directly on target. To understand how the Gannett case illustrates the point, let us examine the Justices' opinions and the constitutional provisions discussed in them.

The first amendment provides in part: "Congress shall make no law abridging the freedom of speech, or of the press..." The sixth amendment provides in part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial..." In 1791 these provisions, along with the rest of the Bill of Rights, were adopted as restraints on the federal government only, not the states. Since 1961, however, the Court has been saying that the fourteenth amendment, adopted in 1868, had the effect of making the press-freedom and public-trial clauses and most but not all of the other Bill of Rights provisions enforceable against the states also. This result could not have been reached through interpretation of the text of the fourteenth amendment; nevertheless, none of the nine Justices in the Gannett decision betrayed any doubt that the first and sixth amendments do apply in state court prosecutions. The differences between the Justices related, rather, to the contents of the guaranties of press freedom and public trial.

12. See generally L. Lusky, supra note 9, at 161-66.
The opinion of the Court was written by Justice Stewart. Four other Justices said they concurred in it, but three of them wrote separate opinions expressing additional views that did not command the support of any Justice except the author of the respective opinion. Justice Blackmun, for himself and three others, dissented.¹³

Justice Stewart dealt with the sixth amendment claim as a problem of interpretation—the approach called for by Marbury v. Madison. By its very terms, the amendment grants to "the accused," and not to the press or the public, the right of public trial. In Justice Stewart's eyes that was decisive, since he found nothing in the structure of the amendment or its historical background which suggested that its makers had not meant exactly what they had said.¹⁴

This "plain language" approach could not be thought so directly decisive against the first amendment claim, because its language, "the freedom of the press," is not so plain as the sixth amendment's "the accused." Therefore it needs judicial interpretation to settle its meaning. Or, from a different perspective, one might say that the term "the freedom of the press" is more malleable, is easier to invest with new meaning than the crisper term "the accused."

In this situation, the conventional judicial approach is to accept prior interpretation; and in several recent cases (none, however, involving closed criminal courtroom procedures) the Court had held that the first amendment does not protect access to information—the right to gather news, as distinguished from the right to publish news already gathered.¹⁵ Although these decisions could easily have been regarded as precedents settling that proposition in all contexts, only Justice Rehnquist was willing to commit himself to this position.¹⁶ Justice Stewart preferred to avoid saying how the language of the amendment should be interpreted. He declared that even if press freedom does include some right of access,

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¹³. All nine Justices agreed, however, that neither the intervening termination of the prosecutions by plea bargains nor the resulting dissolution of secrecy restrictions on the pretrial-hearing transcript had rendered the case moot. 99 S. Ct. at 2904 (Stewart and Stevens, JJ.); id. at 2913 (Burger, C.J., concurring); id. at 2914 (Powell, J., concurring); id. at 2917 (Rehnquist, J., concurring); id. at 2919 (Blackmun, Brennan, White, and Marshall, JJ., concurring in part and dissenting in part).

¹⁴. Id. at 2905-11.


¹⁶. 99 S. Ct. at 2918 (Rehnquist, J., concurring).
the freedom can be—and in this case was—outweighed by the defendant's right to a fair trial.17

Justice Stevens agreed with the Stewart opinion, and said nothing else. Chief Justice Burger said he also agreed with it but added a second reason for interpreting the sixth amendment as being inapplicable, namely, that it refers only to "public trial" and not a pretrial hearing;18 and it is hard to see why he would do this if he fully approved Justice Stewart's broader position, based on the meaning of "the accused." Justices Powell and Rehnquist, the other two members of the majority, also expressed agreement with Justice Stewart's opinion, but went on to answer the first amendment question he had bypassed.19 The form of these two concurrences suggests that they were written after Justice Blackmun's opinion was circulated to the Justices. This would have happened if, as a knowledgeable journalist has suggested, the Blackmun opinion was originally written as the majority opinion but was later converted into a dissent by the defection of one or more Justices.20 Irrespective of whether this is true, the Powell and Rehnquist positions can best be understood after consideration of the Blackmun dissent, which I shall therefore examine first.

Justice Blackmun said Gannett had no more rights under the first amendment as a member of the press than it had as a member of the public under the sixth.21 But he thought there was a valid sixth amendment claim.22 To cope with the undeniable fact that Gannett, not being the accused, did not fit within the language of that amendment, Justice Blackmun offered three lines of argument. Two of them are effectively countered by Justice Stewart's opinion for the Court. The third is not.

First, Justice Blackmun showed that public trial has been the prevailing practice in Anglo-American law since before the Norman Conquest and has been highly prized down through the centuries.23 Justice Stewart responded that the Bill of Rights contained

17. Id. at 2912.
18. Id. at 2913-14 (Burger, C.J., concurring).
19. Id. at 2914-17 (Powell, J., concurring); id. at 2917-18 (Rehnquist, J., concurring).
22. Id. at 2932-33, 2935 (Blackmun, J., concurring in part and dissenting in part).
23. Id. at 2925-29 (Blackmun, J., concurring in part and dissenting in part).
various provisions designed to change British and colonial practice for the better, not to perpetuate it.  

Second, Justice Blackmun pointed out that the sixth amendment guarantees to “the accused” and no one else not only the right of public trial but also the rights of speedy trial and of jury trial. Nevertheless the Court held in 1965 that a defendant has no right to insist on being tried without a jury, and in 1972 it declared the obvious proposition that he has no right to object to a speedy trial. His waiver of jury trial is effective only if the trial judge accepts it. In both cases the trial judge, acting in the public interest, can override the defendant’s wishes. Thus, argued Justice Blackmun, the sixth amendment protections of “the accused” cannot belong to the accused alone; if they did, how could the trial judge disregard his jury and speedy-trial waivers? And if there is a public interest in public trials, why is not Gannett an appropriate party to vindicate it? Once again, Justice Stewart’s response was short but at least arguably sufficient. He said, in effect, that Justice Blackmun’s second point was founded on a non sequitur. It does not follow from the fact that, because a public interest exists, any member of the public can sue to protect it: “[O]ur adversary system of criminal justice is premised upon the proposition that the public interest is protected by the participants in the litigation.”  

Justice Blackmun’s third line of argument, however, gives the majority a good deal more trouble. In fact, the Stewart opinion does not answer it in any convincing way. What Justice Blackmun says is that unless the public, including the news media, has a right of access to criminal trials (and to pretrial hearings involving, as here, claims of official misconduct), the mechanism of popular control of government may be gravely impaired. Therefore, “because there is a societal interest in the public trial that exists separately from, and at times in opposition to, the interests of the accused, a court may give effect to an accused’s attempt to waive his public trial right only in certain circumstances.” He agrees that

24. Id. at 2908.
27. 99 S. Ct. at 2924-25 (Blackmun, J., concurring in part and dissenting in part).
28. Id. at 2907-08.
29. Id. at 2908.
30. Id. at 2930-36 (Blackmun, J., concurring in part and dissenting in part).
31. Id. at 2930 (Blackmun, J., concurring in part and dissenting in part) (citation omitted).
this right of access may be outweighed temporarily by the need for a fair trial,\textsuperscript{32} but disagrees with Justice Stewart's view that it has been outweighed in this case.\textsuperscript{33}

Justice Blackmun discussed at length the circumstances under which the prosecutor's and judge's interests can differ from the general public's:

Any interest on the part of the prosecution in hiding police or prosecutorial misconduct or ineptitude may coincide with the defendant's desire to keep the proceedings private, with the result that the public interest is sacrificed from both sides.

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\ldots Judges, prosecutors, and police officials often are elected or are subject to some control by elected officials, and a main source of information about how these officials perform is the open trial. And the manner in which criminal justice is administered in this country is in and of itself of interest to all citizens. In \textit{Cox Broadcasting Corp. v. Cohn}, 420 U.S., at 495, it was noted that information about the criminal justice system "appears to us to be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business."\textsuperscript{34}

\ldots

\ldots Unlike the other provisions of the Sixth Amendment, the public trial interest cannot adequately be protected by the prosecutor and judge in conjunction, or connivance, with the defendant. The specter of a trial or suppression hearing where a defendant of the same political party as the prosecutor and the judge—both of whom are elected officials perhaps beholden to the very defendant they are to try—obtains closure of the proceeding without any consideration for the substantial public interest at stake is sufficiently real to cause me to reject the Court's suggestion that the parties be given complete discretion to dispose of the public's interest as they see fit. The decision of the parties to close a proceeding in such a circumstance, followed by suppression of vital evidence or acquittal by the bench, destroys the appearance of justice and undermines confidence in the judicial system in a way no subsequent provision of transcript might remedy.\textsuperscript{35}

\textsuperscript{32. Id. at 2936 (Blackmun, J., concurring in part and dissenting in part).}
\textsuperscript{33. Id. at 2940-41 (Blackmun, J., concurring in part and dissenting in part).}
\textsuperscript{34. Id. at 2930-31 (Blackmun, J., concurring in part and dissenting in part).}
\textsuperscript{35. Id. at 2935 (Blackmun, J., concurring in part and dissenting in part).}
Justice Blackmun also answers Chief Justice Burger by pointing out that the need for public information is just as great in pretrial suppression hearings as in actual trials. 36

He nowhere mentions Watergate. One cannot read his dissent, however, without imagining what a different course history might have taken if the first criminal trial (of James McCord and the others directly involved in the break-in) had been handled by a judge and prosecutor who, placing personal ambition ahead of public duty, were ready to comply with a beleaguered President’s request for avoidance of publicity.

The Blackmun policy argument is a powerful one. Certainly it would deserve the most respectful attention by a constitutional convention engaged in drafting a public-trial guaranty. And yet, if Marbury v. Madison marked out the full reach of legitimate judicial review, there would be a simple answer to Justice Blackmun—in the same vein as the Mikado’s answer to Pooh Bah:

Unfortunately, the fool of an Act says “compassing the death of the Heir Apparent.” There’s not a word about a mistake.... There should be, of course. .... But there isn’t.... That’s the slovenly way in which these Acts are always drawn. However, cheer up, it’ll be all right. I’ll have it altered next session. Now, let’s see about your execution—37

In short, any Justice in the five-man majority who believed that judicial review can be justified only by the Marbury approach might have been expected to say: “Perhaps the first and sixth amendments ought to give the public as well as the accused a right to insist on public trial, but they don’t; and that ends the matter.” Actually, only one of the five, Justice Rehnquist, even hints at so tough-minded a position:

[S]ince the Court holds that the public does not have any Sixth Amendment right of access to such proceedings, it necessarily follows that if the parties agree on a closed proceeding, the trial court is not required by the Sixth Amendment to advance any reason whatsoever for declining to open a pretrial hearing or trial to the public. “There is no question that the Sixth Amendment permits and even presumes open trials as a norm.” Ante, at 2908. But, as the Court today holds, the Sixth Amendment does not require a criminal trial or hearing to be opened to the

36. Id. at 2933-36 (Blackmun, J., concurring in part and dissenting in part).
37. W. GILBERT & A. SULLIVAN, THE MIKADO Act II.
public if the participants to the litigation agree for any reason, no matter how jurisprudentially appealing or unappealing, that it should be closed.\textsuperscript{38}

Even Justice Rehnquist, however, hesitates to affirm broadly that the legal effect of the Constitution is to be determined entirely by its text.\textsuperscript{39}

Nor does any of his eight colleagues step forward to champion the idea: The four dissenters plainly repudiate it. Chief Justice Burger's concurrence utilizes the plain-language approach for a limited purpose—interpretation of the word "trials" in the sixth amendment—but, like the Rehnquist opinion, avoids unlimited endorsement of the purely textual approach. Justice Powell's concurrence, to be discussed presently, does not even quote any constitutional language, much less rely on it as determinative. Justice Stewart, and Justice Stevens (who alone joined his opinion without qualification), seem uncertain; they rely on the "plain language" of the sixth amendment's text in holding that it protects only "the accused," but betray ambivalence in reserving nevertheless the question whether nonparties have any public-trial rights by reason of a first amendment right of access to information.

