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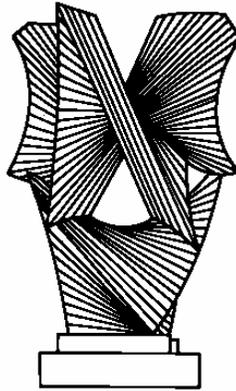
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EXECUTIVE EXPOSURE: GOVERNMENT SECRETS, CONSTITUTIONAL LAW, AND PLATFORMS FOR JUDICIAL INTERVENTION

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EXECUTIVE EXPOSURE: GOVERNMENT SECRETS,
CONSTITUTIONAL LAW, AND PLATFORMS FOR JUDICIAL INTERVENTION

Adam M. Samaha*

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American law never reached a satisfying conclusion about public access to information on government operations. But recent events are prompting reconsideration. As our current system is reassessed, three shortfalls in past debates should be overcome. The first involves ignorance of foreign systems. Other democracies grapple with information access problems, and their recent experiments are illuminating. Indeed they expose two additional domestic weaknesses. One is a line we have drawn within constitutional law. Courts and commentators tend to treat constitutional issues of public access separately from those of executive discretion to withhold information. These matters should be seen as parts of an integrated system. When they are, it is difficult to constitutionalize one without the other. The final deficiency concerns the boundary between constitutional and ordinary law. In a very practical sense, constitutional law and judicial intervention in this field should turn on the character of non-constitutional law—whether non-judicial actors have built an adequate “platform” for judicial action. That connection is not obvious, but a defensible access system is impossible without confronting it. This Article aims to remedy these three mistakes, and it presents a method for evaluating judicial platforms in the information access context and beyond.

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INTRODUCTION

American law never reached a satisfying conclusion about public access to information on government operations. But recent events are prompting reconsideration. Clandestine executive efforts to combat terrorism have dramatized tensions between secrecy and accountability.¹ At the same time, reporters persist in cultivating confidential sources, and vice versa. For example, the informal network of White House officials and mass media journalists was the vehicle for exposing Valerie Plame as a CIA operative. The Plame affair raised serious concerns about the tradition of extralegal discretion to disclose information, as well as the judgment of journalists who enter confidential source relationships.² Meanwhile, the formal law of information access is also under stress. With critics worried that existing law is too weak or too strong or both, Congress occasionally entertains serious reform proposals. Some of these proposals aim to protect government-held information,³ others would codify a journalist-source privilege or bolster statutory rights to disclosure.⁴

What should public access norms look like? Through which institutions should they operate? The United States is not the only country

¹ See *infra* Part I.A.

² See, e.g., Richard B. Schmitt, *Journalist Jailed for Not Revealing Source to Court*, L.A. TIMES, July 7, 2005, at A1 (describing Judith Miller's decision to disobey a court order that she testify before a grand jury investigating the leak); *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964, 965 (D.C. Cir.), *cert. denied*, 125 S. Ct. 2977 (2005).

³ See, e.g., Energy Policy Act of 2005, H.R. 6, 109th Cong., 1st Sess. § 661(f) (2005) (seeking to ensure that the Nuclear Regulatory Commission may issue rules to protect classified information regarding a risk-assessment study); Anti-Terrorism and Port Security Act, H.R. 173, 109th Cong., 1st Sess. § 233 (2005) (proposing to protect port information, including some now public, that might increase vulnerability).

⁴ See, e.g., Free Flow of Information Act, S. 340, 109th Cong., 1st Sess. §§ 4, 7(1) (2005) (proposing to grant certain information gatherers a privilege against revealing their sources in federal proceedings); OPEN Government Act, S. 394, 109th Cong., 1st Sess. § 6 (2005) (proposing to enhance time limits on agency responses); Faster FOIA Act, S. 589, 109th Cong., 1st Sess. (2005).

facing these questions. Every government is confronted with them. Every society, moreover, develops a system for disseminating information about government operations. No functioning state can withhold all such information. Neither can a government of any significant size be perfectly transparent to all of its citizens. The live choices are about the system's details—including the mixture of formal law and informal relationships, the circumstances for public access and official secrecy, and the opportunities for executive discretion and judicial intervention.

Since the collapse of the Soviet Union, many aspiring democracies have responded to public access issues with constitutional law and judicial review.⁵ Whatever informal access mechanisms exist in those countries, they are supplemented with fundamental law enforced by courts. In apparent contrast, U.S. courts have sometimes indicated that public access is a matter for executive and legislative discretion.⁶ “The Constitution itself,” in Justice Stewart’s words, “is neither a Freedom of Information Act *nor* an Official Secrets Act.”⁷ The D.C. Circuit delivered a similar message when it ratified a refusal to disclose information about post-9/11 detainees.⁸ And several prominent scholars have essentially agreed.⁹ Indeed, there are powerful objections to the judiciary designing a system of access and secrecy for the rest of government.¹⁰ True, federal courts might be usefully detached from the desires of incumbent officials and the schemes of their opponents. But judicial ex-

⁵ See *infra* Part I.B.

⁶ See, e.g., *Houtchins v. KQED, Inc.*, 438 U.S. 1, 15 (1978) (plurality opinion of Burger, C.J.); *id.* at 16 & n.* (Stewart, J., concurring) (recognizing accommodation rights for the press but noting that “[f]orces and factors other than the Constitution must determine what government-held data are to be made available to the public”).

⁷ Potter Stewart, “*Or of the Press*”, 26 HASTINGS L.J. 631, 636 (1975) (emphasis added).

⁸ See *Center for Nat’l Sec. Studies v. United States Dep’t of Justice*, 331 F.3d 918, 934 (D.C. Cir. 2003) (“[D]isclosure of government information generally is left to the ‘political forces’ that govern a democratic republic.”), *cert. denied*, 124 S. Ct. 1041 (2004).

⁹ See ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 80–81, 86–87 (1975) (relying on politics and leaks to the press); RONALD DWORKIN, *A MATTER OF PRINCIPLE* 76 (1985); Ronald Dworkin, *Is the Press Losing the First Amendment?*, N.Y. REV. OF BOOKS, Dec. 4, 1980, at 49, 51–52 (leaving open situations in which an agency arbitrarily denies all information about its operations); see also LEE C. BOLLINGER, *IMAGES OF A FREE PRESS* 146 (1991) (warning against “the massiveness of the enterprise of developing a general newsgathering right”); DAVID M. O’BRIEN, *THE PUBLIC’S RIGHT TO KNOW: THE SUPREME COURT AND THE FIRST AMENDMENT* 40, 166–67 (1981); Lillian R. BeVier, *An Informed Public, an Informing Press: The Search for a Constitutional Principle*, 68 CAL. L. REV. 482, 514 (1980) (arguing that the Constitution offers no principled basis for adjudicating access claims); cf. Mary M. Cheh, *Judicial Supervision of Executive Secrecy: Rethinking Freedom of Expression for Government Employees and the Public Right of Access to Government Information*, 69 CORNELL L. REV. 690, 731 (1984) (demanding “reasonable grounds . . . to believe that the President or executive officials are using secrecy to cover up violations of federal law”).

¹⁰ By “system” I mean a set of components that should be seen as interrelated. Cf. SUNNY Y. AU YANG, *FOUNDATIONS OF COMPLEX SYSTEM THEORIES: IN ECONOMICS, EVOLUTIONARY BIOLOGY, AND STATISTICAL PHYSICS* 151, 154–55 (1998) (distinguishing system from collective analysis). I concentrate on the system of public access to information about the federal executive branch.

expertise is limited. An acceptable system must reconcile competing interests and wrestle with the reality that information often is obtained through informal channels. So perhaps U.S. courts do, and should, bow out.¹¹

Our story is not so simple, however. Consider information about the executive branch of the federal government. We now have a statutory, administrative, and judicial system to evaluate public access demands—including the Freedom of Information Act (FOIA),¹² the Federal Advisory Committee Act (FACA),¹³ the Government in the Sunshine Act,¹⁴ the Presidential Records Act,¹⁵ the Federal Records Act,¹⁶ and the Executive Order on classified information.¹⁷ Federal courts regularly use such material to adjudicate access disputes.

Moreover, U.S. courts do not treat the existing access system as a Constitution-free zone. They have restricted access claims that threaten executive functions by pointing to implications of constitutional structure. If such restraints on access claims are justifiable (and they are), then what about modifications of other kinds? In fact, might constitutional inferences support enhanced public access to government information, even if the Constitution is best read to require *no* access claims in the first place? This question points to a broader issue: whether there are situations in which courts may draw on constitutional norms only after some other institution creates a platform for their intervention. My answer is a cautious yes. Sometimes courts should neither design nor prompt a new system, yet they should be free to elaborate on a system initiated by others. Information access systems are one example. This Article offers a way to think about others.

¹¹ Important alternative perspectives include Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 602–11 [hereinafter Blasi, *Checking*]; Thomas I. Emerson, *The First Amendment and the Right to Know*, 1976 WASH. U. L.Q. 1, 14; and Cass R. Sunstein, *Government Control of Information*, 74 CAL. L. REV. 889 (1986). See also MARK G. YUDOF, *WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA* 246–55 (1983); Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 489–95 (1985); Timothy B. Dyk, *Newsgathering, Press Access, and the First Amendment*, 44 STAN. L. REV. 927 (1992) (supporting special access privileges for the press); Steven Helle, *The Newsgathering/Publication Dichotomy and Government Expression*, 1982 DUKE L.J. 1, 4, 52–59 (arguing for a robust constitutional duty of government to disclose information); Heidi Kitrosser, *Secrecy in the Immigration Courts and Beyond: Considering the Right to Know in the Administrative State*, 39 HARV. C.R.–C.L. L. REV. 95 (2004) (advocating access in the deportation context); Barry P. McDonald, *The First Amendment and the Free Flow of Information: Towards a Realistic Right to Gather Information in the Information Age*, 65 OHIO ST. L.J. 249 (2004) (arguing for information gathering rights but limited to certain categories of gatherers).

¹² 5 U.S.C. § 552 (enacted by Pub. L. No. 89-554, 80 Stat. 383 (1966)).

¹³ 5 U.S.C. App. 2 §§ 1 *et seq.* (enacted by Pub. L. No. 92-463, 86 Stat. 770 (1972)).

¹⁴ 5 U.S.C. § 552b (enacted by Pub. L. No. 94-409, 90 Stat. 1241 (1976)).

¹⁵ 44 U.S.C. §§ 2201–2207 (enacted by Pub. L. No. 95-591, 92 Stat. 2523 (1978)).

¹⁶ 44 U.S.C. §§ 3101 *et seq.* (enacted by Pub. L. No. 90-620, 82 Stat. 1297 (1968)).

¹⁷ Exec. Order No. 13,292, 68 Fed. Reg. 15315 (Mar. 25, 2003).

The analysis proceeds in three parts and makes three principal contributions. Part I offers reasons for incorporating information access norms into law, including constitutional law. Democratic governance is premised on some measure of public access to information about government operations. Laws aimed at regulating information access help achieve an acceptable measure of exposure, without jeopardizing executive efficacy or unduly relying on each official's personal preferences. Indeed, these norms are good candidates for constitutionalization and even judicial enforcement. Although largely overlooked in this country, many recently drafted national constitutions make a commitment to public access and state secrecy. In addition, some foreign constitutional courts demand disclosure even without an explicit public access provision. These judicial forays into the access field have been episodic and measured; their preference for sharing responsibility with other institutions is pragmatic and suggestive; and their lessons have not been assessed in the law literature.

Part II turns to our own constitutional order. Few courts have endorsed a general constitutional norm of access to government information. Instead, the U.S. Constitution has been read to imply official discretion to *withhold* certain information. The most obvious example is the doctrine of executive privilege but less recognized instances occur in FOIA and FACA cases. Not all court-generated constitutional law inhibits public access, however. Openness in many judicial proceedings is guaranteed. And private parties are fairly free to disseminate information that happens to escape from government sources. Scholars have identified each of these constitutional positions, but their coexistence is underexplored—and problematic.¹⁸ The theoretical defense for one piece sometimes clashes with the justification for another. And there is a persuasive structural argument, grounded in democratic premises and skepticism about official motives, which would add public access to the list of constitutional norms.

Why has our settlement lasted? The given reasons are basically pragmatic. Concerns about institutional competence have become

¹⁸ For exceptional efforts to analyze more than one component of this scheme, see Sunstein, *supra* note 11, at 905–09 (critiquing the combination of modest speech rights for public employees with minimal public access rights and constraints on government control of truthful information, such as weapons technology); Blasi, *Checking*, *supra* note 11, at 602–11 (supporting a reporter's privilege along with information access rights); and Lillian R. BeVier, *Like Mackerel in the Moonlight: Some Reflections on Richmond Newspapers*, 10 HOFSTRA L. REV. 311, 314–15, 339 (1982) (identifying difficulties in reconciling court-access guarantees with prior access cases). See also Cheh, *supra* note 9, at 709–12 (arguing for enhanced government employee speech rights but limited judicial review of administrative systems to ensure secrecy). Thomas Emerson, *supra* note 11, deserves credit for helping us see the interests in gathering, disseminating, and receiving information as an integrated system of constitutional significance.

stock arguments against constitutionalizing public access. First, it has been asserted that the judiciary lacks easily ascertainable standards for specifying the content of any access guarantee. Second, alternative methods are available to mediate access disputes, such as statutory claims and cultivation of sources by a competitive news media. Public access, therefore, might be a constitutional value that is rightly under-enforced by the judiciary.¹⁹

Even these reasons are difficult to accept on second thought. Heavy reliance on informal access networks is now quite controversial and always came with a price. However essential these networks are for revealing deep secrets, they are only one part of a healthy access system.²⁰ But the problem for the status quo is more serious than popular skepticism about today's journalists and their official patrons. Rather than point in the same direction, arguments about nonjudicial alternatives can collide with the presumption of judicial incompetence. Part III explores this idea. Congress and the executive have constructed a system for analyzing a large number of access claims. This system enlists the judiciary. Perhaps no court could have designed that access system, nor ordered anyone else to do so. But once an access system is up and running, judicial improvisation becomes practically easier. In other words, the United States has a *platform* for judicial intervention into access disputes. The issue is whether the judicial role is restricted to implementation of the system as given, within the confines of ordinary statutory work, or whether courts are empowered to modify it further. This issue has had no serious treatment in the law literature.²¹

¹⁹ See LAWRENCE G. SAGER, *JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE* 6 (2004) ("There is and should be a gap between the Constitution itself and the judicially enforced Constitution."); CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 106–07 (1993) (suggesting that access to government information is a judicially underenforced First Amendment norm, and FOIA as a reasonable response); David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 358–59 (1991) (similar).

²⁰ See *infra* Part I.A.; text accompanying notes 167–179.

²¹ In a paragraph of his influential piece, Emerson noted that information access statutes provide "a good start" in defining the scope of a defensible constitutional right. Emerson, *supra* note 11, at 17; cf. THOMAS M. FRANCK, *POLITICAL QUESTIONS/JUDICIAL ANSWERS* 138–39 (1992) (drawing on in camera proceedings in FOIA litigation to support judicial intervention in foreign affairs cases). Outside the access field, Lawrence Sager recently has pressed the notion that "[c]onstitutional judges are part of a contemporary partnership with popular governmental actors which promises more complete constitutional justice than could be realized by the courts alone." SAGER, *supra* note 19, at 7. Sager goes on to contend that sometimes courts should enforce minimum welfare rights "once other institutions of government have acted and created contexts in which the issue of right surfaces largely unencumbered by other questions." *Id.* at 95; cf. Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875, 935–37 (2003) (explaining experimentalist courts and "big" cases involving complexity as opposed to "hard" cases of fundamental disagreement). It is this kind of collaboration that I will explore, but I distinguish welfare rights below. See *infra* text accompanying notes 296–297.

We ought to hesitate at this opportunity. Under certain circumstances, however, the judiciary should elaborate constitutional law from constitutionally optional platforms. Such action demands a legitimate constitutional mission, a practical obstacle to independent judicial intervention, an existing system that helps solve the problem, and assessment of resulting risks.²² Forerunners do exist,²³ but the platforms model is admittedly unorthodox. It requires an unconventionally soft boundary between ordinary and constitutional law, which is a notion that contemporary scholars are only beginning to mine.²⁴ In any event, the possibilities are attractive. We might achieve a democracy-promoting role for the courts that is legitimate, desirable, and feasible—a role that is within the domain of constitutional value, that does not rely on unrealistic hopes for action by other institutions, but that ameliorates serious difficulties associated with unassisted structural reform and unbridled policymaking.²⁵

I. SECRECY AND DEMOCRACY

The individual provisions of the United States Constitution say little about government secrecy or public access.²⁶ If constitutional law reaches either one, it is due to reasoning of a different kind. The arguments are structural and institutional, involving the proper relationship between citizen and government and a reliable system for resolving tension between openness and efficacy. So it helps to begin with general thinking on secrecy and democracy.

A. Access Assumptions

Like other forms of government, modern democracies seek legitimacy—as in a social condition in which the government’s power is thought to be justified and worthy of respect.²⁷ But they do so in a par-

²² See *infra* Part III.C.3.

²³ See *infra* Part III.C.2.

²⁴ See *infra* text accompanying notes 246–249 (comparing and contrasting platforms with William Eskridge and John Ferejohn’s “super statutes” and Gerhard Casper’s “framework legislation”).

²⁵ Contrast the assertive model for judicial action in Owen M. Fiss, *Forward: The Forms of Justice*, 93 HARV. L. REV. 1, 12, 17, 27–28, 33–34, 43–46, 57–58 (1979) (recognizing difficulties in court-orchestrated structural reform but defending it in light of the alternatives and the asserted expertise of courts in giving meaning to constitutional values), and Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1083 (1984).

²⁶ See *infra* Part II.B.

²⁷ See, e.g., Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 308 (2003) (defining legitimacy as “a quality possessed by an authority, a law, or an institution that leads others to feel obligated to obey its decisions and directives”); see also Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1795–96 (2005) (describing strong and weak senses of “sociological” legitimacy); cf. David A. Strauss, *Reply:*

ticular way. Democracies promise responsiveness and accountability to popular will, rather than claim obedience by divine right or the threat of overwhelming force.²⁸ Citizens will appreciably influence the direction of government, and they will have an opportunity to assess progress and assign blame.²⁹ This influence is plainly limited, however. Some popular demands might be declared out of bounds without the government losing its fundamentally democratic character;³⁰ actual, individual consent to government authority is not the strategy or even a coherent prospect;³¹ and existing democracies do not permit people to “govern themselves” in a strong sense. They retain perceptible lines between government and the governed, with the former sometimes coercing the latter. These governments garner legitimacy by maintaining an adequate connection between, not the fusion of, public and private forces.

There are many ways to accomplish this. Familiar models include representative, deliberative, participatory, and direct democracy.³² Each has a different aspiration for the form and intensity of private involvement in governance. Some theories view democracy as a method of accurately exposing and registering the preferences of often-uninterested voters; others want democratic institutions to function as forums for the articulation and alteration of private interests, toward the formation of public-regarding individuals. Important features are common to all of them, however. Consider the widespread adoption of voting rights with broad-based adult suffrage, plus serious limits on

Legitimacy and Obedience, 118 HARV. L. REV. 1854, 1861 (2005) (“[I]n constitutional debates, an assertion of illegitimacy is generally used, and should only be used, to make a certain kind of moral claim: that a government action is not entitled to a full measure of obedience.”).

²⁸ On the evolution of democracy at the national level, see, for example, ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* (1989). For a compatible argument that majoritarian political accountability should be seen as just one mechanism for protecting liberty, see Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 COLUM. L. REV. 531, 535 (1998).

²⁹ See, e.g., 4 ANNALS OF CONG. 934 (Nov. 24, 1794) (statement of Rep. Madison) (“If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people.”); cf. James Wilson, *Pennsylvania Ratifying Convention* (Dec. 1, 1787) (“[T]he sovereignty resides in the people.”), in 1 THE FOUNDERS’ CONSTITUTION 265 (Philip B. Kurland & Ralph Lerner eds., 1987) [hereinafter FOUNDERS’ CONSTITUTION].

³⁰ See, e.g., U.S. CONST. amend. I (prohibiting Congress from abridging “the freedom” of speech); *id.* amend. XV, § 1 (guaranteeing citizens’ right to vote against denial on account of race). *But cf. id.* art. V (authorizing “Amendments to this Constitution”).

³¹ Accord RANDY BARNETT, *RESTORING THE LOST CONSTITUTION* 30–31 (2004); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 226 (1980).

³² See, e.g., BENJAMIN R. BARBER, *STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE* xiv–xv, 117 (1984); THOMAS E. CRONIN, *DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL* (1989); AMY GUTMANN & DENNIS F. THOMPSON, *DEMOCRACY AND DISAGREEMENT* (1996); RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 154 (2003); CASS R. SUNSTEIN, *DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO* 6–7, 239–43 (2001).

government authority to punish a person's beliefs, expression, or association on matters of politics.³³

Such core elements in a genuine program of popular accountability require a system for disclosing information about government.³⁴ Without meaningful information on government plans, performance, and officers, the ability to vote, speak, and organize around political causes becomes rather empty. One will have a difficult time assessing the incumbent administration in the absence of information concerning revenue, spending, and the progress of government initiatives. Only the most modest understanding of the citizen's role in politics—retrospective voting on passive experience—might do without such information access. This understanding could itself foreclose the government's democratic legitimacy.

But does a system of public access need any specialized law to succeed? To what extent does democracy require a *formal system* for access to information, with rules speaking directly to the matter and institutions reserved for effectuating those rules? Should we instead rely on an *informal system* arising from incentives and interests that are unhitched to any access law per se? There is good reason to think that some formal law is helpful, although the conclusion is not a quick one.

Take the executive branch. It is headed by an elected President and populated by tax-paid employees. They can be seen as agents of the public charged with acting for the public's benefit.³⁵ Many might take that role seriously as a matter of personal honor or ethics. Without effective monitoring, however, some of these officials will be work-shy, careless, corrupt, or otherwise willing to abuse the power afforded by

³³ See, e.g., Dinah Shelton, *The Boundaries of Human Rights Jurisdiction in Europe*, 13 DUKE J. COMP. & INT'L L. 95, 97–98 (2003) (discussing Council of Europe members); Lloyd N. Cutler, *The Internationalization of Human Rights*, 1990 U. ILL. L. REV. 575, 578.

³⁴ See FRANCIS E. ROURKE, *SECRECY AND PUBLICITY: DILEMMAS OF DEMOCRACY* 4–5, 39–40 (1961) (asserting government's interest in influencing opinion formation and posing government secrecy as a threat to public observation and control); Emerson, *supra* note 11, at 14; see also James Madison, *Letter to W.T. Berry* (Aug. 4, 1822), reprinted in 9 THE WRITINGS OF JAMES MADISON 103, 103 (Gaillard Hunt ed., 1910) (lauding a public education program and stating, “[a] popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy, or both”); ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 26 (1948) (“Just so far as, at any point, the citizens who are to decide an issue are denied acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to that issue, just so far the result must be ill-considered, ill-balanced planning for the general good.”); GUTMAN & THOMPSON, *supra* note 32, at 95–101 (discussing the publicity principle, traceable in some form to both Bentham and Kant, as a presumption to promote democratic accountability); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604–05 (1982).