How can ambivalence be inferred from reservation of a question? Ordinarily this means a complete suspension of judgment and affords no insight into judicial thinking. Here, however, the very decision not to decide is significant, since the easier course was simply to follow recent precedents denying a first amendment right of access.\textsuperscript{40} This can best be understood after a brief look at the Powell and Rehnquist concurrences.

As already noted, these concurrences appear to have been written after the dissent was circulated to the Justices. I say this because there is nothing in Justice Stewart's opinion for the Court that would be likely to evoke either of them. Justice Stewart reserved judgment on whether the closing of criminal court proceedings could ever violate the first amendment rights of a stranger to the prosecution;\textsuperscript{41} he opted for a narrower ground. Justices Powell and Rehnquist chose to express themselves on the broader question, with Justice Powell saying yes\textsuperscript{42} and Justice Rehnquist

\begin{itemize}
\item \textsuperscript{38} 99 S. Ct. at 2918 (Rehnquist, J., concurring).
\item \textsuperscript{39} Raoul Berger is one of the few to advocate such an extreme position. See R. Berger, \textit{Government by Judiciary} (1977); text accompanying notes 73-77 supra.
\item \textsuperscript{40} See text accompanying note 15 supra.
\item \textsuperscript{41} 99 S. Ct. at 2912.
\item \textsuperscript{42} Id. at 2914-15 (Powell, J., concurring).
\end{itemize}
There is no apparent reason why either of them should have taken the trouble to write at all, since their silent joinder in the majority opinion would have left them free to maintain their differing viewpoints in any later case where the difference was material. It is not to be supposed that these busy men spent the time needed to write the concurrences simply for the pleasure of publicizing their views; indeed, other things being equal, most judges prefer to hold their fire until it can do some good—thus preserving their options in a fluid and fast-changing theater of operations.

On the other hand, the two concurrences become comprehensible when the dissent enters the scene. Despite its lack of foundation in the constitutional text, the dissent strikes one powerful blow that the majority opinion does not parry—the Watergate argument (that official wrongdoing may be completely and permanently concealed if the public, including the press, is not allowed an unobstructed view of criminal proceedings). This argument does pack a wallop; many of us are old enough to remember, for example, how long most Germans were kept in ignorance of Hitler’s steps toward genocide. A Justice may well be uneasy with a position that does not somehow allow for or leave the Court room for dealing with it. That is what the Powell concurrence does. It declares that the first amendment does require criminal trials and hearings to be public, unless they must be closed to protect the defendant’s right to a fair trial; and the closing must be based on a judicial determination of necessity, subject to appellate review, not on a defendant’s election to waive.

Once Justice Powell had circulated his opinion to his colleagues, Justice Rehnquist had to go on record with his contrary view—otherwise, his silence could be understood as acquiescence. Hence his separate concurrence.

It is easy to see why Justice Powell did not simply change his vote and join (rejoin?) the four dissenters. Like the rest of the majority, he thought the closing of the pretrial suppression hearing on the Clapp murder was, considering all the circumstances, necessary to preserve the fairness of the murder trial. What is less evident is why he did not join the Blackmun dissent in so far as it delineated the scope of the sixth amendment, and join the Stewart opinion on the need for a secret hearing in this particular case. In

43. Id. at 2918 (Rehnquist, J., concurring).
44. Id. at 2930-36 (Blackmun, J., concurring in part and dissenting in part).
45. Id. at 2914-15 (Powell, J., concurring).
46. Id. at 2916 (Powell, J., concurring).
47. Id. at 2917 (Powell, J., concurring).
other words, why did he prefer to rely, without the concurrence of any of his colleagues, on an interpretation of the first amendment as establishing a right of access to information, which the Court in prior cases had repeatedly refused to recognize? The answer may be that he thought an accusation of usurpation by the Court would more probably be triggered by performing a Humpty-Dumpty operation on the hard term “the accused” than by investing the vaguer phrase “the freedom of the press” with new meaning. This, of course, is speculation, and other explanations can be constructed.

Also speculative is the question whether circulation of the dissent led Justice Stewart to modify the Court’s opinion in any respect. We have already noted that the plain-language basis of the sixth amendment holding does not sit easily with Justice Stewart’s reservation of the question whether the first amendment ever comes into play. The textual approach, as developed in the Stewart opinion, leaves no room for such hesitation. It seems likely that Justice Stewart’s first amendment discussion was added to his opinion after circulation of the dissent, to cope with Justice Blackmun’s Watergate argument.

THE QUALITY OF THE COURT’S WORKPRODUCT

The Justices’ performance in the Gannett case illustrates these significant points: (1) The great majority of the Justices, if not all of them, reject the purely textual approach to judicial review and therefore presumably approve of constitutional rulemaking by the Court; at any rate, they stand ready to engage in it when and if necessary. (2) The Justices do not openly acknowledge that they have thus grasped power to revise the Constitution. They continue to disguise their actions, whenever possible, as mere interpretation of the constitutional text or fidelity to judicial precedent. (3) This lack of candor seriously impairs the quality of the Court’s performance and may eventually undermine the prestige it now enjoys.

The first point has already been discussed. As for the second, I invite the reader to search the five opinions rendered in the Gannett case. He will find no word of Justice Blackmun acknowledging that his dissent proposes a rule not based on constitutional text, nor any word in the other four opinions reproaching the dissent for urging usurpation of nonjudicial power. Formulation of new constitutional rules not grounded in the words of the Constitution or its amendments has become so commonplace that the Jus-
tices now engage in it without apology or fear of disapproval.\textsuperscript{48} They do have their many differences, but those differences concern the wisdom of particular new formulations rather than their lack of textual foundation.

My third point cannot be fully developed here because its full exposition requires a critical review of the Court's ups and downs since 1937—when the Court surrendered its self-proclaimed guardianship of business freedoms and accumulated wealth, and entered its modern era.\textsuperscript{49} Definitive appraisal of the Court's new and expanded conception of judicial review must take account of the problems it has faced during that period and the alternatives that were open to it. Even so, a single decision such as the \textit{Gannett} case provides a basis for tentative observations from which a working hypothesis can be constructed.

My first observation is that the case reveals prodigal waste of the Justices' time, their scarcest resource. Second, the net result is five copiously documented opinions covering forty pages in the \textit{Supreme Court Reporter} (seventy-eight pages in the \textit{United States Reports}), which accomplish remarkably little in settling the law, in affording guidance to lower courts and lawyers, or in offering moral leadership by explaining the governmental ideals that underlie the decision. Third, the Court's failure to tender any \textit{justification} for making constitutional rules on its own initiative provokes charges of usurpation which, in the long run, may blast its prestige and provoke indiscriminate, destructive attack on its legitimate and crucially important power of judicial review. The first two observations, taken together, relate to the Court's craftsmanship—its ability to handle the public-trial problem in such a manner as to achieve results valuable enough to justify the time and effort invested. The third observation relates to the legitimacy of formulating new constitutional rules, which most of the Justices showed themselves ready to do.

\textit{Craftsmanship}

The Court's workproduct in the \textit{Gannett} case is a full-scale set piece, presented with all the trappings suitable to a landmark decision. The opinions display the fruits of extensive historical research

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\textsuperscript{48} See L. Lusky, \textit{supra} note 9, at 76-79. The Court has in fact openly admitted that it engages in constitutional rulemaking. \textit{E.g.}, Linkletter v. Walker, 381 U.S. 618, 628-29, 639 (1965).

\textsuperscript{49} See generally L. Lusky, \textit{supra} note 9, at 102-14.
and thorough examination of judicial precedents and scholarly writing back through the ages. Even if counsel and law clerks did all the spade work (unlikely), five of the Justices must have devoted considerable time to writing their respective opinions and perhaps adjusting them in the light of other opinions when circulated; and each of the nine, of course, had to study each opinion and any revisions of it.

There may have been a time when the Court's docket was light enough to permit exhaustive consideration of all its cases no matter how much time was spent on any one of them. For more than half a century, however, this has not been true. Heavy caseload was the principal reason for inaugurating the Court's discretionary certiorari jurisdiction in 1891 and greatly expanding it in 1925. Thus authorized, the Court hears only the few cases it believes to have public importance. There are a few types of cases that the Court is obligated to review regardless of their public importance, but even these "appeal cases" are disposed of without a full hearing if the Court chooses. At the October 1978 Term, the Court had time for full hearings in only 157 (3.3%) of the 4,636 appeal and certiorari cases that appeared on its docket, or 116 (2.7%) of the certiorari cases and 41 (13.4%) of the appeal cases. It is therefore evident that time spent on one case is time denied to another that had to be turned away.

This is a real cost, since many of the cases denied full hearing involve questions of substantial public importance, and all of them are presumably important to the immediate litigants. Moreover, the Court no longer has time even to review all cases where federal courts of appeals have disagreed on questions of federal law—a category in which certiorari used to be granted automatically in order to preserve geographical uniformity in the application of federal law. Such a cost is tolerable only if it is balanced or outweighed by the value of the Court's workproduct. So let us evaluate what the Court accomplished in the Gannett case.

The Court did render a final judgment rejecting Gannett’s claim that it had been wrongly excluded from the pretrial suppression hearing. If the Court followed its usual practice, a vote to affirm or reverse was most probably taken at a conference held within a few days after November 7, 1978, when oral argument was heard. Until then the Justices did not need to spend much time on the case. Then some member of the Court, presumably Justice Stewart or Justice Blackmun, was designated to write the majority opinion. The other opinions made their appearance one by one, and revised versions were also circulated. Finally, on July 2, 1979, five days less than eight months after oral argument, the decision was announced. Our question relates to the value not of the decision but of the opinions. That is, what would have been lost if the Court had announced only its affirmation of the state court’s judgment, and perhaps the vote, and nothing more? If something would have been lost, could that something have been achieved more easily and directly than it was?

One main reason a court writes an opinion is that justice not only must be done, but must be seen to be done. A typical judicial opinion either undertakes to show that the present decision is consistent with previous rulings and applicable statutes; or else it explains why a judicial precedent should be overruled, or a statute disregarded because unconstitutional; or else, if there is no applicable statute or judicial precedent, it states the premises the court adopted. In this way, the losing party and everyone else is given a basis for believing that the court has been guided by legal principle and not by personal favor or animosity. The other main reason for writing an opinion is that it facilitates use (and prevents misuse) of the case as a precedent in future litigation. Both of these purposes are automatically served when a court’s opinion sets forth the true reasons for its decision. The Gannett opinions, however, perform the expository function inefficiently and the precedential function not at all.

What do the opinions tell us about the reason for affirmance of the judgment against Gannett? All nine Justices agree that the case has not been rendered moot by the completed plea bargains in the original murder prosecutions, with consequent dissolution of the secrecy restriction on the pretrial transcript.54 Four of them vote for reversal, so our scrutiny is narrowed to the opinions of the other five. The five do not all agree that Gannett has standing to

54. See note 13 supra.
raise a constitutional objection to the closing of the hearing. (Justice Powell thinks there is standing to raise a first amendment access question, but Justice Rehnquist disagrees and the other three reserve judgment.) What all five do agree on is that any right Gannett may have must yield to the need for a fair trial in the murder case (indeed, the dissenters agree to this) and that the closing of the hearing was warranted by the danger of unfairness to the accused through premature publicity.

If the Court, after stating the facts (to show the world it had actually considered them), had done no more than explain why the trial judge rightly thought a closed pretrial hearing was necessary for a fair trial. Gannett and everyone else would have known the basis of the affirmance. Such an opinion could have been short and simple, and would almost certainly have dispensed with the magnificent display of scholarship and rhetoric that now graces the United States Reports.

Nor is the effort invested in the present opinions worthwhile because of the guidance they provide for future cases. Close examination reveals that the case has little, if any, precedential value, except on the mootness point. Only four of the Justices (the dissenters) believe that Gannett had standing to claim a sixth amendment right; the other five disagree. Only one of the nine (Justice Powell) declares that Gannett had standing to claim a first amendment right; five others (Justice Rehnquist and the four

56. Id. at 2918 (Rehnquist, J., concurring).
57. Id. at 2912 (Stewart and Stevens, JJ.); id. at 2913 (Burger, C.J., concurring).
58. Id. at 2912 (Stewart and Stevens, JJ.); id. at 2913 (Burger, C.J., concurring); id. at 2915-16 (Powell, J., concurring); id. at 2917 (Rehnquist, J., concurring).
59. Id. at 2936-39 (Blackmun, Brennan, White, and Marshall, JJ., concurring in part and dissenting in part).
60. Id. at 2912 (Stewart and Stevens, JJ.); id. at 2913 (Burger, C.J., concurring); id. at 2916-17 (Powell, J., concurring); id. at 2917 (Rehnquist, J., concurring).
61. Had any Justice contended that Gannett possessed a first or sixth amendment right that should not yield to the fair-trial imperative, that question of law would also have called for discussion. On this point, however, as just noted, there was no disagreement.
62. Id. at 2932-33, 2935 (Blackmun, Brennan, White, and Marshall, JJ., concurring in part and dissenting in part).
63. Id. at 2911 (Stewart and Stevens, JJ.); id. at 2913 (Burger, C.J., concurring); id. at 2914 (Powell, J., concurring); id. at 2917 (Rehnquist, J., concurring).
64. Id. at 2914-15 (Powell, J., concurring).
65. Id. at 2918 (Rehnquist, J., concurring).
dissenters\(^66\)) disagree, and the other three reserve judgment.\(^67\) Thus, a majority deny that freedom of the press includes a right of access, and a quite different majority deny that the right to public trial belongs to anyone but the accused.

Justice Powell, however, does offer a set of standards and procedures for trial judges to use in future cases to decide whether a closed hearing is necessary.\(^68\) He plainly believes that respect for the *Gannett* decision will require adherence to these standards and procedures. Justice Rehnquist, in response, adduces an inconvenient fact:

> My Brother Powell . . . believes that the four dissenters—who expressly reject his First Amendment views . . . and who, instead, rely on a Sixth Amendment analysis that is repudiated by a majority of the Court today—will join him in any subsequent case to impose constitutional limitations on the ability of a trial court to close judicial proceedings. I disagree with Mr. Justice Powell. . . . [I]n a matter so commonly arising in the regular administration of criminal justice, I do not so lightly as my Brother Powell impute to the four dissenters in this case a willingness to ignore the doctrine of *stare decisis* and to join with him in some later decision to form what might fairly be called an "odd quintuplet," agreeing that the authority of the trial court to close judicial proceedings to the public is subject to limitations stemming from two different sources in the Constitution.\(^69\)

In short, says Justice Rehnquist, the *next* public trial case may find the dissenters submitting to the will of the present majority and going along with the sixth amendment position of the other five Justices, who reject Gannett’s sixth amendment claim here. In that event, Justice Powell in the later case might stand quite alone or, at best, be one of a minority. One may doubt that Justice Blackmun would have written his exhaustive dissent if he had not intended to adhere to it in the future in the hope that it would eventually receive majority approval. Yet it is not inconceivable that his Herculean labor was performed solely in the hope of attracting (or retaining?) a fifth vote in the *Gannett* case itself, and the dissenters nowhere say whether they will cling to their position

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66. *Id.* at 2921-22 (Blackmun, Brennan, White, and Marshall, JJ., concurring in part and dissenting in part).
67. *Id.* at 2912 (Stewart and Stevens, J.J.); *id.* at 2913 (Burger, C.J., concurring).
68. *Id.* at 2916 (Powell, J., concurring).
69. *Id.* at 2919 n.2 (Rehnquist, J., concurring).
in future cases. I am persuaded that the Rehnquist argument is unanswerable and that, as he contends, "the lower courts are under no constitutional constraint either to accept or reject those procedures" that Justice Powell has advanced.\textsuperscript{70} If this is so, it is hard to see how the \textit{Gannett} opinions have any precedential value whatever so far as free press and public trial are concerned.

Is it possible to attribute value to those opinions on other and less conventional grounds? If, taken together, they committed the Court to a ringing affirmation of the relationship between public trial and some basic national goal, such as self-government or justice for the accused, they would help reinforce the pride of community and strengthen the sense of personal security. Only the four dissenters, however, sound this cry.\textsuperscript{71} Arguably, publication of the Justices' careful researches will facilitate the access of scholars, lawyers, and other judges to the source materials. On the other hand, other media (such as treatises, commentaries, and law journals) are available for this purpose, and each Justice can publish his research individually without burdening the time of his colleagues. Also, though it is no longer easy to recall the time when Justices kept their views to themselves until cases arose in which expressing them could do some good, it is not so long since the marvelously scholarly but eventually unused opinions of Justice Brandeis were published—after his death.\textsuperscript{72} His profound indifference to public approbation may now seem quaint and old-fashioned, but take a moment to consider whether the change in judicial style represents a wholesome or unfortunate development.

The best I can say for the \textit{Gannett} opinions is that they have the same fascination as an historic battlefield, which in a sense is what they are. It is an interesting pastime to map the dynamics of the contest, thrust and parry, attack and counterattack, just as at Gettysburg or Manassas. That is what I have attempted here. But supplying the raw material for a challenging wit-twister seems a dubious use of the Justices' time and talents.

\textit{Legitimacy}

Entirely distinct from the question of craftsmanship is the question of legitimacy. \textit{By what right} do most or all of the Justices

\textsuperscript{70} \textit{Id.} at 2918 (Rehnquist, J., concurring).
\textsuperscript{71} \textit{See id.} at 2930-36 (Blackmun, Brennan, White, and Marshall, JJ., concurring in part and dissenting in part).
\textsuperscript{72} \textit{L. BRANDEIS, THE UNPUBLISHED OPINIONS} (A. Bickel ed. 1957).
claim authority to make new constitutional rules not based on interpretation of the constitutional text? Scholars have struggled with this problem for a long time, as have judges. One school of thought, led today by Raoul Berger,\(^7\) denies the legitimacy of all constitutional rules not based on interpretation of the written words. There is an opposing school that affirms the legitimacy of any constitutional rules that the Court reasonably considers to be desirable in the light of modern conditions. Leonard Levy is a well-known spokesman for this philosophy,\(^7\) and it seems to me that Laurence Tribe gives it more support than he acknowledges.\(^7\)

I myself adhere to an intermediate position that is more complex than either of the others. I believe that a constitutional rule which lacks textual support may or may not deserve to be criticized as illegitimate. It all depends.

What does it depend on? Allow me to defer that question for the moment and explain first why I cannot accept either of the two simpler extremes. At the outset, I confess to instinctive sympathy with Raoul Berger's insistence on textual sources for all constitutional rules (perhaps with a reasoned exception for the foreign affairs powers of Congress and the President\(^7\)). The position is that the orthodox conception expounded in \textit{Marbury v. Madison} marks not only the minimum but also the maximum scope of legitimate judicial review. That is what I learned in law school. That is what I taught my own students until, beginning in the 1960's, the Court revealed more and more clearly that it had developed a much broader view of its own authority and responsibility than the orthodox conception allows to it. And it used this newly asserted jurisdiction for prodigious assaults on societal evils which the elective organs of government seemed powerless to cope with, and which threatened to degrade if not destroy the openness of our society and the controllability of government by the governed:\(^7\)

Discrimination against minorities, especially blacks; muffling of politically significant protest; cruel formalism in the criminal process, and indifference to conviction of the probably innocent; grotesque legislative malapportionment; and others. To insist in the late twentieth

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\(^7\) See R. Berger, supra note 39.


\(^7\) See L. Tribe, American Constitutional Law iv, 52, 572-75 (1978).


century that judicial review encompasses no more than interpreting words written for the most part in the much different social context of the eighteenth and nineteenth centuries, means repudiating all these magnificent judicial achievements. That, in my opinion, is too high a price to pay—at least if there is a feasible alternative, as I believe there is.

Even so, I cannot embrace the other extreme position, which approves whatever actions the Court reasonably thinks the public welfare demands. That would accord the status of a super-legislature to the least representative, least politically responsible of all our governmental organs. For the Court to recognize no constraint except the Justices' own notions of public need, and to devise new constitutional rules with all the unlimited freedom of a continuing constitutional convention, would be to let the Court embark on a collision course with the electorate (acting through Congress, the President, and the state and local governments as their chosen spokesmen). And in any such contest the Court must lose; Congress, through its power to define the Court's appellate jurisdiction, could effectively limit or abolish judicial review if only the voters would tolerate such action. The voters would tolerate it if enough of them became convinced that only thus could they retain the power to govern themselves; and in that event some overkill, at least, would be likely. The crippling or abolition of judicial review, even for such purposes as preservation of our nationwide common market and other tasks essential to the health of our complex governmental system, might well follow. That would be a disaster. Judicial review is a vital national resource. It should be kept within limits that will prevent it from provoking its own destruction.

Thus, by a process of elimination, I am driven to prefer a theory of judicial review not confined to the written text but still kept within some verifiable, "principled" limit. A limit is verifiable if someone outside the Court can ascertain with considerable confidence whether the Court has observed or transgressed that limit. (There is thus an analogy with arms limitation treaties.) If the Court, having rejected the principled limit prescribed by orthodox theory (enforcement of law set forth in the constitutional text), makes clear its intention to observe some other principled limit

78. U.S. Const. art III, § 2.
that has a basis in reason, there will be no cause for the electorate to attack judicial review as a threat to self-government.79

The principled limit can be achieved, I believe, through a new use of the concept of implied power. Implied legislative power has been familiar at least since Chief Justice Marshall delivered the opinion of the Court in *McCulloch v. Maryland.*80 The written Constitution says nothing of banks or corporations, yet the Court held that Congress has power—implied from the commerce power, the currency power, and other powers that are expressly granted—to charter a banking corporation.81 Chief Justice Marshall reasoned that an express grant of legislative power to Congress is to be understood as the legitimation of a particular legislative purpose, which implies the legitimation also of any rational means chosen or instrumentality created by Congress to achieve that purpose.82

Can similar logic be adduced to justify the implication of judicial power to make new constitutional rules? The logic cannot be identical since the Constitution’s grant of judicial power is entirely general; there is no express specification of subject matters that are to be regarded as legitimate objectives of constitutional innovation by the Court. Even the supremacy clause,83 which can be interpreted as authorizing judicial review of state action, provides no explicit support for judicial review of federal action. Yet it has long been settled that the power to hold federal84 as well as state85 ac-

79. This principled limit ought not be regarded as a formula for predicting the Court’s future actions. It does have some utility in this regard by making it possible to identify with confidence certain operational areas that the Court will not enter. But, on the whole, the level of indeterminacy will remain nearly as high as it now is. I mention this because misunderstanding on this score has occasioned some criticism of my book *By What Right?*, in which the ideas sketched here are developed in more detail. My critics appear to complain of my failure to offer a crystal ball. See, e.g., McDougal, *The Application of Constitutive Prescriptions: An Addendum to Justice Cardozo,* 33 *The Record* 255, 290 n.9. (1978) (reprint of 1977 Cardozo Lecture of Association of the Bar of the City of New York). That would indeed be a great help to lower courts and to lawyers if I could devise it. Also worth pursuing, however, is my own more modest aim: to help preserve judicial review by proposing a principled limit that will give it great scope but forestall an effective challenge to its legitimacy.