³⁵ See, e.g., Archibald Cox, *Foreword: Freedom of Expression in the Burger Court*, 94 HARV. L. REV. 1, 24 (1980).

their government positions.³⁶ Indeed, if they want to retain power and are given unrestrained discretion to manage information access, we might expect them to disclose information that makes the administration look public spirited, effective, and efficient, but withhold information to the contrary.³⁷ This story accords with well-known examples of executive efforts to do questionable business behind closed doors—such as President Johnson’s spin on military progress in Vietnam, the Nixon administration’s Watergate scandal, the Reagan administration’s Iran-Contra affair, and the health care and energy policy task forces during the Clinton and second Bush administrations.³⁸ Some part or all of these efforts became public, of course, but that is cold comfort. If the desire to mislead via control over information access persists, is there good reason to believe that the desire will be thwarted systematically rather than episodically?

There surely can be impediments to excessive executive secrecy without any access law. Some government operations are so visible that the public need not rely on official representations, at least to judge outcomes. Federal income tax paid by an individual is one instance. Second, some high-ranking officials will not pursue a single-minded agenda of political entrenchment. Some will act on what they perceive to be the dictates of conscience or the needs of the public good, including the revelation of bad news. More important, the U.S. has an active though informal system of information access. Unauthorized disclo-

³⁶ See, e.g., Max Weber, *Bureaucracy*, in 2 MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 956, 992 (Gunther Roth & Claus Wittich eds., 1978) (“This superiority of the professional insider every bureaucracy seeks further to increase through the means of *keeping secret* its knowledge and intentions.”); cf. 1 JEREMY BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* 524 (1978) [1827] (discussing trials and asserting that “[w]ithout publicity, all other checks are insufficient”); LOUIS D. BRANDEIS, *OTHER PEOPLE’S MONEY AND HOW THE BANKERS USE IT* 92 (1913) (“Publicity is justly commended as a remedy for social and industrial diseases.”).

³⁷ See Joseph E. Stiglitz, *Information and the Change in the Paradigm in Economics (Part I)*, 47 *AMERICAN ECONOMIST* 6, 26 (Fall 2003) [hereinafter Stiglitz, *Information*] (noting that transparency can disclose mistakes and corruption); see also Joseph E. Stiglitz, *On Liberty, the Right to Know, and Public Discourse: The Role of Transparency in Public Life*, in *GLOBALIZING RIGHTS: THE OXFORD AMNESTY LECTURES 1999*, at 115 (Matthew J. Gibney ed., 2003) [hereinafter Stiglitz, *Transparency*]; Christina E. Wells, “National Security” *Information and the Freedom of Information Act*, 56 *ADMIN. L. REV.* 1195, 1221 (2004).

³⁸ Other examples include internal executive assessments about the need for Japanese internment, and the government’s radiation experiments on unconsenting Americans—stories that came out long after the fact. See *Korematsu v. United States*, 584 F. Supp. 1406, 1417–19 (N.D. Cal. 1984) (granting a writ of *coram nobis*); Brief of Amicus Curiae Fred Korematsu in Support of Petitioners 17–20, *Rasul v. Bush*, 124 S. Ct. 2686 (2004); William Lanouette, *Reporting on Risk: Who Decides What’s News?*, 5 *RISK: HEALTH, SAFETY & ENV’T*, 223, 230–32 (1994); Nestor M. Davidson, Note, *Constitutional Mass Torts: Sovereign Immunity and the Human Radiation Experiments*, 96 *COLUM. L. REV.* 1203, 1203 (1996); see also Jack Goldsmith & Cass R. Sunstein, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes*, 19 *CONST. COMMENT.* 261, 263–64 (2002) (relating the FBI’s good fortune in learning about Nazi saboteurs who had entered the country during World War II).

sure is possible and even routine.³⁹ Whistleblowing and leaking produced vivid mass media exposure of detention practices at the Abu Ghraib prison and on Guantanamo Bay.⁴⁰ In addition, the possibility of leaks should dampen enthusiasm *ex ante* for secrecy among high-ranking officials. Public perceptions of a cover-up can result in severe political consequences, and government officials surely value the first opportunity to frame the significance of a revelation. Even the most craven executive official might then consider not only the benefit of secrecy, but also the risk of unauthorized disclosure, the costs of minimizing it, and the upside of preemptive disclosure.

Finally, competitive politics might promote openness. When aspiring officeholders face off in elections, they could compete away their authority to withhold information. This prospect has been seriously doubted, however.⁴¹ While voters have reason to fear shirking and cheating, they might lack a reliable mechanism for detecting breaches of access promises,⁴² one candidate will have difficulty making a credible promise of better behavior than another, and future electoral defeat is “a fairly blunt instrument” for enforcing access guarantees.⁴³ Alternatively, government officials might promise to relinquish secrecy for a slightly different reason: to extend or retain the scope of government

³⁹ See, e.g., Lawrence K. Grossman, *Reflections on Leaks in the United States: The Media Perspectives*, in *FREE SPEECH AND NATIONAL SECURITY* 78, 79 (Shimon Shetreet ed., 1991).

⁴⁰ See, e.g., ERIK SAAR, *INSIDE THE WIRE: A MILITARY INTELLIGENCE SOLDIER'S EYEWITNESS ACCOUNT OF LIFE AT GUANTANAMO* (2005); SEYMOUR M. HERSH, *CHAIN OF COMMAND: HOW THE DEPARTMENT OF DEFENSE MISHANDLED THE DISASTER AT ABU GHRAIB* xv–xvi, 22, 34–35, 44 (2004). Law has, however, plainly contributed to recent reporting. See, e.g., Eric Lichtblau, *Justice Department Opens Inquiry into Abuse of U.S. Detainees*, N.Y. TIMES, Jan. 14, 2005, at A14 (drawing on anonymous sources and documents obtained by the ACLU under FOIA).

⁴¹ See John Ferejohn, *Accountability and Authority: Toward a Theory of Political Accountability*, in *DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION* 131, 132–33, 137–38 (Adam Przeworski et al. eds., 1999).

⁴² Transparency in the violation of transparency norms is a problem whether the system includes access law or not. Political scientists and sociologists have pointed to this difficulty by distinguishing “deep” from “shallow” secrets. Sometimes information outsiders are aware that information is being withheld from them (making the secrecy shallow); other times they are not (making the secrecy deep). See GUTMANN & THOMPSON, *supra* note 32, at 121; KIM LANE SCHEPPELE, *LEGAL SECRETS: EQUALITY AND EFFICIENCY IN THE COMMON LAW* 21 (1988); Dennis F. Thompson, *Democratic Secrecy*, 114 POLI. SCI. Q. 181 (1999); *infra* text accompanying note 178 (discussing the importance of leaks); cf. Alan Strudler, *Moral Complexity in the Law of Nondisclosure*, 45 UCLA L. REV. 337, 370 (1997) (recognizing the distinction but disagreeing, from a Kantian perspective, with Scheppele’s Rawlsian conclusions). In any event, deep secrecy is probably a more severe problem with respect to executive than legislative action. Legislatures usually affect the world through formal legislation, which is presumably public before it becomes enforceable (excepting, for example, the intelligence budget).

⁴³ Ferejohn, *supra* note 41, at 137.

power.⁴⁴ “Transparency” could boost voter support for state action. But similar doubts are in order here, too. Detection of secrecy and blunt penalties are still problems. We also must assume that public officials prefer greater (or at least stagnant) job responsibilities. They might instead prefer less turf to police⁴⁵ and so never offer openness in the first place.

Political pressure has certainly instigated disclosure in the past. A recent example might be the 9/11 Commission’s investigation,⁴⁶ which was initially opposed by a President whose party enjoyed (narrow) majorities in Congress.⁴⁷ But these results are the product of conditions, not givens. They might not be satisfied in a particular democracy at a particular time. Concerns for adequate access are more serious regarding executive action that is difficult for individuals to detect on their own; when social, professional, and legal penalties for unauthorized disclosure make it less likely; and where political opposition is weak and public skepticism minimal. Equally problematic is a failure to provide any standard for judging whether public access is appropriate. Even if an official is willing to disclose information whenever it serves the public interest, it is a mistake to grant unrestrained individual authority to make that judgment.⁴⁸ Some officials will be far too cautious; others will offer too much disclosure for the public’s own good. It makes sense, then, to add law to the system of access. It can be consciously designed to account for these circumstances.

Indeed, the argument for access regulation may be stronger for the public sector than for corporate management. The average shareholder can more easily sever her connection to secretive corporate managers than can the average voter exit a disturbingly clandestine government.⁴⁹ Governments (especially national governments) are closer to inescapable monopolies than voluntarily chosen investments. Again, there are

⁴⁴ See *id.* at 133–34, 136–40; see also Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. CHI. L. REV. 361, 414–15 (2004) (elaborating on the political competition theme as applied to Congress).

⁴⁵ See Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915 (2005) (challenging assumptions that government tends to unjustifiably expand in a systematic way).

⁴⁶ See THE 9/11 COMMISSION REPORT (2004).

⁴⁷ See Scot J. Paltrow, *Full Disclosure: White House Hurdles Delay 9/11 Commission Investigation*, WALL ST. J., July 8, 2003, at A1; CBS News, *Bush Opposes 9/11 Query Panel* (May 23, 2002), <<http://www.cbsnews.com/stories/2002/05/15/attack/main509096.shtml>>.

⁴⁸ See Stiglitz, *Information*, *supra* note 37, at 26. For further analysis of leaking as an informal option, see text accompanying notes 167–179.

⁴⁹ See Stiglitz, *Transparency*, *supra* note 37, at 127–28; Stiglitz, *Information*, *supra* note 37, at 26. A few liberals might have moved to Canada after the 2004 elections, but probably not many. Cf. Rick Lyman, *Some Bush Foes Vote Yet Again, with Their Feet: Canada or Bust*, N.Y. TIMES, Feb. 8, 2005 (“Firm numbers on potential émigrés are elusive.”).

elections for both corporate and political office. But mechanisms of control over government officials by voters are likely less forceful than those used to discipline corporate management.⁵⁰

Finally, promoting access to information about government might represent an agreement to disagree about behavioral norms. Pro-disclosure policies can implement a compromise: expose conduct for evaluation by principals instead of specifying good or bad conduct in law *ex ante*. A democratic society might facilitate citizen ability to judge their government on individually chosen normative principles. We might not be willing or able to agree on statutory language intended to cap private influence on lawmakers, for example, and yet find adequate support for rules that mandate the disclosure of contacts between lobbyists and legislators. The for-profit private sector seems different. There is perhaps a narrower band of rational grounds for judging corporate behavior and objectives (*i.e.*, maximizing investor wealth) such that the costs associated with broad access rights become less tolerable.⁵¹ We might reasonably conclude that a few measures of financial health are sufficient in the corporate context, without ordinarily requiring by law disclosures that detail outsider influence on managerial decisions. In any event, access-promoting law seems at least as desirable in the context of government operations.

None of this dictates “government transparency.” That might be a fine slogan but it does not suggest a realistic platform.⁵² Unfettered access to government information will cripple the state’s public-regarding efforts as much as anything else. Openness exposes not just waste, fraud, and abuse, but also battle plans, law enforcement sources, confidential and otherwise candid advice, intimately private information, and trade secrets. In addition, social welfare might be enhanced if the government sometimes withholds its enforcement policies from the public, like the algorithm for selecting income tax returns for audits or the patterns of police patrols.⁵³ Restricted information flow can therefore enhance government efficacy and prevent commercial or personal injury to private parties. A rule of full disclosure might also prompt officials to sanitize the public record as it is created. Nor will information

⁵⁰ See Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 355 (2000). With respect to the U.S. presidency, matters are not helped by repeated final-period problems that accompany a two-term limit.