81. Id. at 421-24.
82. Id. at 409-21.
83. U.S. CONST. art. VI, cl. 2.
tions unconstitutional is impliedly vested in the Supreme Court. The makers of the Constitution are thought to have so intended, as a matter of historical fact.

The same proposition can be restated in the conceptual pattern of *McCulloch v. Maryland*. The grant of the power of judicial review to the federal judiciary is to be understood as the legitimation of a definable judicial purpose, namely, preservation of the Constitution and of the national objectives which it embodies and memorializes. Whatever new constitutional rules are needed for achievement of those objectives are likewise legitimate. As I have written elsewhere:

One perpetrates no violence upon logic or known historical fact by assuming that the Founding Fathers intended (a) to create a government; (b) to prescribe certain essential characteristics of that government, both by allocating powers among its component organs and by stipulating the general form of the relationship between it and its people; and (c) to empower the Court to serve as the Founders' surrogate for the indefinite future—interpreting the Constitution not as they themselves would have directed if they had been consulted in 1787, but as is thought right by men who accept the Founders' political philosophy—their commitment to self-government and the open society—and consider themselves obligated to effectuate that philosophy in the America of their own day.86

... Implication of power in the Court to make constitutional rules involves two elements. The first is a national objective which is either spelled out in the written Constitution (notably in the preamble), or inferable from its underlying pattern or the known purposes of the Constitutors. The second is a comprehensible reason why the Court is better fitted than other organs of government to effectuate that objective. If either of these elements is lacking, the Court's rule is an exercise of raw power. It does not deserve the name of law, because it does not evoke the voluntary compliance engendered by respect for legitimate authority. Instead of resolving conflicts and easing tensions within the society, which is the function of law properly so called, it aggravates them. It provokes evasion by those whom the Court has undertaken to bind, countered by angry claims of legal right on the part of those whom the Court has undertaken to benefit.87

86. L. Lusky, *supra* note 9, at 21 (emphasis omitted).
87. Id. at 107 (emphasis omitted).
Our opinion as to the legitimacy of implied judicial power must turn on the single question whether it is less hazardous to societal welfare than any visible alternative. 88

It will be argued here (1) that the Court has been correct in answering the question in the affirmative, thus grasping implied power for itself, but (2) that the Court deserves criticism for the manner in which it has done so, and (3) that the methodological flaw has led to unwarranted assumption of judicial power in some cases. 89

I believe this earlier appraisal is valid as far as it goes, and I reaffirm it. As the Gannett case illustrates, however—and it is one of many—the appraisal ought to include an additional proposition: The "methodological flaw" that I referred to (namely, the Court's adherence to the fiction that all judicial review is grounded in the constitutional text) has impaired the Court's performance even where, as in the Gannett case, there is no unwarranted assumption of judicial power and a wholly justifiable result has been reached.

**BUT WILL IT FLY?**

The law, a pragmatic discipline, mistrusts proposed changes unless their practical consequences are explored. I have explained my criticisms of the Gannett opinions fully, but the criticisms are stated in basically abstract form. To complete the critique, I shall now attempt to sketch an opinion for the Gannett case as it might have been written if the Justices had been willing to say candidly that implied judicial power played a part in the adjudication process. The opinion would consist of two parts, the first stating the justification for implication of judicial power, both as a general proposition and as applied to problems of free press and fair trial. The second part would analyze the Gannett record in light of the conclusions thus reached. 90

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88. *Id.* at 24.
89. *Id.* (emphasis omitted).
90. In sketching a Gannett opinion I do not impersonate a Justice, but use my own style in stating the substance of the points to be covered. In the interest of brevity I also make freer use of incorporation by reference, particularly of material contained in By What Right?, than would be done in an actual opinion.
Implied Judicial Power in General, and Its Application to Problems of Free Press and Fair Trial

Ever since the days of Chief Justice Marshall the Court has engaged in the formulation of national policy. Through judicial review of presidential, congressional, and state actions it has played a significant part in making the federal system work and in shaping the people-government relationship along the lines it has thought were contemplated by those who adopted the written Constitution and its amendments.

Until about 1937, the Court was generally able to achieve the desired results by attributing them to expansive (or, occasionally, restrictive) interpretation—which, of course, was a misuse of that term to the extent that the Court sought to satisfy current national needs rather than effectuate the original intention of the authors. For example, expansive interpretation of the direct-tax provision of article I led to invalidation of the 1894 federal income tax. Expansive interpretation of “liberty” and “property” in the due process clauses of the fifth and fourteenth amendments served as the foundation for a panoply of constitutional protections of business freedom and accumulated wealth. Expansive interpretation of the tenth amendment served to protect “state rights.”

On the other hand, restrictive interpretation of the term “citizen” in article III produced the disastrous Dred Scott decision, and restrictive interpretation of “the right of the people to keep and bear arms” reduced the second amendment to a virtual dead letter. The main exception to reliance on interpretation of the constitutional text was the federal foreign affairs power, which the Court initially tried to predicate on various expressly granted powers but ultimately acknowledged to be extra-constitutional in origin.

98. See, e.g., Fong Yue Ting v. United States, 149 U.S. 698, 711-12 (1893). See also Legal Tender Cases, 79 U.S. (12 Wall.) 457, 555-56 (1872) (Bradley, J., concurring).
99. See sources note 76 supra.
A new era began in 1937, upon termination of the epic conflict between the Court and the political branches over the Roosevelt New Deal programs. These programs sought to substitute a regulated economy for the free enterprise system the Court had preserved for so long under constitutional shelters. A change of position by Justice Roberts and the appointment of New Deal Senator Hugo L. Black to succeed Justice Vandevanter decisively shifted the Court's balance of power. The onetime dissenters became the majority and inaugurated a regime of judicial self-restraint. They overruled the many decisions invalidating official intrusion upon the laissez faire market system and the wealth accumulations it had spawned. For a time it even seemed that the logic of self-restraint on economic matters might compel the Court to withdraw almost completely from protection of all individual liberties against abridgment by state action—personal liberties such as freedom of speech and the exercise of religion, as well as business liberties such as freedom of contract.

Two opinions at the 1937-1938 Term show that the Justices had identified this problem and were seeking a reasoned basis for retaining ample judicial review in the field of civil liberties while renouncing it in the field of business and vested wealth protection. *Palko v. Connecticut* grappled with the problem of providing safeguards against miscarriage of justice in state court criminal prosecutions. *United States v. Carolene Products Corp.* offered a rationale for invalidating *statutes* restricting civil liberties but not statutes regulating the economy. I have traced the doctrinal developments that flowed from these seminal cases in *By What Right?*, and, fascinating though they are, I can do no more than summarize them here.

The *Palko* case dealt with the fact that the Bill of Rights was adopted in 1791 to restrict only the feared new national government, not the states. Until after the Civil War, there were no federal constitutional protections against state action infringing the freedoms of speech, press, assembly, and petition.

104. 304 U.S. 144 (1938).
105. *Id.* at 152 n.4.
106. L. Lusky, *supra* note 9, Part Two.
and no such protections against unjust criminal prosecution other than the prohibition of ex post facto laws and bills of attainder.\textsuperscript{108} In 1868 the fourteenth amendment did require the states to accord due process and equal protection; and although it has been contended that the amendment was intended by its makers to "incorporate" the whole Bill of Rights and make all its safeguards applicable against the states,\textsuperscript{109} the Court has persistently concluded that, as a matter of historical fact, no such intent existed.\textsuperscript{110}

On the other hand, the fourteenth amendment does seem to guarantee respect for the fundamentals of fair procedure. That is the most natural interpretation of "due process of law." Whatever additional content may be found in this vague phrase, it must at least require the reversal of convictions obtained through procedures occasioning an intolerably high risk of convicting the innocent.

To be sure, even this seemingly obvious proposition was not immediately accepted. In \textit{Hurtado v. California}\textsuperscript{111} the Court declared that the fourteenth amendment due process clause did not protect against any of the practices \textit{specifically} forbidden by the Bill of Rights in federal prosecutions,\textsuperscript{112} such as denial of counsel,\textsuperscript{113} compulsory self-incrimination,\textsuperscript{114} denial of speedy and public trial,\textsuperscript{115} double jeopardy,\textsuperscript{116} and so on. The logic was starkly formal: The term "due process of law," as used in the \textit{fifth} amendment to restrict federal action, could not have been understood by its makers to include the several specific safeguards, such as the right to indictment by a grand jury, that are contained in \textit{other} Bill of Rights provisions; for that would mean that the specific safe-

\begin{itemize}
  \item \textsuperscript{108} U.S. CONST. art. I, § 10.
  \item \textsuperscript{109} E.g., Adamson v. California, 332 U.S. 46, 89 (1947) (Black, J., dissenting).
  \item \textsuperscript{110} See, e.g., Duncan v. Louisiana, 391 U.S. 145, 147-49 (1968); \textit{id.} at 211 (Fortas, J., concurring); Adamson v. California, 332 U.S. 46, 51-54 (1947); Palko v. Connecticut, 302 U.S. 319, 323 (1937); Twining v. New Jersey, 211 U.S. 78 (1908). One unfortunate consequence of total incorporation of the entire Bill of Rights into the fourteenth amendment, which doubtless helped convince the Court that it was not intended, would have been to require grand jury action for all state prosecutions of infamous crimes, \textit{see} U.S. CONST. amend. V, and jury trial in all state court civil actions involving more than twenty dollars, \textit{see} \textit{id.} amend. VII. \textit{See generally} Hurtado v. California, 110 U.S. 516, 520-21 (1884).
  \item \textsuperscript{111} 110 U.S. 516 (1884).
  \item \textsuperscript{112} \textit{Id.} at 538.
  \item \textsuperscript{113} U.S. CONST. amend. VI.
  \item \textsuperscript{114} \textit{Id.} amend. V.
  \item \textsuperscript{115} \textit{Id.} amend. VI.
  \item \textsuperscript{116} \textit{Id.} amend. V.
\end{itemize}
guards were redundant and unnecessary.\textsuperscript{117} But the due process clauses of the fifth and fourteenth amendments are virtually identical. Therefore, the Court said, the subject matter of every specific Bill of Rights safeguard was excluded from the coverage of the fourteenth amendment due process clause.\textsuperscript{118}

This was incorporation in reverse: far from being required to comply with the specific restrictions set out in the Bill of Rights, the states were exempted from such compliance. Thus it happened that for the first decades after the fourteenth amendment’s adoption the Court made little use of its due process clause. There was some scope for its operation, in areas not specifically dealt with by the Bill of Rights, such as the requirement of notice and opportunity for hearing,\textsuperscript{119} and territorial limitations on judicial jurisdiction.\textsuperscript{120}

Finally, however, the absurdity of the \textit{Hurtado} dictum became plain and “due process of law” came to be interpreted as requiring fundamentally fair procedure, whether or not departure from specific Bill of Rights standards was involved. The initial refusal to follow the logic of that dictum came in a civil case, \textit{Chicago, Burlington & Quincy Railroad v. Chicago},\textsuperscript{121} which held that the right to compensation for property taken for public use, though specifically guaranteed by the fifth amendment eminent domain clause, was also guaranteed by the fourteenth amendment due process clause.\textsuperscript{122} It was a third of a century before the Court began to do as much for accused persons as it had done for property owners. \textit{Powell v. Alabama}\textsuperscript{123} set aside a state death sentence for rape, holding that failure to provide defendants in capital cases with the assistance of counsel (specifically guaranteed by the sixth amendment) was a denial of due process.\textsuperscript{124} The Court’s rationale, however, was that the uncounseled defendant had, in effect, been denied a \textit{hearing};\textsuperscript{125} and an opportunity for a hearing is guaranteed by no Bill of Rights provision except the fifth amendment due process clause—which is mirrored in the fourteenth amendment.