⁵¹ *Cf. id.* at 355 (“Unlike investors in private firms, then, the principals of governments do not share a singular interest in maximizing firm value.”).

⁵² *Accord* Benjamin S. DuVal, Jr., *The Occasions of Secrecy*, 47 U. PITT. L. REV. 579, 583 (1986) (“[S]ociety is distinctly ambivalent about the benefits of increased knowledge.”); Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. — (2006 forthcoming) (manuscript at 7).

⁵³ See generally Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984).

fuel only public-welfare-enhancing interests. Access can facilitate rent-seeking at the expense of the common good, or translate destructive populist rages into formal law.⁵⁴

Thankfully, radical public access seems to have occurred only under defunct regimes and perhaps in extremely small communities where the public/private line disappears. Every other living democracy must make choices about what to reveal and what to conceal, understanding that disclosure might threaten vital objectives while secrecy might threaten government legitimacy. They aim for government “translucency” more than “transparency.”

B. Comparative Constitutional Law

Assuming access law is desirable, what form should it take? How should it manage the contest among values of openness, injury prevention, and efficacy? One option is to use constitutional law and judicial review. If access law is denominated fundamental and supreme, we might (not must) be more confident that it will withstand attack from political elites, bureaucrats, and partisan desires. If an independent judiciary is involved, we might (not must) gain advantage from the judgment of an institution somewhat insulated from ordinary politics.⁵⁵ These propositions go beyond public access claims. They also can support executive secrecy.

Several other democracies seem to accept these propositions.⁵⁶ Even ignoring “right to receive information” provisions, which might not reach unwilling government sources, at least two-dozen foreign constitutions now explicitly command some degree of public access to government-held information or records.⁵⁷ These provisions are not merely

⁵⁴ See generally Vermeule, *supra* note 44, at 412–13; Note, *Open Meeting Statutes: The Press Fights for the Right to Know*, 75 HARV. L. REV. 1199, 1202 (1962) (adding that openness may deter public officials from constructive confessions of ignorance). On the tension between the need for public-regarding reasons and open deliberation in democracy, see Simone Chambers, *Behind Closed Doors: Publicity, Secrecy, and the Quality of Deliberation*, 12 J. POLI. PHIL. 389 (2004).

⁵⁵ See, e.g., U.S. CONST. art. III, § 1; JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 88, 102–03, 112 (1980); SAGER, *supra* note 19, at 74.

⁵⁶ See Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1228 (1999) (suggesting the possible value of cautiously analyzed foreign experience).

⁵⁷ Freedominfo.org puts the number of access provisions at forty, see DAVID BANISAR, *THE FREEDOMINFO.ORG GLOBAL SURVEY: FREEDOM OF INFORMATION AND ACCESS TO GOVERNMENT RECORD LAWS AROUND THE WORLD 4* (2004), <<http://www.freedominfo.org/survey.htm>>, but that number seems to include provisions that do not speak to executive access or that more vaguely declare a right to receive information. E.g., CONSTITUTION OF LATVIA art. 100 (1998); see also INT’L COVENANT ON CIV. & POLI. RTS. art. 19; EURO. CONVENTION FOR THE PROTECTION OF HUMAN RTS. & FUND’L FREEDOMS art. 10; HERDÍS THORGEIRSDÓTTIR, *JOURNALISM WORTHY OF THE NAME: FREEDOM WITHIN THE PRESS AND THE AFFIRMATIVE SIDE OF ARTICLE 10 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 111–17 (2005).

hortatory. There is a significant body of case law in the field. And while these sources cannot be restated as a uniform constitutional law of access, they do share a provocative point: it is appropriate to constitutionally assure a measure of public access to government information, and even a measure of secrecy. Moreover, enforcement of access guarantees is a multi-institutional effort. When foreign courts intervene, they tend to rely on the work of other political actors, sometimes explicitly leaving room for judicial retreat. Foreign experience therefore suggests that constitutional access norms are feasible and useful if their aspirations are limited.

1. Textual provisions

Written access guarantees vary in strength. A weak type is simply legislation-prompting. It orders the legislature to enter the field, without providing an independently enforceable public access right. Constitutions of Estonia, Greece, and the Netherlands likely fall into this category.⁵⁸

Most access clauses are more ambitious, however. A second type constitutionalizes a baseline of public access. Although the location of the baseline may differ and legislative exemptions may be authorized, these provisions are self-executing. The Czech Republic probably fits this model. Its constitutional text obligates government to disclose certain information and apparently without waiting for legislation: “Organs of the State and of local self-government shall provide in an appropriate manner information on their activity.”⁵⁹ But this provision leaves room for subsequent legislative judgment: “The conditions and the form of implementation of this duty shall be set by law.”⁶⁰

Unless otherwise noted, citations are to English translations of constitutions collected by the Venice Commission. See 1 CONSTITUTIONS OF EUROPE: TEXTS COLLECTED BY THE COUNCIL OF EUROPE VENICE COMMISSION vii (2004) (noting forty-six constitutions in the collection). Cases and English-language summaries thereof are also available at the Commission’s website (<http://codices.coe.int>). Other sources were used to extend the scope of case law reviewed.

⁵⁸ See CONSTITUTION OF ESTONIA art. 44, para. 2 (1992) (stating that authorities must provide certain information about their work but “to the extent and in accordance with procedures determined by law”); CONSTITUTION OF GREECE art. 10.3 (1975) (“A request for information shall oblige the competent authority to reply, provided the law stipulates.”); CONSTITUTION OF THE NETHERLANDS art. 110 (1983) (“In the exercise of their duties government bodies shall observe the right of public access to information in accordance with rules to be prescribed by Act of Parliament.”).

⁵⁹ CZECH REPUBLIC, CHARTER OF FUND’L RTS. & FREEDOMS art. 17.5 (1993).

⁶⁰ *Id.*; accord CONSTITUTION OF ALBANIA art. 23.1–2 (1998) (declaring that “[t]he right to information is guaranteed” but also stating that “everyone has the right, in compliance with law, to obtain information about the activity of state organs, and of persons who exercise state functions”) (emphasis added); CONSTITUTION OF COLUMBIA art. 74 (1991) (declaring that every person has a right to access public documents “except in cases established by law”), reprinted in 4 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 163, 176 (Gisbert H. Flanz ed., 1995); CONSTITUTION

Finally, many clauses impose explicit restraints on legislative discretion. They may dictate a degree of secrecy, a degree of openness, or both. Take Romania. Its access provision begins with a qualified declaration of openness—“A person’s right of access to any information of *public interest* cannot be restricted”⁶¹—while another clause makes clear that this right “shall not be prejudicial to the protection of the young or to national security.”⁶² In Austria, administrative officials “shall impart information about matters pertaining to their sphere of competence,” but only “insofar as this does not conflict with a legal obligation to

OF BELGIUM art. 32 (1994); CONSTITUTION OF THE PHILIPPINES art. III, § 7 (1987), *reprinted in* 15 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 163, 170 (Albert P. Blaustein & Gisbert H. Flanz eds., 1986); CONSTITUTION OF THE SLOVAK REPUBLIC art. 25.5 (1992, as amended in 2001); CONSTITUTION OF THE REPUBLIC OF SLOVENIA art. 39, para. 2 (1991); *see also* Legaspi v. Civil Serv. Comm’n, 150 S. Ct. Rpts. Ann. 530, 534–35, 541–42 (May 29, 1987) (*en banc*) [Philippines] (declaring that its constitutional provision is self-executing, and ordering disclosure of information to check civil service eligibility of city health department employees).

Other wrinkles are possible. South Africa’s 1996 Constitution straddles the line between legislation-prompting and access baselines. It provides that everyone has a right of access to information held by the state, *see* CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA § 32(1)(a) (1996), and that national legislation “must be enacted to give effect to this right,” *id.* § 32(2). A transitional provision indicated that, in the absence of such legislation, access rights are limited to “information . . . required for the exercise or protection of” other rights. *Id.* schedule 6, art. 23(2). And a third clause seems to deprive the legislature of authority to enact access legislation if it delays for three years. *See id.* art. 23(3). South Africa thus encouraged legislation without requiring it, with inaction resulting in a modest but self-executing access provision. *See generally* Jonathan Klaaren, *Access to Information and National Security in South Africa*, in NATIONAL SECURITY AND OPEN GOVERNMENT: STRIKING THE RIGHT BALANCE, 193, 203, 207 (2003) [hereinafter BALANCE] (critiquing implementation of this guarantee with regard to national security information).

⁶¹ CONSTITUTION OF ROMANIA art. 31.1 (1991) (emphasis added); *see also* CONSTITUTION OF THE REPUBLIC OF BULGARIA art. 41.2 (1991) (referring to “information . . . on any matter of *legitimate interest* to” the requesting citizen) (emphasis added); *cf.* CONSTITUTION OF THE REPUBLIC OF CROATIA art. 38, cl. 1 (2001) (“*Journalists* shall have the right to . . . access to information.”) (emphasis added).

⁶² CONSTITUTION OF ROMANIA art. 31.3 (1991); *see also* CONSTITUTION OF THE REPUBLIC OF BULGARIA art. 41.1 (1991) (granting a general right to obtain information but declaring that it shall not be exercised to the detriment of the rights of others, national security, public order, or public health and morality); *id.* art. 41.2 (granting rights to obtain information “which is not a state or official secret and does not affect the rights of others”); CONSTITUTION OF THE REPUBLIC OF CROATIA art. 37 (2001) (“Everyone shall be guaranteed the safety and secrecy of personal data. . . . Protection of data and supervision of the work of information systems in the State shall be regulated by law.”); CONSTITUTION OF THE REPUBLIC OF MOLDOVA art. 34.3 (1994) (“The right of access to information may not prejudice either the measures taken to protect citizens or national security.”); CONSTITUTION OF THE KINGDOM OF THAILAND § 58 (1997) (“A person shall have the right to get access to public information in possession of a Government agency, State agency, State enterprise or local administration, unless the disclosure of such information shall affect the security of the State, public safety or interests of other persons which shall be protected as provided by law.”), *reprinted in* 18 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 1, 13 (Gisbert H. Flanz ed., 1998).

maintain secrecy.”⁶³ Another provision adverts to secrecy obligations. These officials are:

[S]ave as otherwise provided by law, pledged to secrecy about all facts of which they have obtained knowledge exclusively from their official activity and whose concealment is enjoined on them [1] in the interest of the maintenance of public peace, order and security, [2] of universal national defence, of external relations, [3] in the interest of a public law corporate body, [4] for the preparation of a ruling or [5] in the preponderant interest of the parties involved⁶⁴

Other constitutions *enhance* public access by restricting legislative discretion. Finland’s constitution states that documents and recordings possessed by government authorities are public “unless their publication has for compelling reasons been specifically restricted by an Act.”⁶⁵ A legislative exemption from public access must therefore satisfy a clear statement rule and be supported by a persuasive justification. Alternatively, some constitutions speak directly to the standards for access. In Poland, the list of acceptable justifications for secrecy is extensive and perhaps flexible, but closed: limitations on rights to obtain information “may be imposed by statute *solely* to protect freedoms and rights of other persons and economic subjects, public order, security or important economic interests of the State.”⁶⁶

Sweden’s Freedom of the Press Act has the oldest heritage, the most detail, and arguably the strongest restraints on legislative discretion.⁶⁷ It combines elements from each of the constitutions just discussed: exemptions from access require a clear legislative statement, necessity, and accordance with one of seven categories. Thus the first of several

⁶³ CONSTITUTION OF AUSTRIA art. 20(4) (1987).

⁶⁴ *Id.* art. 20(3).