\textsuperscript{117} 110 U.S. at 534.
\textsuperscript{118} Id. at 535, 538.
\textsuperscript{119} See, e.g., Iowa Cent. Ry. v. Iowa, 160 U.S. 389, 393 (1896).
\textsuperscript{120} See, e.g., Pennoyer v. Neff, 95 U.S. 714, 733-36 (1877).
\textsuperscript{121} 166 U.S. 226 (1897).
\textsuperscript{122} Id. at 233-41.
\textsuperscript{123} 287 U.S. 45 (1932).
\textsuperscript{124} Id. at 71.
\textsuperscript{125} Id. at 68-69, 71.
Brown v. Mississippi\textsuperscript{126} was the first square holding that action forbidden in federal criminal prosecutions by a specific Bill of Rights provision is forbidden in state prosecutions by the fourteenth amendment due process clause. In that case the court set aside a death sentence for murder because it was based on a confession obtained by torture,\textsuperscript{127} which in a federal prosecution would have violated the fifth amendment self-incrimination clause.

At this point, the interpretation of "due process of law" had finally been allowed to expand to the full extent of its literal meaning in so far as it affected criminal procedure and practice. But the Court was careful to explain that, though the Bill of Rights no longer operated to narrow due process, it did not broaden due process either. In his opinion for the Court in Brown v. Mississippi, Chief Justice Hughes said:

\begin{quote}
[T]he question of the right of the State to withdraw the privilege against self-incrimination is not here involved. . . . Compulsion by torture . . . is a different matter [from "compulsion of the processes of justice by which the accused may be called as a witness and required to testify"].

The State is free to regulate the procedure of its courts in accordance with its own conceptions of policy, unless in so doing it "offends some principle of justice so firmly rooted in the traditions and conscience of our people as to be ranked as fundamental." . . . Because a State may dispense with a jury trial, it does not follow that it may substitute trial by ordeal. The rack and torture chamber may not be substituted for the witness stand.\textsuperscript{128}
\end{quote}

In short, the due process clause was held to guarantee fundamental justice in criminal procedure, but not to require compliance with the specific Bill of Rights safeguards as such.

This was the state of the law in 1937 when Palko v. Connecticut\textsuperscript{129} was decided. The question in that case was whether Connecticut had put Palko in jeopardy twice for the same offense. In a federal prosecution the answer would have been yes, on fairly technical grounds, under the fifth amendment double jeopardy clause;\textsuperscript{130} and Palko contended that the fourteenth amendment had made that clause, along with the rest of the Bill of Rights, applica-

\begin{footnotes}
\item[126] 297 U.S. 278 (1936).
\item[127] Id. at 281-85.
\item[128] Id. at 285-86.
\item[129] 302 U.S. 319 (1937).
\item[130] Kepner v. United States, 195 U.S. 100 (1904).
\end{footnotes}
ble to the states. Justice Cardozo's opinion for the Court, following the line marked out in *Brown v. Mississippi* the year before, held otherwise. He said the question was not whether the double jeopardy clause had been violated, but whether the due process clause had been violated through denial of fundamental justice: "[I]mmunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states." Here, he said, "[t]he state is not attempting to wear the accused out by a multitude of cases with accumulated trials." There being no cruelty, "nor even vexation to any immoderate degree," fundamental justice has not been denied.

Justice Cardozo thus held against "incorporation" of Bill of Rights protections for the accused into the fourteenth amendment. His opinion did, however, contain a dictum which some have cited in support of the view that the first amendment has been thus "incorporated":

We reach a different plane of social and moral values when we pass to the privileges and immunities that have been taken over from the earlier articles of the federal bill of rights and brought within the Fourteenth Amendment by a process of absorption. These in their origin were effective against the federal government alone. If the Fourteenth Amendment has absorbed them, the process of absorption has had its source in the belief that neither liberty nor justice would exist if they were sacrificed. . . . This is true, for illustration, of freedom of thought, and speech. Of that freedom one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom.

Whether Justice Cardozo intended his metaphorical term "absorption" to mean the same thing as the precise legal term "incorporation" is not entirely clear.

Presently I shall return to "incorporation" of the sixth amendment public-trial clause into the fourteenth amendment. First, however, we should take note of developments in the other area discussed in the *Palko* opinion, the first amendment, and particular

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132. 302 U.S. at 324-25 (footnotes omitted).
133. *Id.* at 328.
134. *Id.*
135. *Id.* at 326-27 (emphasis added) (citation omitted) (footnote omitted).
larly freedom of expression (i.e., the freedoms of speech and of the press), which entered deeply into the reasoning of the *Gannett* opinions.

*Freedom of expression.*—Some four months after the *Palko* decision, the Court decided *United States v. Carolene Products Corp.*, 136 upholding a federal commercial regulation. Footnote 4 to Justice Stone's opinion picked up the first amendment problem where the *Palko* opinion had left it, and delved more deeply into the reasons why courts should protect freedom of expression more carefully than business freedom. The footnote contained three paragraphs, only the first two of which are pertinent here.137

The first and second paragraphs offered two alternative justifications for according special judicial protection to freedom of expression. The first continued the line of thought expressed in the *Palko* opinion: "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth."138 Here the operative major premise is that even though the Bill of Rights was not intended, either in 1791 or 1868, to serve as a limitation on the states, the specific identification of a type of action it forbids to the federal government authorizes the Court to forbid it to the states as well. In thus asserting its power to make new constitutional rules, the Court makes no mention of any principle it considers itself bound to follow; nothing but its own unbounded discretion is to determine whether or not the newly claimed authority will be exercised with respect to each of the "specific prohibitions."

The second paragraph is based on an entirely different conception.139 Here the central idea is that the nation is committed to self-government, that judicial review is ordinarily unnecessary for elimination of unwise laws because the voters can achieve that without the help of courts, but that courts must stand ready to intervene against legislative interference with the very political processes through which the electoral will can be made effective. Here is the second paragraph:

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136. 304 U.S. 144 (1938).
137. The third paragraph dealt with minority rights.
138. 304 U.S. at 152 n.4 (emphasis added) (citations omitted).
139. There was no inconsistency with the first, but simply another separate and alternative proposal for justifying judicial activism in some fields but not in others.
It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. On restrictions upon the right to vote, see *Nixon v. Herndon*; *Nixon v. Condon*; on restraints upon the dissemination of information, see *Near v. Minnesota ex rel. Olson*; *Grosjean v. American Press Co.*; *Lovell v. Griffin*; on interferences with political organizations, see *Stromberg v. California*; *Fiske v. Kansas*; *Whitney v. California*; *Herndon v. Lowry*; and see *Holmes, J.*, in *Gitlow v. New York*; as to prohibition of peaceable assembly, see *De Jonge v. Oregon*.140

It will be observed that “dissemination of information” is recognized as part of the corrective political processes. If this is true—and its truth seems obvious—then restraints upon the freedom of speech and press should occasion judicial concern, lest the incumbent officeholders insulate themselves against electoral control and thus frustrate the national commitment to self-government. Moreover, the judicial concern should be acute when there is official interference with reports by news media on the workings of government itself, including the prosecution of accused persons.

The Devil’s Advocate speaks up. This is all logical enough, he says, and perhaps provides a sound reason for the Court to interpret the first amendment broadly. For example, it may possibly justify the Court’s stretching of the amendment’s literal terms—“Congress shall make no law . . . abridging the freedom of speech, or of the press”—to cover federal executive and federal judicial restraints on expression. However, whether or not such an interpretation can be squared with the text of the amendment, applying it against the states would seem to overreach the farthest limits of interpretation properly so called. For it has long been accepted that the Bill of Rights, including the first amendment, was adopted in order to limit the federal government and not the states.141 And the Court has consistently rejected the view that the fourteenth amendment was intended by its makers to “incorporate” the Bill of Rights in its provisions limiting state action.142

The reasoning is persuasive. Before yielding to it, however,

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140. 304 U.S. at 152 n.4.
142. *See* cases note 110 *supra*. 


we must take note of the uncomfortable fact that some great judges have remained unpersuaded. Justice Stone, in the *Carolene Products* footnote, makes it clear that he is proposing standards for judicial review of *state* action; the references to the fourteenth amendment can have no other meaning. Chief Justice Hughes not only concurred in the footnote, but made a suggestion that led to inclusion of the first paragraph. Justice Brandeis also concurred in it. Justice Cardozo took no part because of ill health, but four months previously, writing in the *Palko* case for the whole Court except Justice Butler, he had declared that the fourteenth amendment had “absorbed” the guaranty of free speech contained in the first.143 And so we ask the Devil’s Advocate: How do you account for this near-unanimity unless the Justices had come to regard judicial review as amounting to more than mere interpretation?

I grant you, he replies, that even before 1937 the Court had begun to hold state abridgment of the freedoms of speech and press to be unconstitutional.144 This did not mean, however, that the first amendment was being applied to state action; all it meant was that these freedoms were held to be a part of the “liberty” protected by the fourteenth amendment due process clause. Surely it does no violence to the term “liberty” to interpret it as including these “freedoms.”

I realize, he goes on, that Justice Cardozo might have been thought to go farther in the *Palko* opinion by saying that the fourteenth amendment had “absorbed” some of the articles of the Bill of Rights, presumably including the first. But “absorb” is a cloudy, metaphorical term having no accepted legal meaning, and it is doubtful that he intended it to mean “incorporate,” which does have an accepted legal definition. To incorporate one writing into another is to read the latter as if it contained the very words of the former. The fact that seven of his colleagues expressed no reservation was less significant in showing their agreement with his choice of words than it would be today; for in 1937 the Justices had not yet begun to write dissents and special concurrences to publicize any disagreements they might have with the Court’s opinion, however trivial.145

143. See text accompanying note 135 supra.
Furthermore, he adds, I must concede that the logic of the Carolene Products footnote does apply equally to the state and federal governments. The national commitment to self-government applies to both. The Constitution guarantees to the states a republican form of government and that guaranty memorializes a national commitment, whether or not disputes concerning its application are justiciable. As for the federal government, the Constitution provides that the President and all members of Congress shall be elected, directly or indirectly, by the people, and the sterilization of the electoral college and adoption of the seventeenth amendment have almost completely substituted direct for indirect election. So the solicitude for self-government manifested in the second paragraph of the Carolene Products footnote relates to both state and federal governments. Moreover, as already noted, the first paragraph as well as the second refers to the fourteenth amendment.

I must agree, also, continues the Devil's Advocate, that it is simple realism to regard the freedoms of speech and press as a part of the process of self-government; for they are essential to the effective mobilization of public opinion, at least in so far as they protect politically significant expression—expression pertinent to the question whether or how the law or officeholder(s) should be changed. This may be reason enough for interpreting the term "liberty" as including the freedoms of speech and press, and even for especially strict judicial scrutiny of official incursions upon them. Nevertheless, your argument that the first amendment, as such, applies to the states remains incomplete unless you deal with three more points: First, the Carolene Products footnote did not purport to decide anything; it merely made some suggestions for future consideration. Second, only four of the Justices—less than a majority of the whole Court—joined in the footnote; Justice McReynolds dissented, Justice Butler concurred in the result but not in the reasoning, Justice Black declined to join the portion of the Court's opinion that contained the footnote, and

146. U.S. Const. art. IV, § 4.  
151. Id. (Butler, J., concurring in result).  
152. Id. (Black, J., concurring in result and opinion except part three).
Justices Cardozo and Reed took no part. Third, the footnote makes no reference at all to the first amendment; and, as I have already said, the Palko opinion's assertion that the fourteenth amendment had "absorbed" the first was most probably not intended to mean that incorporation had literally taken place.