⁶⁵ CONSTITUTION OF FINLAND § 12 (2000), *reprinted in* 7 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 1, 3 (Gisbert H. Flanz ed., 2000); *cf.* CONSTITUTION OF THE REPUBLIC OF HUNGARY art. 61.1, .3 (1989) (“[E]veryone has the right . . . to receive and impart information of public interest. . . . A majority of two-thirds of the votes of the Members of Parliament present is required to pass the statute on the public access to information of public interest”); CONSTITUTION OF PERU art. 2(5) (1993) (“Information involving intimate personal matters and that *expressly* excluded by law or for reasons of national security is excluded”) (emphasis added), *reprinted in* 14 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 109 (Gisbert H. Flanz ed., 1995).

⁶⁶ CONSTITUTION OF POLAND art. 61.3 (1997) (emphasis added); *cf.* CONSTITUTION OF SPAIN art. 105 (1978) (requiring the law to regulate citizen access to administrative records and files “except as they may concern the security and defense of the State, the investigation of crimes and the privacy of individuals”); CONSTITUTION OF THE PORTUGUESE REPUBLIC art. 268.2 (1989) (similar).

⁶⁷ For another old, but narrower, provision, see France’s DECLARATION OF THE RIGHTS OF MAN art. 14 (1789) (“All the citizens have a right to decide, either personally or by their representatives, as to the necessity of the public contribution; to grant this freely; to know to what uses it is put.”).

detailed articles declares that “[e]very Swedish citizen shall be entitled to have free access to official documents, in order to encourage the free exchange of opinion and the availability of comprehensive information.”⁶⁸ Article 2 then explains that this access right “may be restricted *only* if restriction is *necessary* having regard to” seven categories of possible exemptions.⁶⁹ Those categories include national security and international relations, crime control, privacy, and even “the preservation of animal or plant species.”⁷⁰ As for the clear-statement rule, article 2 adds that “[a]ny restriction of the right of access to official documents shall be *scrupulously specified* in a provision of a special act of law, or . . . in another act of law to which the special act refers.”⁷¹ Although Sweden does not have a tradition of robust judicial review, its access provision is nevertheless meaningful.⁷²

2. Judicial intervention

Like the character of access provisions, judicial intervention into the access field differs across countries. If there is one theme in the decisions, it is that courts are reluctant to independently, authoritatively, and conclusively dictate access norms. They tend to proceed cautiously whether or not constitutional text speaks to the issue. Bulgaria presents a rather extreme illustration of judicial retreat. Its access provision looks self-executing: “Citizens shall be entitled to obtain information from state bodies and agencies on any matter of legitimate interest to them which is not a state or official secret and does not affect the rights of others.”⁷³ Yet that country’s constitutional court was unwilling to move without more specific legislative authorization: “The concrete contents” of the obligation to provide information “cannot be determined in any other manner but through legislation.”⁷⁴ Not every court

⁶⁸ THE FREEDOM OF THE PRESS ACT [Sweden], ch. 2, art. 1 (adopted in 1766 & 1949, amended in 1976).

⁶⁹ *See id.* art. 2 (emphasis added).

⁷⁰ *See id.*

⁷¹ *See id.* (emphasis added).

⁷² *See* Bernard Michael Ortwein II, *The Swedish Legal System: An Introduction*, 13 IND. INT’L & COMP. L. REV. 405, 408 n. 17, 414–15 (2003).

⁷³ CONSTITUTION OF THE REPUBLIC OF BULGARIA art. 41.2 (1991).

⁷⁴ ALEXANDER KASHAMOV, ACCESS TO INFORMATION LITIGATION IN BULGARIA 11 n.8 (2002), <http://www.aip-bg.org/pdf/court_eng.pdf> (quoting Constitutional Court of Bulgaria, Case No. 7/96, Ruling No. 7 of 4.VI.1996 (Dec. 6, 1996)); *see also* Károly Bárd, *Judicial Independence in the Accession Countries of Central and Eastern Europe and the Baltics*, in JUDICIAL INTEGRITY 265, 284 (András Sajó ed., 2004) (suggesting lack of public confidence in Bulgaria’s judicial system); Alexander Kashumov, *National Security and the Right to Information in Bulgaria*, in BALANCE, *supra* note 60, at 123, 126–27, 136; Constitutional Court of Bulgaria, Case No. 11/2002, Decision No. 3 (Sept. 25, 2002) (as summarized in http://www.constcourt.bg/constcourt/ks_eng_frame.htm) (dividing and therefore upholding repeal of legislation providing access to defunct secret police files).

is so shy, however. Indeed, foreign judiciaries have employed several techniques to invigorate public access norms without assuming sole or even primary responsibility for the system.

a. Nondelegation and clarification. Foreign courts have repudiated access regulation schemes for their lack of potency. Lithuania went through the experience. That country's 1996 ruling was important yet mild. The constitutional court conceded that the Lithuanian constitution's guarantee of public access did not reach certain state secrets.⁷⁵ But the court nevertheless concluded that the legislature failed adequately to constrain the categories of information that could be withheld by the executive.⁷⁶ The decision therefore shifted more of the responsibility for generating public access norms from administrators to legislators, without necessarily enlisting the judiciary in that task.⁷⁷

b. Declaration of principle and legislative reconsideration. The Hungarian Constitutional Court reached similar results on more assertive rationales. It struck down parts of a lustration law in 1994. This statute mandated background checks for certain officials but gave them the choice of resigning to prevent public disclosure. In essence, the court required the legislature to rebalance access and privacy rights, along with the interest in "informational self-determination" of those who were spied on.⁷⁸ The decision relied on structural logic. "Democratically formed public opinion is an indispensable, institutional aspect of a constitutional state, and it is thus the constitutional obligation of the

⁷⁵ See CONSTITUTION OF LITHUANIA art. 25, para. 5 (1992) (granting citizens the right to "available information which concerns them" in the manner established by law.").

⁷⁶ See Constitutional Court of Lithuania, Case 3/96, §§ 1.2, 1.4 (Dec. 19, 1996), <<http://www.lrkt.lt/dokumentai/1996/n6a1219a.htm>>; see generally Nida Gelazis, *Defending Order and Freedom: The Lithuanian Constitutional Court in Its First Decade*, in CONSTITUTIONAL JUSTICE, EAST AND WEST: DEMOCRATIC LEGITIMACY AND CONSTITUTIONAL COURTS IN POST-COMMUNIST EUROPE IN A COMPARATIVE PERSPECTIVE 395 (Wojciech Sadurski ed., 2002).

⁷⁷ See also Constitutional Court of the Czech Republic, Case No. Pl. US 11/2000 (July 12, 2001) (as summarized in <http://codices.coe.int>, indexed as CZE-2001-2-012) (striking down portions of the Protection of Classified Information Act involving administrative discretion and denial of security clearances absent independent judicial review); cf. Military Secret Leakage Case, 4 KCCR 64, 89 Hun-Ka104 (Feb. 25, 1992) [South Korea] (as described in CONSTITUTIONAL COURT, REPUBLIC OF KOREA, THE FIRST TEN YEARS OF THE KOREAN CONSTITUTIONAL COURT: 1988–1998, at 143, 144 (2001) [hereinafter TEN YEARS] (narrowing a criminal statute prohibiting leaks of "military secrets" to only undisclosed facts, marked classified, the disclosure of which will pose a clear threat to national security); Jibong Lim, *Korean Constitutional Court Standing at the Crossroads: Focusing on Real Cases and Variational Types of Decisions*, 24 LOY. L.A. INT'L & COMP. L. REV. 327, 328–29, 336–43, 357–59 (2002) (noting tools of restraint to help the court survive).

⁷⁸ See Constitutional Court of Hungary, Decision No. 60/1994 (XII.22) AB (points 1 & 5), reprinted in 2 E. EURO. CASE RPTR. OF CONST. L. 159, 162–63, 169–72, 175–76, 190–91 (Dec. 22, 1994); see also Gabor Halmai, Laszlo Majtenyi & Kim Lane Scheppele, *Confronting the Past: The Hungarian Constitutional Court's Lustration Decision of 1994*, 1 E. EURO. HUMAN RTS. REV. 111, 118–19 (1996) (describing cases on access to local government meetings and socialist archives).

State to provide the conditions for its development and maintenance.”⁷⁹

At the same time:

The political decision about the precise determination of the range of information subject to the probe and the range of information to be deemed personal cannot be based upon the Constitution, but instead on the *constitutional certainty* that the records neither can be kept secret, nor be brought entirely to light.⁸⁰

In other words, the court was willing to unsettle a political compromise by invoking constitutional access mandates—yet it refused to write up the details of a new compromise as a matter of constitutional law. Hungary’s constitution was invoked to restart the political process, but no one indicated that the document itself was a sufficient source from which the judiciary alone could engineer a comprehensive public access policy.

In fact, access clauses in constitutional text have not been essential to judicial action. The Israeli Supreme Court acted without an express charge in positive law. In 1990, it recognized the principle that coalition agreements, which are practically essential to forming a government in Israel, must ordinarily be disclosed to the public. The Court relied on a structural feature of representative democracy:

Freedom of public opinion and knowledge of what is happening in the channels of government are an integral part of a democratic regime, which is structured on the constant sharing of information about what is happening in public life with the public itself. Withholding of information is justifiable only in exceptional cases where security of the State or foreign relations may be impaired or where there is a risk of harming some vital public interest.⁸¹

Yet Israel’s decision was like Hungary’s in preferring legislative involvement. The court authorized the Knesset to help regulate the field, establishing the principle of disclosure but leaving its details to the legislature.⁸²

⁷⁹ Decision No. 60/1994, *supra* note 78, at 173; *see id.* at 169 (“[T]he fundamental right to the freedom of information presumes that the functioning of the State is transparent to its citizens.”).

⁸⁰ *Id.* at 176 (emphasis in original); *cf. id.* at 177–78 (proceeding to critique the categories of persons subject to background checks). On this court’s procedure and power more generally, see Georg Brunner, *Structure and Proceedings of the Hungarian Constitutional Judiciary*, in *CONSTITUTIONAL JUDICIARY IN A NEW DEMOCRACY: THE HUNGARIAN CONSTITUTIONAL COURT* 65, 70, 76–89, 93 (László Sólyom & Georg Brunner eds., 2000).

⁸¹ *Shalit v. Peres*, 44(3) P.D. 353, H.C. 1601-4/90, at 214 [1990]; *see id.* at 218–20 (Barak, J.).

⁸² *See id.* at 217.

c. *Borrowing rules.* Another important example of judicial intervention occurred recently in India. Official investigations indicated significant connections between politicians and criminal gangs. India's Supreme Court considered the evidence of corruption, along with proposals by the nation's election commission that would have required legislative candidates to disclose information regarding criminal proceedings against them and their personal finances. The court then ordered the commission to mandate a list of disclosures, with recalcitrant candidates facing removal from the ballot.⁸³ The court was, however, unwilling to assume sole responsibility for designing a system of candidate disclosure: "where there is inaction by the executive, for whatever reason, the judiciary must step in, in exercise of its constitutional obligations to provide a solution"—but just until the legislature enacts "proper legislation to cover the field."⁸⁴ It forced action while drawing on the proposals of others and leaving room for supplanting legislation. India may have a weak record of protecting controversial private speech,⁸⁵ but its courts found a way to encourage a measure of official openness.

* * *

National constitutions are written and implemented in unique circumstances, and so caution is in order before foreign ideas are imported into domestic law. Some of the countries discussed here were recovering from more authoritarian forms of government when their current constitutions were adopted. Some faced problems unknown to the United States today, such as the absence of mass media organizations with meaningful independence from the central government. Their written constitutions sometimes reflect those challenges without

⁸³ See *Union of India v. Association for Democratic Reforms*, Civ. App. No. 7178, 2 LRI 305, paras. 34, 38, 46, 53 (2002) (available in LexisNexis database) (relying on free speech and democracy to derive a people's/voters' right to get information about public functionaries).