The first two points are readily countered by a single observation: True as it is that the Carolene Products footnote was tentative and was approved by four Justices only, the ideas offered in its first and second paragraphs were very soon embraced by the whole Court, and they remain as well settled as any propositions of constitutional law can be. The third point must be discussed at greater length.

The question whether the fourteenth amendment "incorporates" the first, and gives it exactly the same scope in limiting the actions of the state and federal governments, was not a focus of attention in the Palko and Carolene Products cases. Most probably it did not occur to Justice Cardozo or any of his colleagues (except possibly the newly appointed Justice Black) that use of the term "absorb" in the Palko opinion would be understood by anyone to mean "incorporate." Since 1892, when the Court in O'Neil v. Vermont decisively rejected the contention of the first Justice Harlan that the fourteenth amendment incorporates the Bill of Rights, no Justice had renewed the contention. As a matter of fact, Frank Palko had urged this very position on the Court, arguing that the fourteenth amendment had incorporated the double jeopardy clause of the fifth, but the Court upheld his death sentence. Ten years later, however, incorporation again became the subject of active debate, dividing the Court almost evenly. The vote in Adamson v. California was five to four, with Justice Black's dissent vigorously contending for the incorporationist position. The Adamson case proved to be the overture to the debate, not the final curtain. This is not the place to examine its fascinating ramifications, but its ultimate resolution does shed light on our problem.

154. 144 U.S. 323 (1892).
155. Id. at 370 (Harlan, J., dissenting).
156. Id. at 332.
157. Brief for Appellant, supra note 131, at 29-34.
158. 302 U.S. at 328.
159. 332 U.S. 46 (1947).
160. Id. at 68-92 (Black, J., dissenting).
The Black and Frankfurter opinions in the Adamson case were the main statements on incorporation, pro and con. Each of them followed orthodox reasoning; they explored the legislative history of the fourteenth amendment, and other contemporaneous facts, to determine how the makers of the fourteenth amendment intended their words to be understood. The Court decided against Justice Black’s position, and has never accepted it to this day. Although he lost this battle, however, he eventually won the war; that, at least, is what he boasted in Duncan v. Louisiana, and the boast was not an empty one. This paradoxical result has flowed from the Court’s approval of “selective” incorporation—incorporation not of the entire Bill of Rights, but of those Bill of Rights provisions which the Court declares to be “fundamental.”

By 1968 nearly all of the Bill of Rights provisions had been declared “fundamental”; they are catalogued in the Court’s Duncan opinion, which lists the sixth amendment right to a public trial among the “fundamental” ones. Also listed are the first amendment freedoms of speech and press, which the Palko opinion had treated as fundamental for the quite different purpose of explaining why they were part of the “liberty” protected by the fourteenth amendment due process clause.

There is only one important objection to selective incorporation: there is a problem about its legitimacy, about the source of the Court’s authority to adopt it. As I wrote in By What Right?:

On its face, selective incorporation involves constitutional rulemaking by the Court. There is no conceivable historical basis for believing that the Fourteenth Amendment was intended to incorporate part of the Bill of Rights. When the Court declares that one or another of the Bill of Rights provisions is “fundamental” and therefore incorporated, it draws only upon its own sense of what the Fourteenth Amendment ought to say. Justice Black, who (as already noted) deplored such exercise of discretionary judicial power, had a personal defense against the charge that he himself approved it in the Gideon case and its successors. He persisted in maintaining that full incorporation is the only correct position and that he accepted selective incorporation solely as the closest approach to it that the intransigence of his col-

161. Id. at 59-68 (Frankfurter, J., concurring).
164. See Id. at 148-49.
165. Id. at 148.
166. Id.
167. 302 U.S. at 324-25.
leagues permitted. But the intransigent colleagues had no such defense, and indeed offered none. For them, the practical utility of selective incorporation was evidently a sufficient reason to approve it.

The practical utility is undeniable. On the one hand, the states can be left untouched by the grand jury and civil jury provisions. On the other, there is great economy of judicial effort. Case-by-case inquiry as to whether the particular record reveals fundamental injustice in punishing the particular defendant is an exhausting business. The Fourth, Fifth, Sixth, and Eighth Amendments focus the issues more narrowly by their more specific language. Furthermore, each of their clauses has been sharpened by interpretation in numberless Federal prosecutions, and the gloss thus accumulated is made immediately applicable to state prosecutions by the single pronouncement that the provision is "fundamental."

This availability of accumulated case law also results in a corresponding economy of effort on the part of defense counsel and thus facilitates constitutional defenses in the general run of criminal cases. Indigent defendants in such cases (which is to say, most persons accused of serious crime) are represented by lawyers serving pursuant to judicial appointment or as employees of a legal service organization. Incorporation enables these hard-pressed lawyers to cite controlling precedents; they need not start from scratch, approaching the elusive issue of fundamental injustice as an original proposition in each case.168

We have seen that the Court now treats the fourteenth amendment as subjecting the states to the full reach of the first and sixth amendment guaranties of press freedom and public trial. No Justice questions that proposition, so we must accept it as established. However, in deciding how press freedom and public trial are to be reconciled if they conflict, as they may in the Gannett case, it is useful to inquire as to the exact nature of the national interests that justify the Court in approving selective incorporation of the press-freedom and public-trial clauses. Having done this already for press freedom, I turn to public trial.

Public trial.—The public-trial clause is one of the several sixth amendment safeguards of fair criminal trials. It provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a . . . public trial." The words say that public trial is a right of the accused and seem to imply that it belongs to no one else. Moreover,

168. L. LUSKY, supra note 9, at 163-64 (emphasis in original) (footnotes omitted).
the well-understood term “trial” does not include pretrial hearings. Thus, the Gannett claim of a sixth amendment public-trial violation by the closing of a hearing in advance of a state murder trial encounters two difficulties arising from the “plain language” of the amendment: (1) Since the right of public trial is not expressly given to anybody except the accused, is there any reason why someone else should be able to complain of closed criminal court proceedings if the accused does not? (2) Should the right of “public trial” apply to a pretrial hearing on the motion of the accused to suppress his incriminating pretrial statement on the ground that it was involuntary?

It is evident, both from the wording of the public-trial clause and from its location in the sixth amendment with other guaranties of justice to accused persons, that it was intended—primarily at least, and perhaps exclusively—as a protection for persons charged with crime. And yet, unlike its companion provisions for speedy trial, jury trial, notice of charges, confrontation with adverse witnesses, compulsory process for favorable witnesses, and assistance of counsel, the public-trial clause may have been adopted with the secondary purpose of enabling everyone to see for himself how fairly and how vigorously prosecutions are conducted. That is to say, it may conceivably have been intended partly to buttress the freedoms of speech and press by providing a right of public access to a limited but important type of information about government. The first and sixth amendments were adopted as parts of a single package and should therefore be read in pari materia. So far as I am aware, however, there is no contemporary evidence that in 1791 the sixth amendment was regarded as anything beyond a set of protections for accused persons.

Even if we assume that the public-trial clause was thus limited in its original purpose, we may nevertheless be able to explain its incorporation into the fourteenth amendment. Incorporation depends on whether implied judicial power to expand the reach of the clause can rightly be thought to exist. That, in turn, depends on whether unwarranted secrecy in state prosecutions would frustrate some national objective and, if so, whether the Court is better able to provide a remedy than are other governmental organs.¹⁶⁹

¹⁶⁹. This series of questions is not unique to the public-trial clause. It applies as well to the other Bill of Rights protections against undue risk of wrongful conviction.
Criminal prosecutions conducted in such a way as to incur substantial risk of convicting the innocent tend to defeat two national objectives of the first magnitude: self-government and the open society. I have already sought to show that the nation is committed to self-government. But self-government includes not only popular control of legislation but also *accurate adjudication*, which is essential to the translation of that legislation into living reality. This consideration is not made inapposite by the fact that it calls for conviction of the guilty as well as acquittal of the innocent, and applies to civil as well as criminal litigation, whereas the sixth amendment speaks only of the rights of “the accused” in “criminal prosecutions.” That is true enough. But where avoidance of *erroneous convictions* is concerned, the general national interest in accurate adjudication for the sake of self-government is reinforced and intensified by the national commitment to the open society—that is, a society in which personal autonomy is maximized, this being possible because order is maintained without an intrusive police apparatus. As Justice Black declared for the Court in *Chambers v. Florida*:  

> Tyrannical governments had immemorially utilized dictatorial criminal procedure and punishment to make scapegoats of the weak, or of helpless political, religious, or racial minorities and those who differed, who would not conform and who resisted tyranny.  

... Today, as in ages past, we are not without tragic proof that the exalted power of some governments to punish manufactured crime dictorially is the handmaid of tyranny.

The sixth amendment does single out wrongful convictions as an especially feared type of inaccurate adjudication (and, given the rigid formalism and one-sidedness of eighteenth-century criminal process, it was perhaps the most prevalent type). That in itself, however, does not necessarily negate the existence of a broader national interest in accurate adjudication generally.

With this background, let us consider the first of our two questions: whether the accused, being the only one to whom the sixth amendment explicitly grants the right of public trial, is the

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170. *See* text accompanying and following notes 139 & 140 *supra*.
171. 309 U.S. 227 (1940).
172. *Id.* at 236.
173. *Id.* at 241.
only one who should have standing to claim it. This would be true if he were the only person having a substantial concern in defending the national interest in self-government and the open society. (It might also be true if he were qualified to stand in judgment for other concerned persons, on a theory of virtual representation; but this is not permissible if there is a possible divergence between his interests and theirs, and there obviously is such divergence between the interests of Gannett and the accused in this case.)

The foregoing quotation from the Court's opinion in *Chambers v. Florida* provides sufficient answer to the question. We need not look as far as the Gulag Archipelago to see the readiness of modern police states to use trumped-up criminal charges as an instrument of thralldom; reports of that ancient practice appear with sickening frequency in current news dispatches. Those of us who prize self-government and the open society therefore have strong reason to keep vigilant watch on the performance of criminal tribunals, lest we drift toward the police state unawares.

A decision that the sixth amendment protects others as well as the accused would not be wholly unprecedented. The Court held in *Singer v. United States* that an accused person cannot dispense with jury trial by simply waiving his sixth amendment right to it; the trial judge and the prosecutor, both presumably acting on behalf of the general public, must agree. What is true of the right of jury trial would seem to be true of the right of public trial also. Indeed, the *Singer* opinion contains a dictum to that effect.

The Court thus declines to rely on article III of the original Constitution which, since it establishes jury trial without special reference to the accused, might have been thought to provide a special ground for denying him an absolute right of waiver, a ground inapplicable to the sixth amendment right of public trial.

Of course, the accused does have an absolute right to waive all his trial rights by pleading guilty. That, however, does not necessarily jeopardize the public interest in access to information about the criminal process. Even if the guilty plea has been bargained,

174. See text accompanying notes 34 & 35 supra.
177. Id. at 36.
178. Id. at 35.
179. U.S. Const. art. III, § 2 ("Trial of all Crimes . . . shall be by Jury").
the trial judge is entitled, indeed obligated, to question the accused about his crime, the voluntariness of his confession, if any, and other facts relevant to the credibility of his plea. The privilege against self-incrimination no longer protects him from such inquiry.

Our second question is whether the right of "public trial" should be held applicable to a pretrial hearing. Here the orthodox approach to judicial review differs most dramatically from the implied judicial power approach, because they plainly lead to opposite results. The term "trial" has a clear meaning, and as a matter of interpretation it does not include a pretrial hearing. On the other hand, there is likewise no doubt that the public interest in access to information about the criminal process is no greater in trials than in pretrial hearings on the voluntariness of a confession or incriminating admission. Either proceeding, or both, may elicit testimony about police methods that suggests the need for a change in the law.