⁸⁴ *Id.* para. 51. Another Indian decision reached judicial and executive information. The court ordered disclosure of correspondence between the Law Minister and the Chief Justice pertaining to certain judicial appointments. See *S.P. Gupta v. President of India*, A.I.R. 1982 S.C. 149, 158–59 (deriving information access claims from textually guaranteed speech rights); see also *Constitutional Court of Latvia*, Case No. 04-02(99) (July 6, 1999), <http://codices.coe.int/cgi-bin/om_isapi.dll?clientID=1765517&infobase=codices.nfo&softpage=Doc_Frame_Pg42> (relying in part on access legislation and international law to invalidate executive action that permitted government contractors to keep their contracts confidential); *Forests Survey Inspection Request Case*, 1 KCCR 176, 88Hun-Ma22 (Sept. 4, 1989) [South Korea], <<http://www.court.go.kr/english/decision03.htm#c3-2-1>> (as described in TEN YEARS, *supra* note 77) (deriving self-executing access claims from rights of speech, similar to the Indian Supreme Court cases, and holding that a county violated the constitution by ignoring requests for forest- and property-survey records).

⁸⁵ See MARTHA NUSSBAUM, *DEMOCRACY IN THE BALANCE: VIOLENCE, HOPE, AND INDIA'S FUTURE* ch. 7 (forthcoming 2006) (discussing efforts to restrain academic publication by court order).

providing obvious lessons for our own system of public access and state secrecy. It also seems clear that a formally entrenched and judicially enforceable law of public access is not absolutely necessary to a legitimate democracy. Great Britain is perhaps the leading example on this point. Similarly, penciling in public access guarantees does not ensure meaningful government accountability. Uzbekistan's constitution has a written access guarantee but that hardly makes the country a model democracy.⁸⁶

At the same time, a few salient points can be distilled from foreign experience. First, information access is commonly seen as a component of a well-functioning democracy. Whether by textual direction or judicial inference, whether from outright structural logic or pinned on free speech principles, numerous countries understand the importance of public information about government operations. Surely this understanding applies equally well in the United States. Second, while public access is now often included in constitutional text, so too is support for access restrictions. Secrecy, not just openness, is becoming a consensus value. In a strong sense, secrecy and openness are locations on a single dimension. Both suggest a ratio of information insiders to information outsiders. Indeed information access may entail unhappy trade-offs, which a nation's fundamental law might profitably identify. Accordingly constitutional law in non-U.S. democracies often reaches the information flow from government to public in more than one way—sometimes dictating access, sometimes requiring secrecy, sometimes backed by court intervention, always involving institutions other than the judiciary.

This last observation about institutional collaboration the third lesson from foreign experience, and it is worth emphasizing. When pressing for reform, foreign courts have been gentle. They avoid the strain of wholesale system design in favor of more limited tools: demanding clarity in nonconstitutional rules; declaring general principles on which action must follow; identifying substantial system deficiencies without mandating exclusive solutions; and borrowing proposals fashioned elsewhere to provide at least interim relief. All of this helps mark the outline of a balanced and multi-institutional approach to information access problems.

⁸⁶ See CONSTITUTION OF UZBEKISTAN art. 30 (1992); BANISAR, *supra* note 57, at 95–96 (noting access restrictions); Adrian Karatnycky, *The 2003 Freedom House Survey: National Income and Liberty*, 15 J. DEM. 82, 91 (2004) (rating Uzbekistan at or near the bottom of a seven-point scale for political rights and civil liberties); see also K.S. Venkateswaran, *India: National Security, Freedom of Expression and Emergency Powers*, in *SECRECY AND LIBERTY: NATIONAL SECURITY, FREEDOM OF EXPRESSION AND ACCESS TO INFORMATION* 321, 329–31 (Sandra Coliver *et al.* eds., 1999) (asserting a culture of secrecy in India's bureaucracy).

II. OUR UNEASY ORDER

In some ways the text of the United States Constitution is obviously different from the foreign law just canvassed. As discussed in more detail below,⁸⁷ the document lacks a general-purpose public access provision, a special procedure for enacting laws affecting public access, or an explicit obligation to pass such legislation.⁸⁸ It also lacks a clause governing secrecy in the executive branch. Yet the United States shares a democratic structure with the countries discussed above. Informed public discussion about government operations is no less important. In addition, our federal courts have become as active and effective as any. Absence of explicit constitutional authorization for judicial intervention has not been a complete bar to U.S. court action in other areas. Finding it for access issues would not be surprising.

A. Partial Constitutionalizing

As it turns out, United States courts have been reluctant to dictate access to information about the federal executive branch as a matter of constitutional law. But as foreign law suggests, openness is not the only relevant norm. Secrecy might be part of constitutional law, too. In fact, our courts recognize some constitutional protection for executive discretion to withhold information. Adding this component to the formal system for evaluating public access claims alters the mix of in-

⁸⁷ See *infra* Part II.B.

⁸⁸ Contrast the following *state* constitutional provisions regarding executive-held information: CAL. CONST. art. I, § 3(b) (adopted in 2004 by initiative) (establishing a public access right “to information concerning the conduct of the people’s business,” an interpretive rule favoring access that applies to existing and new laws, and a requirement that new limitations be accompanied by findings of need, but shielding privacy protections and otherwise grandfathering in current law); FLA. CONST. art. I, § 24(a)–(c) (establishing a right to inspect “any public record” and opening certain executive branch meetings, while permitting exemptions only after a two-thirds vote in both houses and only if such legislation “state[s] with specificity the public necessity justifying the exemption” and is “no broader than necessary to accomplish the stated purpose of the law”); LA. CONST. art. XII, § 3 (“No person shall be denied the right to observe the deliberations of public bodies and examine public documents, except in cases established by law.”); MONT. CONST. art. II, § 9 (“No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.”); N.H. CONST. pt. 1, art. 8 (“All power residing originally in, and being derived from, the people, all the magistrates and officers of government are their substitutes and agents, and at all times accountable to them. Government, therefore, should be open, accessible, accountable and responsive. To that end, the public’s right of access to governmental proceedings and records shall not be unreasonably restricted.”); N.D. CONST. art. XI, § 6 (“Unless otherwise provided by law, all records of public or governmental bodies, boards, bureaus, commissions, or agencies of the state or any political subdivision of the state, or organizations or agencies supported in whole or in part by public funds or expending public funds, shall be public.”).

formation it can produce, and allows a kind of reasoning that is difficult to contain.

1. Spheres of executive discretion

Our courts protect government secrets with constitutional law, and for good reason. Effective executive power and the President's success as commander in chief sometime depend on discretion to withhold information from general circulation. Deliberation, diplomacy, and military victory can be jeopardized when the executive cannot control information.⁸⁹ Federal constitutional law meets these concerns in two ways. First, the President has inherent authority to restrict access to sensitive information, as when disclosure would threaten legitimate national security interests. Congressional authorization is unnecessary before the President takes action to limit access to such data.⁹⁰ Second, courts are willing to insulate certain executive decisions to maintain secrecy despite the contrary wishes of other institutions. An executive decision in this field is sometimes final and supreme.

a. Executive privilege. The first decision worth considering ended badly for the President but not the presidency. In *United States v. Nixon*,⁹¹ the Supreme Court affirmed the denial of the President's motion to quash a subpoena duces tecum and rejected his argument for an absolute executive privilege. That prerogative would have afforded presidents judicially unreviewable discretion to withhold their confidential communications with advisors.⁹² The Court also held that the Special Prosecutor had adequately demonstrated sufficient need for in camera inspection of the recordings and documents in question, in view of the President's reliance on a "generalized interest in confidentiality."⁹³

Yet the *Nixon* case did an important favor for presidential power. It validated a qualified executive privilege to withhold information, and it planted that privilege in constitutional law.⁹⁴ This conclusion was eas-

⁸⁹ See generally *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319–21 (1936) (recognizing virtues of executive secrecy in foreign affairs).

⁹⁰ See *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988).

⁹¹ 418 U.S. 683 (1974).

⁹² See *id.* at 703–07.

⁹³ *Id.* at 713; see *id.* at 710 (noting that the President did not argue that military or diplomatic secrets would be disclosed); see also *id.* at 707.

⁹⁴ See *id.* at 705–06, 708, 711–13. For some critical commentary, see RAOUL BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH (1974). For a defense of executive privilege in some form, see MARK J. ROZELL, EXECUTIVE PRIVILEGE: THE DILEMMA OF SECRECY AND DEMOCRATIC ACCOUNTABILITY ch. 6 (1994).

ily avoidable by arguendo assumptions.⁹⁵ The Court was making a special effort to add constitutional protection for the executive. Furthermore, the Court openly conceded that constitutional text was inadequate to establish executive privilege for confidential communications.⁹⁶ And the opinion hardly mentioned historical materials.⁹⁷ The logic for a presumptive constitutional privilege was practical and structural: the efficacy of the presidency can be undermined by the speech-dampening effect of unrestricted access to presidential communications with staff.⁹⁸ “Nowhere in the Constitution . . . is there any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President’s powers, it is constitutionally based.”⁹⁹

Just how far executive privilege should extend is contested. Aside from the uncertainty generated by qualified tests of any kind, there is controversy over the constitutionally required scope of the privilege. Several access restrictions can be broken out from that general heading. They include protection for presidential communications (at least between the President and his closest advisors), deliberative process not involving the President himself, state or military secrets, and confidential sources.¹⁰⁰ Likewise unsettled is whether the scope of executive privilege should change when Congress demands information. In any event, federal courts are willing to afford the executive qualified constitutional protection from information demands.

⁹⁵ Cf. *Nixon*, 418 U.S. at 698 (discussing FED. R. CRIM. P. 17(c) limits and citing the constitutional avoidance canon in *Ashwander v. TVA*, 297 U.S. 288, 346–47 (1936) (Brandeis, J., concurring)).

⁹⁶ See *id.* at 711; see also *Swidler & Berlin v. United States*, 524 U.S. 399, 410 (1998) (stating that *Nixon* dealt with a privilege unknown to the common law); David A. Strauss, *Common Law, Common Ground, and Jefferson’s Principle*, 112 *YALE L.J.* 1717, 1741–44 (2003) (arguing that *Nixon* is an example of constitutional text fading when the issue becomes more important).

⁹⁷ See *Nixon*, 418 U.S. at 705 n. 15 (noting that the Constitutional Convention was closed).

⁹⁸ See *id.* at 705–06 & n. 16 (indicating that a privilege for presidential communications “flow[s]” from enumerated powers, per *McCulloch v. Maryland*); *id.* at 708 (underscoring the value of candor). Whether presidential control over the privilege is a net good has been debated. See 26A CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE: FEDERAL RULES OF EVIDENCE* § 5673, at 39 (1992). For an empirical study of evidentiary privileges, see Vincent C. Alexander, *The Corporate Attorney Client Privilege: A Study of the Participants*, 63 *ST. JOHN’S L. REV.* 191 (1989).

⁹⁹ *Nixon*, 418 U.S. at 711.