Any reluctance to apply the sixth amendment to hearings which, literally speaking, are not "trials" may be lessened when it is considered that in 1791, when the amendment was adopted, motions to suppress evidence were made at the trial. Pretrial adjudication of the admissibility of confessions and admissions is a recent development, designed to avoid the unfairness that would ensue if the confession were excluded from evidence after the trial jury had learned of its existence. Also relevant is the fact that the pretrial hearing frequently turns out to be the principal judicial proceeding in the case. The grant of a motion to suppress often leads to dismissal of charges; its denial often leads to a plea of guilty. Justice Harlan, dissenting in Mapp v. Ohio, said that "all

182. 99 S. Ct. at 2909 n.17; id. at 2935 (Blackmun, J., concurring in part and dissenting in part).
183. Cf. Jackson v. Denno, 378 U.S. 368, 388-91 (1964) (unconstitutional to let jury decide voluntariness of confession; jury prejudiced by hearing confession, even if they decide that it is inadmissible and do not consciously consider it in arriving at verdict).
184. As Justice Blackmun noted in his dissent: "[I]n 1976, when this case was processed, every felony prosecution in Seneca County . . . was terminated without a trial on the merits." 99 S. Ct. at 2934 (Blackmun, J., concurring in part and dissenting in part) (citing JUDICIAL CONFERENCE OF NEW YORK, 22D ANNUAL REPORT 55 (1977)).
the careful safeguards erected around the giving of testimony, whether by an accused or any other witness, would become empty formalities in a procedure where the most compelling possible evidence of guilt, a confession, would have already been obtained at the unsupervised pleasure of the police."\(^{186}\)

It remains to consider the second essential condition of implied judicial power, namely, a comprehensible reason why the Court is better fitted than other organs of government to effectuate the national objectives of self-government and the open society. In other words, why can the electorate not be counted upon to activate the corrective political processes and obtain needed improvements through legislation? Here I shall be very brief. More could be said, but for present purposes it is enough to quote from *By What Right?*:

Laws hindering criticism of government [including publicization of official lawlessness] are unlikely to be repudiated by the electorate because they smother the very processes whereby public dissatisfaction is articulated and made effective. Miscarriages of criminal "justice" are unlikely to stimulate a public outcry because the public, being unable to assess guilt or innocence for itself, assumes from the very fact of conviction that a convicted defendant is an enemy to society; therefore any procedural abuses in the course of prosecution tend to be dismissed as mere irregularities, regrettable but trivial detours on the road to a just result.\(^{187}\)

* * *

The foregoing exposition of implied judicial power, with a fairly detailed analysis of the particular aspects of it that are relevant to the *Gannett* problem, would have had a place in the Court's *Gannett* opinion only because the Court had not previously articulated its approval of implied judicial power as a legitimating principle.\(^{188}\) On the assumption that the opinion I am sketching would constitute the official unveiling of implied judicial power, I have covered much ground which later opinions would not have

\(^{186}\). *Id.* at 685 (Harlan, J., dissenting).

\(^{187}\). L. *Lusky*, *supra* note 9, at 98-99.

\(^{188}\). I believe that the principle has in fact been guiding most of the Justices, if not all of them, for a long time; but none of them has publicly acknowledged that fact, or admitted that the orthodox *Marbury v. Madison* approach to judicial review cannot account for a great many of the Court's decisions during the last two decades.
to repeat—or, to say the same thing differently, much of the discussion applies to many issues in addition to the ones involved in the *Gannett* case. For example, discussions of selective incorporation of the Bill of Rights into the fourteenth amendment, and of the Court’s special competence in dealing with restraints on politically significant expression and with matters of criminal procedure, would not have to be repeated in future cases involving incorporation or freedom of expression. In a sense, therefore, the foregoing analysis would have to encumber the Court’s opinion in the *Gannett* case only because of the Court’s failure to explain its reliance on implied judicial power when it first began to use it in such cases long ago.

**Application of Implied Judicial Power in the Gannett Case**

The remaining task is to sketch the positions taken by the Court and by the several Justices in the *Gannett* case as they might have been set forth had implied judicial power been acknowledged to exist. The foregoing analysis of implied judicial power makes the task relatively simple. I shall adhere faithfully to the views expressed in the five *Gannett* opinions as to how this and future cases should be decided, but not to the attempts of the several Justices to explain those views by interpretation of the constitutional text.

(1) *All nine Justices* agree that the case has not been rendered moot by completion of the pretrial hearing, by publicization of a transcript of the hearing some days later, or by termination of the prosecutions through plea bargains. The asserted constitutional violation is of a type that is usually too short-lived to permit Supreme Court review before it ceases; yet *Gannett*, as publisher of a newspaper, is likely to encounter it repeatedly in future cases. The dispute between *Gannett* and the trial judge is therefore still alive. The eventual availability of a transcript does not make the closing of the hearing immaterial, because a transcript is not as complete and accurate a source of information as first-hand observation, and because delay impairs newsworthiness.

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189. *99 S. Ct. at 2904* (Stewart and Stevens, JJ.); *id. at 2913* (Burger, C.J., concurring); *id. at 2914* (Powell, J., concurring); *id. at 2917* (Rehnquist, J., concurring); *id. at 2919* (Blackmun, Brennan, White, and Marshall, JJ., concurring in part and dissenting in part).


All nine Justices agree that the written words of the Constitution and its amendments, even when interpreted with the greatest reasonable liberality, provide Gannett with no basis for claiming that the trial judge's order closing the hearing violated any of its constitutional rights. No provision of the original Constitution seems applicable. The Bill of Rights, which does cover press freedom and public trial, was intended to restrict only the federal government, not the states, and this case involves action by a state court. The fourteenth amendment cannot be interpreted as incorporating the Bill of Rights, because its makers did not so intend. Nor do any of its own restrictions on state action help Gannett's position: The due process clause seems inapplicable because Gannett has not been "deprived" of life, liberty, or property, or, indeed, of anything; and the equal protection clause does not come into play because Gannett does not (and cannot, truthfully) complain that it has been subjected to unequal treatment.

All nine Justices also agree, however, that "selective incorporation" of particular Bill of Rights provisions into the fourteenth amendment, though it is not sustainable as a rational interpretation of constitutional text, can justifiably be approved by the Court through the exercise of implied judicial power.

All the Justices except Justice Rehnquist agree that the Court may possess the further implied judicial power to expand the Constitution in a different way as well. They agree that the Court is justified not only in applying certain Bill of Rights restrictions in cases they were not designed to reach (by "selectively incorporating" them), but perhaps also, if sufficient cause exists, in extending the reach of those restrictions to situations not within the originally intended meaning of their words (for example, by holding that "trial" includes a pretrial hearing or that "freedom of the press" includes some right of access to information).

Justice Rehnquist, though he evidently approves selective incorporation, denies that the Court possesses this further power. He denies the legitimacy of extending the scope of Bill of Rights provisions beyond the limits of reasonable textual interpretation.

Four of the Justices (Stewart, Burger, Powell, and Stevens) agree that whether or not the Court possesses this further

193. See text accompanying note 110 supra.
195. Id. at 2912; id. at 2914-16 (Powell, J., concurring).
196. See id. at 2918 (Rehnquist, J., concurring).
power, the facts of the Gannett case do not justify its exercise here. The trial judge evinced appropriate concern for press freedom as well as for fair trial in the Clapp murder case; he was justifiably apprehensive that immediate publicity about Greathouse's knowledge of where Clapp's gun was buried might prevent the impaneling of an impartial jury; and he took reasonable steps to end the secrecy as soon as the need for it ceased.\footnote{Id. at 2912 (Stewart and Stevens, JJ.); \textit{id.} at 2916-17 (Powell, J., concurring).} Therefore the judgment of the highest New York court, upholding his action,\footnote{43 N.Y.2d 370, 372 N.E.2d 544, 401 N.Y.S.2d 756 (1977).} should be affirmed. Justice Rehnquist, arriving at the same conclusion more directly, of course concurred.\footnote{99 S. Ct. at 2917-18 (Rehnquist, J., concurring).} There is thus a majority vote for affirmance.

The other four Justices (Blackmun, Brennan, White, and Marshall) dissent and vote to reverse, on the ground that the Court not only possesses the power to go beyond the constitutional text, but ought to do so in this case. Their position on the latter proposition results from their appraisal of the record, which in their opinion does not show that opening the pretrial hearing would have created an unmanageable risk of unfairness in the criminal trial.\footnote{Id. at 2940 (Blackmun, J., concurring in part and dissenting in part).}

* * *

To this point, I have carefully refrained from including anything that was not needed for explanation of the result in the Gannett case itself. I submit that the five numbered paragraphs do provide an intelligent and intelligible explanation. But judicial opinions are also supposed to provide guidance for future cases, and the five numbered paragraphs provide little guidance if any, either for other courts or for the Supreme Court itself in later cases.

In a moment I shall summarize the workproduct of the Justices in so far as they attempt to point the way for the future. Here again, implied judicial power plays a part; but a distinction is to be noted. Whereas it was possible for me to explain their views on disposition of the present case without relating those views to particular textual provisions of the Constitution, that is not true in describing their views concerning future cases. The reason is that a customary way of demarcating the boundaries of a judicially created constitutional rule is to describe it as an extension of some
specific textual provision. For example, incorporation of a particular Bill of Rights provision into the fourteenth amendment implies that it will thenceforth restrict state action just as it restricts federal action, and no more. Occasionally, as in the 1973 abortion cases a judicially created constitutional rule has so little relationship with the constitutional text that this method of indicating boundaries cannot be used. The Court prefers to use it where possible, however, because the unhappy alternative is to leave the future clouded and await the pricking out of boundaries case by case—as has happened in the abortion area. The Justices were able to express their views about future cases involving the Gannett problem by relating those views to particular textual provisions, namely, the first and sixth amendments. Here is the gist of their several positions:

(6) The four dissenting Justices (Blackmun, Brennan, White, and Marshall) believe that the public, including the press, can invoke the sixth amendment right of public trial, unless publicity would irretrievably jeopardize fair trial in the criminal case. For this purpose, these Justices believe that the pretrial hearing of a motion to suppress evidence should be regarded as a “trial.” Justice Powell disagrees only as to the relevance of the sixth amendment; he reaches approximately the same result on the theory that the first amendment freedoms of speech and press should be held, for this limited purpose, to include a right of access to information—and this requires modification of existing precedents denying the right of access. Thus, five Justices agree in principle that in some cases freedom of expression may possibly prevent the closing of criminal proceedings even though the accused so requests and the prosecutor and trial judge concur.

(7) Justice Rehnquist alone denies this possibility. He ad-
heres to the precedents denying the right of access, and declines to recognize that anyone except "the accused" has a right to public trial.

(8) The other three Justices (Stewart, Burger, and Stevens) suggest no guidelines for the future, except that they make it clear that if they do eventually go along with the five who would forbid secrecy in some cases, they will not do so on the sixth amendment theory proposed by the four dissenters; rather, they say, they reserve judgment as to the availability of the first amendment (which Justice Powell favors).

THE COST OF PRESERVING THE FICTION

Were this the end of the story, there might be no serious complaint about the quality of the Court's workproduct. The opinions make it clear that five Justices thought the exclusion order attacked by Gannett was justified as a necessary measure to assure the fairness of the impending murder trial. The opinions also make it clear that a different five Justices thought such an exclusion order should be set aside unless shown to be essential to a fair criminal trial. Has the Court not, therefore, rendered the basic services we are entitled to expect, namely, explanation of the present decision and guidance for future cases?