¹⁰⁰ See generally 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 4–15, at 770–71 (3d ed. 2000); 26 WRIGHT & GRAHAM, *supra* note 98, § 5664; see also *Roviaro v. United States*, 353 U.S. 53, 62 (1957) (recognizing a qualified privilege for police informants but rejecting its use on the facts); *United States v. Reynolds*, 345 U.S. 1, 10 (1953) (indicating limits on in camera court review in state secrets cases); *Judicial Watch, Inc. v. United States Dep’t of Justice*, 365 F.3d 1108, 1113–14 (D.C. Cir. 2004) (distinguishing deliberative-process from presidential-communications privilege).

b. FACA and presidential advisors. Judicial perception of institutional needs supports secrecy beyond claims of executive privilege. It also affects statutory construction, especially when presidential advisors or classified information would be exposed. As to the former, courts have ensured minimum interference from the Federal Advisory Committee Act (FACA). That statute covers certain private groups “established or utilized” by the President or a federal agency to get advice.¹⁰¹ These groups are supposed to be regulated in several ways. FACA requires that they hold open meetings unless the executive determines that closure comports with the Government in the Sunshine Act; it mandates notice of meetings and meeting minutes; and it subjects the group’s records to FOIA.¹⁰²

In *Public Citizen v. Department of Justice*,¹⁰³ the question was whether the ABA’s federal judiciary committee was “utilized” by the executive within the meaning of FACA. Using the word’s common meaning, it was hard to say no. For decades the Justice Department had asked for and received the ABA’s investigation-backed advice regarding potential nominees. Essentially conceding the textual point, the majority instead condemned the lay reading using other sources (including the executive’s pre-FACA practice under its own executive order¹⁰⁴), and ultimately relied on a canon of constitutional avoidance to “tip the balance decisively.”¹⁰⁵ Justice Kennedy’s concurrence went further, resting solely on constitutional ground: “The mere fact that FACA would regulate so as to interfere with the manner in which the President obtains information necessary to discharge his duty assigned under the Constitution to nominate federal judges is enough to invalidate the Act [as applied here].”¹⁰⁶

Public Citizen might be unimportant standing alone. Constitutional concern centered on the textually explicit presidential nomination power—and the case touched on a process that the Justices themselves had survived.¹⁰⁷ But sympathy for advisory confidences runs deeper

¹⁰¹ See 5 U.S.C. App. § 3(2)(A)–(B); see also *id.* § 4(b)–(c); *Judicial Watch, Inc. v. Clinton*, 76 F.3d 1232, 1233 (D.C. Cir. 1996).

¹⁰² See 5 U.S.C. App. § 10(a)–(c); see generally 2 JAMES T. O’REILLY, *FEDERAL INFORMATION DISCLOSURE* ch. 24 (3d ed. 2000). For an argument that Congress cannot constitutionally regulate presidential advisory committees that do not receive federal appropriations, see Jay S. Bybee, *Advising the President: Separation of Powers and the Federal Advisory Committee Act*, 104 *YALE L.J.* 51 (1994). FACA’s application to *agency* as opposed to presidential advisors is a separate matter.

¹⁰³ 491 U.S. 440 (1989).

¹⁰⁴ See *id.* at 456–57 (discussing President Kennedy’s Executive Order No. 11,007).

¹⁰⁵ *Id.* at 465; see *id.* at 455, 460, 466.

¹⁰⁶ *Id.* at 488–89 (Kennedy, J., joined by Rehnquist, C.J., and O’Connor, J.).

¹⁰⁷ Records involving the appointment process for the Supreme Court were not plainly at issue. See *id.* at 443, 444 n.1, 447.

and includes simple policy advice. *Cheney v. District Court*¹⁰⁸ helps make the argument. Judicial Watch and the Sierra Club sought information about an energy policy task force. In that case, the task force was authorized by the President to develop a national energy policy, chaired by the Vice President, and populated by federal government employees. But plaintiffs alleged that lobbyists participated as if they were full-fledged members of the group, and thus their closed meetings had violated FACA.¹⁰⁹ Plaintiffs needed evidence of private influence, however; so the issue was whether discovery into “de facto membership” would violate the Constitution. The district court permitted discovery without narrowing upfront the plaintiffs’ broad requests, while allowing the executive to raise particularized privilege objections.¹¹⁰ Mandamus was denied in the D.C. Circuit, which relied on the district court to restrain the plaintiffs.¹¹¹

The Supreme Court stepped in and chastised the appellate court for underestimating its authority to act swiftly.¹¹² Availability of specific privilege objections was no bar to immediate consideration of a broader effort to immunize presidential advisors from exposure. “As this case implicates the separation of powers, the Court of Appeals must . . . ask . . . whether the District Court’s actions constituted an unwarranted impairment of another branch in the performance of its constitutional duties.”¹¹³ The Supreme Court must have seen some merit in the constitutional objection, at least when raised by the Vice President against a relatively unrestrained discovery request in civil litigation.¹¹⁴ A small question is why the majority was unwilling to compel issuance of mandamus outright, rather than remanding. After all, the Court believed that “[t]he Executive Branch, at its highest level, [was] seeking

¹⁰⁸ 124 S. Ct. 2576 (2004).

¹⁰⁹ See *id.* at 2583. The General Accounting Office was tasked by certain members of Congress with investigating the group, but it did not receive all of the information it sought. See GENERAL ACCOUNTING OFFICE, ENERGY TASK FORCE: PROCESS USED TO DEVELOP THE NATIONAL ENERGY POLICY (Aug. 2003) (GAO-03-894).

¹¹⁰ See *Judicial Watch, Inc. v. National Energy Policy Dev. Group*, 219 F. Supp. 2d 20, 54–55 (D.D.C. 2002).

¹¹¹ See *In re Cheney*, 334 F.3d 1096, 1106 (D.C. Cir. 2003) (recognizing that plaintiffs only needed documents on non-federal-official participants).

¹¹² See *Cheney*, 124 S. Ct. at 2584–85, 2593.

¹¹³ *Id.* at 2592. In dissent, Justices Ginsburg and Souter argued that defendants failed to ask for narrower discovery, so a remand to consider mere limits on discovery was improper. See *id.* at 2595–99. The Court’s vision of remand seems broader, however. See *id.* at 2593 (suggesting reexamination of the de facto member doctrine).

¹¹⁴ See *id.* at 2589–92 (stressing such points to distinguish *Nixon*); see also *id.* at 2589 (indicating that impairing private FACA suits would not impair “Article III authority or Congress’ central Article I powers”); *id.* at 2583–84, 2592–93 (noting that the district court itself had been asked by plaintiffs to wield mandamus under 28 U.S.C. § 1361 to enforce FACA, which lacks an obvious private right of action).

the aid of the courts to protect its constitutional prerogatives.”¹¹⁵ But the executive did not have to wait long for victory. Now reading the statute narrowly in light of “severe separation-of-powers problems,” on remand the en banc D.C. Circuit issued mandamus directing dismissal of the complaint.¹¹⁶

c. FOIA and national security. National security information likewise triggers judicial modesty. Consider cases under Exemption 1 of FOIA,¹¹⁷ which permits the executive to withhold classified documents from the public. The statutory text is startling. The records withheld must be not just marked classified, but *in fact properly* classified pursuant to Executive Order;¹¹⁸ the *executive* bears the burden of proving that they are; and the judiciary must perform *de novo* review, with authority to examine documents in camera.¹¹⁹ Bear in mind what it means for information to be “in fact properly classified.” Under the current order, information should be marked “confidential” (the lowest classification level) if its unauthorized disclosure “reasonably could be expected to cause damage to the national security that the original classification authority is able to identify or describe.”¹²⁰ This is the predictive judgment that purportedly must be made, *de novo*, by federal courts. And nearly anyone may request documents under FOIA.¹²¹

FOIA’s aggressive message was no scrivener’s error. Before the statute was so clear, the Supreme Court had scoffed at the idea of courts parsing and second-guessing classification decisions. *EPA v. Mink*¹²² called it “wholly untenable.”¹²³ There the Court turned aside an attempt by Representative Patsy Mink and other House members to obtain information about a possible nuclear weapons test. The print press had reported disagreement about the test among administration officials; plaintiffs wanted that debate more fully disclosed. But the execu-

¹¹⁵ *Id.* at 2589; *see id.* at 2593 (noting the appellate court truncated its analysis by misapplying *Nixon*, and that no original writ had been requested from the Supreme Court).

¹¹⁶ *In re Cheney*, 406 F.3d 723, 730 (D.C. Cir. 2005).

¹¹⁷ 5 U.S.C. § 552(b)(1).

¹¹⁸ *See* Exec. Order No. 13,292, 68 Fed. Reg. 15315 (Mar. 25, 2003). The order forbids classification to, for instance, “conceal violations of law, inefficiency, or administrative error.” *Id.* § 1.7(a)(1). Note that records may be withheld even if they are classified *upon* a FOIA request. *See* O’REILLY, *supra* note 101, § 11.31.

¹¹⁹ *See* 5 U.S.C. § 552(b)(1) (“[FOIA] does not apply to matters that are . . . (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order”); *id.* § 552(a)(4)(B) (mandating *de novo* review, authorizing in camera inspection, and placing the burden of justification on the agency).

¹²⁰ Exec. Order No. 13,292, § 1.2(a)(3).

¹²¹ *See* 5 U.S.C. § 552(a)(3)(A) (referring to “any person”); *id.* § 552(a)(3)(E) (prohibiting intelligence agencies from disclosing records to foreign governments and their representatives).

¹²² 410 U.S. 73 (1973) (denying court authority to conduct in camera document review).

¹²³ *Id.* at 84.

tive offered an affidavit listing relevant documents and attesting that most had been duly classified.¹²⁴ Even though FOIA commanded de novo review, the case was closed on those documents. Justice Stewart wrote separately to place responsibility on Congress for writing a weak statute. As he read FOIA, Congress “chose . . . to decree blind acceptance of Executive fiat,” despite the risk that ignorance would “paraly[ze]” the democratic process in this dispute.¹²⁵

Such “blind acceptance” was incompatible with the politics of the late-Nixon period. A year after *Mink* and over the new President’s veto, Congress responded.¹²⁶ The 1974 FOIA amendments seemed to enact the scheme thought unimaginable by the Court. The new statute left the general de novo review provision in place, then added authority for in camera review, a duty to segregate nonexempt portions of records, and the “in fact properly classified” clause.¹²⁷ Congress was enlisting the judiciary’s help in checking executive control over classified information.

Yet little has changed.¹²⁸ The Supreme Court left Exemption 1 cases to the lower courts about twenty-five years ago,¹²⁹ and they have been friendly to the executive ever since, relying in part on a passage from legislative history.¹³⁰ Ordinarily the executive’s judgment will be de-

¹²⁴ See *id.* at 76–77 & n.3, 81, 84. At that time, Exemption 1 referred to matters “specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy.” *Id.* at 81. The executive also invoked Exemption 5, which protects certain nondiscoverable memoranda. See *id.* at 85–94.

¹²⁵ *Id.* at 95 (Stewart, J., concurring); see also *id.* at 94 (noting no constitutional question was at issue). Then-Justice Rehnquist did not participate. Three Justices dissented.

¹²⁶ See 10 WEEKLY COMP. PRES. DOC. 1318 (Oct. 17, 1974); 2 O’REILLY, *supra* note 101, at 510–11, 513–15 (suggesting the political atmosphere of Watergate made Congress hostile to “national security” justifications for secrecy and confident in the judiciary).

¹²⁷ See Pub. L. No. 93-502, §§ 1(b)(2), 2(a), (c) (Nov. 21, 1974) (amending 5 U.S.C. §§ 552(a)(4)(B), (b)(1), and adding a sentence regarding segregable portions of documents to § 552(b)).

¹²⁸ See generally Cheh, *supra* note 9, at 730; Robert P. Deyling, *Judicial Deference and De Novo Review in Litigation over National Security Information under the Freedom of Information Act*, 37 VILL. L. REV. 67, 82–86 (1992); Wells, *supra* note 37, at 1205–08.

¹²⁹ See *Weinberger v. Catholic Action of Hawaii*, 454 U.S. 139, 145 (1981) (holding that the military did not have to prepare and release an environmental impact assessment that would be covered by Exemption 1); *cf.* *CIA v. Sims*, 471 U.S. 159 (1985) (extending Exemption 3 to intelligence sources who were not promised confidentiality, thereby relieving the CIA from satisfying the requirements of Exemption 1).