To be sure, one might wish that the Justices had taken more pains to reconcile their differences and clarify the exact disagreements that divided them. One might wish that their thoughts had not been embedded in a series of five long opinions whose complexities require unraveling before their conclusions can be grasped. One might wish that, once it became clear that the Justices held widely divergent views, the Court had merely announced its judgment of affirmance and stated the rule that five Justices say they will follow in future cases, with a minimum of ar-

209. Id. at 2918 (Rehnquist, J., concurring).
210. Id. at 2917-18 (Rehnquist, J., concurring).
211. Id. at 2905-11 (Stewart and Stevens, JJ.); id. at 2913-14 (Burger, C.J., concurring).
212. Id. at 2922-39 (Blackmun, Brennan, White, and Marshall, JJ., concurring in part and dissenting in part).
213. Id. at 2912 (Stewart and Stevens, JJ.); id. at 2913 (Burger, C.J., concurring).
214. Id. at 2914-16 (Powell, J., concurring).
215. Id. at 2912 (Stewart and Stevens, JJ.); id. at 2913 (Burger, C.J., concurring); id. at 2916-17 (Powell, J., concurring); id. at 2917-18 (Rehnquist, J., concurring).
216. Id. at 2916-17 (Powell, J., concurring); id. at 2936-41 (Blackmun, J., dissenting in part and concurring in part).
gumentative discussion; that could have been done in far less time than the eight months the five opinions took to prepare and might have left the Justices freer for other cases. Are these not trivial criticisms, however, so long as the Court has done its main job by explaining the instant decision and providing guidance for future ones?

If the Court had in fact provided guidance for future cases as well as explaining its affirmance in the Gannett case, my answer would be yes. Unfortunately, however, no such guidance has been provided. If the description of the Justices' positions set out above in the eight numbered paragraphs were a complete summary of their views, one could (by a head-count) predict how the Court will decide future cases involving closed criminal proceedings. However, because the Justices refuse to acknowledge their exercise of implied judicial power and continue their lip service to the orthodox Marbury v. Madison approach to judicial review, the logic of that approach inexorably sweeps them beyond the intelligible position set out in the eight numbered paragraphs above and into the morass of indeterminacy. That is to say: By insisting on the pretense that their several positions are based on interpretations of constitutional text, the Justices—perhaps unwittingly—trigger the policy favoring adherence to precedent, or, in the Latin idiom, stare decisis. In effect, this adds a new dimension that vastly complicates the process of head-counting as a guide to future action.

I have already quoted Justice Rehnquist's resort to one aspect of this additional dimension.217 "True enough," he might say, "there are five Justices who say in this Gannett case that the Court should disallow closed judicial proceedings where fair trial is not jeopardized; but four of them, the dissenters, rely on the sixth amendment which the other five of us hold inapplicable, and Justice Powell, the fifth, relies on the first amendment which five Justices (the four dissenters and I) hold inapplicable. It is entirely possible that, having been outvoted here, the four dissenters and Justice Powell will accept the decision of the majority as binding upon them. Actually, Justice Powell strongly implies that he will not accept the majority decision against his first amendment position, but will adhere to the same position in the next case; but the four dissenters give no indication that they will not respect stare decisis, and if they do respect it Justice Powell may find himself to be a minority of one in the next case."

217. See text accompanying note 69 supra.
The same uncertainty beclouds the future positions of Chief Justice Burger, Justice Stewart, Justice Stevens—and even Justice Rehnquist. The net of it is that the laboriously written opinions in the *Gannett* case are virtually useless as guidance for the future.

This is not conjecture but fact, as can be shown by a review of the disturbing sequel to the decision. By August 8, slightly more than five weeks after the July 2 announcement of the ruling, principals in thirty-nine cases around the country had urged judges to close trials to the press or public, or both. A judge in Westminster, Maryland, closed an entire trial to the press and public in order to avoid possible embarrassment to witnesses. A federal district judge in New York City even barred the public from the sentencing at the conclusion of a trial. Some trial judges in West Virginia, South Carolina, and New York excluded the press but not the rest of the public. Other judges have denied motions for exclusion.\textsuperscript{218}

On August 8 Chief Justice Burger, evidently troubled at what he considered a misunderstanding of the *Gannett* decision, consented to a press interview. There, according to the UPI report, he said, “The opinion referred to pretrial proceedings only”; and he suggested that the press had published misleading reports of the *Gannett* decision, while judges who had closed criminal trials were at fault for “reading newspaper reports of what we said” rather than the *Gannett* opinions themselves.\textsuperscript{219} As noted above, however, the Chief Justice’s individual concurring opinion was the only one that contended for a distinction between criminal trials and pretrial suppression hearings.\textsuperscript{220} Moreover, that concurrence did express agreement with Justice Stewart’s opinion for the Court, where the more general rationale was adopted. Later that week Warren Weaver, Jr., pointed these things out in a mild but firm rejoinder to the Chief Justice’s aspersions on the press.\textsuperscript{221} And the following week, the same point was made in a stinging *New York Times* editorial, entitled *The Open Disarray of Closed Justice*, which concluded with these words:

Mr. Burger’s off-the-cuff commentary, while unusual, is a human reaction to a confusion partly of his own making. But he

\textsuperscript{218} N.Y. Times, Aug. 9, 1979, at A17, col. 1; N.Y. Times, Oct. 13, 1979, at 21, col. 1.
\textsuperscript{219} Quoted in N.Y. Times, Aug. 9, 1979, at A17, col. 1.
\textsuperscript{220} See text accompanying note 18 supra.
\textsuperscript{221} Weaver, *Burger’s View on Right to Attend Trial*, N.Y. Times, Aug. 11, 1979, at 43, col. 4.
has only demonstrated that he remains one voice on a nine-
member tribunal. Even if he could hold back the tide by his
public utterances, we fear that the confusion runs deeper, to the
*Gannett* decision itself, which paid insufficient tribute to the
centuries-old tradition of open trial. Only the full Court can de-
definitively straighten that out, if it has the will and finds the op-
portunity.\footnote{222. N.Y. Times, Aug. 18, 1979, at 18, col. 1.}

Meanwhile, five days earlier, Justice Powell had entered the
public debate. In a panel discussion at the annual meeting of the
American Bar Association, he is reported to have “pointed out
that the majority opinion was based on an analysis of the Sixth
Amendment right to a public trial, and did not settle the issue of
what right of access the First Amendment itself
\footnote{223. N.Y. Times, Aug. 14, 1979, at A13, col. 1.}
confers.”\footnote{224. 99 S. Ct. at 2914-16 (Powell, J., concurring).}
Of course, as we have seen, this is true; but it is not the whole truth.
Justice Powell’s concurring opinion made it quite clear that he
thought the first amendment might afford the press more protec-
tion than the sixth,\footnote{225. Id. at 2912.} but no other Justice joined it. The Stewart
opinion for the Court did leave the first amendment question open;\footnote{226.
*Id.* at 2918 (Rehnquist, J., concurring).} but although five Justices said they joined in that opin-
ion, one of them (Justice Rehnquist) made it clear in his separate
concurrence that he thought the first amendment had no applica-
tion.\footnote{227. *Id.* at 2922 (Blackmun, Brennan, White, and Marshall, JJ., concurring in
part and dissenting in part).}
The four dissenters took the same position,\footnote{228. *Quoted in* N.Y. Times, Sept. 4, 1979, at A15, col. 1.}
so that a
clear majority of the Justices had rejected Justice Powell’s position.

Late in August, Justice Blackmun told a group of federal
judges in South Dakota that, “despite what my colleague, the
Chief Justice, has said,” the opinion authorizes the closing of full
trials.\footnote{229. *Quoted in* N.Y. Times, Sept. 9, 1979, § 1, at 41, col. 1.} And on September 8 Justice Stevens, the only member of the
*Gannett* majority who had not authored an opinion of his own,
pointed out that legislative action for the better protection of pub-
litrial was entirely feasible even though, he said, the *Gannett*
majority had concluded that “members of the general public, in-
cluding the press, could not assert the rights guaranteed to the
accused by the Sixth Amendment.”\footnote{222. N.Y. Times, Aug. 18, 1979, at 18, col. 1.}
force what Justice Blackmun had just said. Justice Brennan, in an
address at Rutgers University, subsequently expressed a similar
opinion.230

The press was not slow to deplore the confusion caused by
these divergent views. In a September 10 column entitled Stopp-
ing Secret Trials, Anthony Lewis declared:

When members of the Supreme Court disagree publicly
about the meaning of a decision they have just handed down,
something is not right. That is what has happened since the
Court's July decision in the Gannett case . . . .

. . . .

The disagreement is troubling for the Court as an institu-
tion, and it has immediate public consequences.231

The disagreement is indeed troubling for the Court as an insti-
tution. Sober criticism like that of Mr. Lewis or the Interfaith
Committee of Religious News Officials of the National Council of
Churches232 is not so worrisome as the possibility that the Justices
may expose the Court to ridicule. The situation is uncomfortably
similar to that depicted in John Godfrey Saxe's rhymed fable, "The
Blind Men and the Elephant":

It was six men of Indostan
To learning much inclined,
Who went to see the Elephant
(Though all of them were blind),
That each by observation
Might satisfy his mind.233

One after the other, they felt different parts of the beast. The one
who felt its side thought it was very like a wall; the one who felt its
tusk thought it was very like a spear; likewise with the trunk (a
snake), the knee (a tree), the ear (a fan), and the tail (a rope).

And so these men of Indostan
Disputed loud and long,
Each in his own opinion
Exceeding stiff and strong,
Though each was partly in the right,
And all were in the wrong234

(1892).
234. Id. at 112.
The tremendous power of the modern Court rests ultimately on its prestige. There is no other way to account for it; for the words of the original Constitution endow the Court with such scant powers that Alexander Hamilton, in *Federalist Paper No. 78*, could plausibly assert that “the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution.”\(^2\)\(^3\)\(^5\) History shows, to be sure, that the Court has been able to survive grievous self-inflicted wounds\(^2\)\(^3\)\(^6\) and the bitter attacks that they have occasioned; but one searches in vain for a time when there was reason to fear that its pronouncements might not be taken seriously. However unwise they may have been thought, they were not absurdly incomprehensible.

On October 9 the Court made known its readiness to take remedial action—to have a “second try,” as Anthony Lewis had put it, at “composing their real and complex intellectual differences.”\(^2\)\(^3\)\(^7\) It agreed to receive briefs and hear oral argument in *Richmond Newspapers, Inc. v. Virginia*\(^2\)\(^3\)\(^8\) where the highest state court of Virginia, relying on the *Gannett* case, had upheld exclusion of the press and the rest of the public from an entire criminal trial. Very probably the Court will now proceed to provide some basis for predicting and thus controlling the disposition of future public-trial issues.

How can we reckon the cost of this inefficiency in the adjudication process? Or, to state the same question differently, what does the *Gannett* decision, with its sequel, reveal as to the price we pay for preservation of the fiction that our whole Constitution is contained in the 1787 text and its twenty-six amendments? Some elements of the price, of course, such as impairment of respect for the Court and of faith in the utility of judicial review, resist measurement. But one element is easy to quantify: It is now necessary for the Court to use up a second portion of its carefully rationed time for the disposition of the public-trial question; it will have taken two adjudications to do the work of one. Therefore some other case of the thousands that are turned away—many of them entirely worthy of review, which the Court would have entertained if time had permitted—will go unheard. It is not a negligible price.

\(^{235}\). *The Federalist* No. 78, at 520 (A. Hamilton) (Heritage Press pub. 1945).

\(^{236}\). See C.E. Hughes, *The Supreme Court of the United States* 50-55 (1928).

\(^{237}\). Lewis, supra note 231, at A27, col. 1.