¹³⁰ “[T]he conferees recognize that the Executive [departments responsible for national defense and foreign policy matters have unique insights into what adverse effects might occur as a result of public disclosure of a particular classified record. Accordingly, the conferees expect that Federal courts, in making *de novo* determinations in [Exemption 1] cases under [FOIA], will accord substantial weight to an agency’s affidavit concerning the details of the classified status of the disputed record.” CONF. REP. NO. 93-1200, *reprinted in* 1974 U.S.C.C.A.N. 6285, 6290. 1996 amendments did add an oblique reference to courts giving “substantial weight” to agency decisions, although without specifying classification decisions. See 5 U.S.C. § 552(a)(4)(B) (as amended by Pub. L. No. 104-231, § 6) (“In addition to any other matters to which a court ac-

ferred to and trusted, and procedures involving executive affidavits and document indexes are used to avoid actual document review.¹³¹ Essentially the government must articulate a logical basis for classification. When logic is lacking in the executive's arguments, the normal response is to give the government another try.¹³² In fact, it is unclear whether a court has ever successfully commanded the production of documents withheld under Exemption 1.¹³³ The suggestions for modifying the legislation in President Ford's *veto* message are, ironically, a good summation of post-1974 practice:

[W]here classified documents are requested the courts could review the classification, but would have to uphold the classification if there is a reasonable basis to support it. In determining the reasonableness of the classification, the courts would consider all attendant evidence prior to resorting to an *in camera* examination of the document.¹³⁴

This judicial behavior is not explained by modifications to the relevant Executive Order. Courts did this on their own. Nor is the behavior an automatic step from practical institutional constraints. An expertise gap can be narrowed by appointing an independent expert witness,¹³⁵ a technical advisor,¹³⁶ or a special master¹³⁷ with security clearance. But apparently the judiciary is not excited by the idea of developing national security expertise.

cords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B)."). For helpful context from the pro-court perspective, see Deyling, *supra* note 128, at 70–82.

¹³¹ See, e.g., Halpern v. FBI, 181 F.3d 279, 292 (2d Cir. 1999); Hayden v. National Sec. Agency/Central Sec. Serv., 608 F.2d 1381, 1387 (D.C. Cir. 1979) (stating that *in camera* review is neither necessary nor appropriate once the government submits adequately specific affidavits—absent contrary evidence or evidence of bad faith); FRANCK, *supra* note 21, at 143. *But cf.* CONF. REP. NO. 93-1200, *supra* note 130, at 9 (suggesting an affidavit process to demonstrate that documents are “clearly exempt” before *in camera* review, which would be necessary “in many cases”).

¹³² See John A. Bourdeau, Annotation, *What Matters Are Exempt from Disclosure Under Freedom of Information Act* (5 U.S.C.A. § 552(b)(1)), 169 ALR FED. 495, 515 (2001).

¹³³ See *id.* at 514–15; Deyling, *supra* note 128, at 67, 82, 86–87.

¹³⁴ 10 WEEKLY COMP. PRES. DOC. 1318 (Oct. 17, 1974); *cf.* SUBCOMM. ON ADMIN. PRACTICE & PROC., SEN. COMM. ON THE JUDICIARY, FREEDOM OF INFORMATION ACT SOURCEBOOK: LEGISLATIVE MATERIALS, CASES, ARTICLES, 93d Cong., 2d Sess., at 189 (1974) (noting a rejected Senate Judiciary Committee version that would have limited judicial review to “reasonable basis”).

¹³⁵ See FED. R. EVID. 706.

¹³⁶ *Cf.* Conservation Law Found. v. Evans, 203 F. Supp. 2d 27, 30–31 (D.D.C. 2002) (finding inherent and statutory authority to appoint an advisor to tutor the court on fishery questions).

¹³⁷ See FED. R. CIV. P. 53; Deyling, *supra* note 128, at 105–11 (advocating their use, along with document sampling, at least in cases involving a large volume of records).

This does not mean FOIA is ineffectual. Statutes can affect decisions far upstream from litigation.¹³⁸ Knowing that a court will ask for an explanation might prompt the executive to release documents based on the simple prospect of suit. There seems to be consensus that the executive habitually over-classifies as an initial matter,¹³⁹ and maybe FOIA never had a chance to prevent that behavior.¹⁴⁰ Nevertheless, FOIA requests and even gentle versions of judicial review can make a positive difference.¹⁴¹

2. Quixotic access norms

Rarely have courts held that federal constitutional law points in the other direction, toward public access.¹⁴² There is unsettled territory here, however. Recent disputes over the executive's conduct of the war on terrorism exposed disagreement in the lower courts. This conflict was partly due to an absence of concrete guidance on public access to the executive branch. Supreme Court treatment of constitutional access claims does not squarely address that question. Instead, the development of these cases can be divided into three stages: no access, court access, and silence.

a. No constitutionally compelled access? Around the same time executive privilege and secrecy in the name of national security hit the judicial agenda, the Supreme Court decided some information access claims grounded in constitutional law. The claimants typically asserted First Amendment rights, and not without reason. "Speech" and "press" refer to communication, which is a social process. One can logically read the Amendment as promoting a system of communica-

¹³⁸ See Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653, 656 (1985).

¹³⁹ See, e.g., REPORT OF THE COMMISSION ON PROTECTING AND REDUCING GOVERNMENT SECRECY, S. Doc. No. 105-2, at 36 (1997) (collecting sources and noting one Defense Department white paper to the contrary); *Too Many Secrets: Overclassification as a Barrier to Critical Information Sharing*, Hearing Before the Subcomm. on Nat'l Security, Emerging Threats & Int'l Relations of the House Comm. on Gov't Reform, 108th Cong., 2d Sess. 1-2 (2004) (statement of Rep. Shays); *id.* at 23 (statement of William J. Leonard, Director, Information Security Oversight Office, National Archives and Records Administration) ("It is no secret that the government classifies too much information.").

¹⁴⁰ Not without a more meaningful penalty provision, anyway. See 5 U.S.C. § 552(a)(4)(E) (permitting assessment of attorney fees against the United States); *id.* § 552(a)(4)(F) (calling for investigation of and possible disciplinary action against an employee for suspected arbitrary or capricious withholding, if records were ordered disclosed); *id.* § 552(a)(4)(G) (authorizing contempt penalties against employees if a court order is disobeyed).

¹⁴¹ See Deyling, *supra* note 128, at 110-11 (providing an example).

¹⁴² See DANIEL A. FARBER, *THE FIRST AMENDMENT* 219 (2d ed. 2002) ("Thus, it seems clear that the government can generally restrict access to its own documents . . ."); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-4, at 814 n. 36 (2d ed. 1988); *id.* § 12-20, at 955.

tion¹⁴³ in which audiences possess interests in parity with speakers. In fact, the Court had long accepted listeners' First Amendment interests.¹⁴⁴ And the judiciary was indicating that "political speech" and "robust" debate on "public issues" were at the core of its concerns.¹⁴⁵ The trick for claimants was overcoming the objections of unwilling speakers. An audience might have a constitutionally respected interest in receiving information *about* their government, but that might not include information *from or facilitated by* their government.¹⁴⁶ The early access cases saw just this distinction and produced a short string of government victories.

Foreshadowing came with the Supreme Court's holding that the executive was not obliged to permit foreign travel to Cuba for a personal fact-finding mission.¹⁴⁷ Such cases do not directly resolve questions about access to U.S. government-held information, and they can be limited by the countervailing concerns of foreign policy and border control. But the Court went further in situations involving domestic prisons. Despite the significance of newsgathering activities to recognized constitutional values, journalists were denied face-to-face access to inmates of their choosing.¹⁴⁸ Justice Stewart frowned on the idea that "the Constitution imposes upon government the affirmative duty to make available to journalists sources of information not available to members of the public generally."¹⁴⁹ The culminating case in this set is *Houchins v. KQED, Inc.*,¹⁵⁰ which denied press access to locations in a jail that were off-limits to the rest of the public. At one point the plurality put it bluntly and broadly: "Neither the First Amendment nor the Four-

¹⁴³ See, e.g., THOMAS EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 3 (1970).

¹⁴⁴ See, e.g., *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756–57 (1976); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943); cf. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969) (stressing audience interests and upholding a right-of-reply regulation in broadcasting).

¹⁴⁵ See *Mills v. Alabama*, 384 U.S. 214, 218–19 (1966) ("[T]here is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs."); *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

¹⁴⁶ Cf. *Virginia State Bd.*, 425 U.S. at 756 ("Freedom of speech presupposes a willing speaker.").

¹⁴⁷ See *Zemel v. Rusk*, 381 U.S. 1, 3–4, 16–17 (1965) (pointing to a problem of claimant insincerity); see also *Kleindienst v. Mandel*, 408 U.S. 753, 756, 759–60, 769–70 (1972) (rejecting professors' First Amendment challenge to the executive's denial of a visa to a Belgian advocate of communism, where Congress had delegated power to exclude aliens and the executive could provide "a facially legitimate and bona fide reason" for the exclusion).

¹⁴⁸ See *Pell v. Procunier*, 417 U.S. 817, 830–32, 834–35 (1974) (stressing parity in treatment with the rest of the public, and alternative means of obtaining information); *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974).

¹⁴⁹ *Pell*, 417 U.S. at 834; see also *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972).

¹⁵⁰ 438 U.S. 1 (1978).

teenth Amendment mandates a right of access to government information or sources of information within the government's control."¹⁵¹

If one were so inclined, *Houchins* and the like could be waved away because the Court was largely preoccupied with the question whether "the press" was entitled to greater access than others,¹⁵² or because the Court was placing special limits on judicial interference with the physical management of government facilities, particularly prisons,¹⁵³ or even because the claimant relied on the First Amendment rather than a structural argument about democracy.¹⁵⁴ A broader message was nevertheless difficult to ignore.

b. The puzzling case of court access. Then the message became mixed. In four cases decided over eight years, the Supreme Court established that criminal trial proceedings ordinarily must be open to the public.¹⁵⁵ Despite the language in *Houchins*, a majority relied on the First Amendment and democratic theory. Access to criminal trials promotes an informed discussion of governmental affairs, which in turn might "ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government."¹⁵⁶ And the presumption of access is strong. It is not enough for the defendant, the prosecutor, and the trial judge to agree on closure. Closed criminal proceedings are unconstitutional "unless specific, on the record findings are made demonstrating that closure is essential to preserve higher values and is narrowly tailored to serve that interest."¹⁵⁷ Closure was rejected, as a matter of constitutional law, in all four cases. Nor have court access claims been limited to criminal trials. Aside from certain

¹⁵¹ *Id.* at 15 (plurality opinion of Burger, C.J.); *cf. id.* at 16–19 (Stewart, J., concurring) (suggesting special accommodations for the press when they enter spaces already open).

¹⁵² *See id.* at 7 ("[T]hey argue for an implied special right of access . . .").

¹⁵³ *See id.* at 8 (citing *Procurier v. Martinez*, 416 U.S. 396, 405 (1974)).

¹⁵⁴ *Cf. Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980) (plurality opinion of Burger, C.J.) (relying on the First Amendment shortly after similar arguments were rejected in *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979) (focusing on the Sixth Amendment)); *id.* at 584–85 (Brennan, J., concurring).

¹⁵⁵ *See id.* (arising from defendant's motion to close his entire criminal trial, which was unopposed by the prosecution); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (involving a state statute mandating closure during the testimony of children who are alleged victims of certain sex crimes); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) (*Press-Enterprise I*) (arising from defense- and prosecution-supported motions to close most of voir dire and seal the transcript thereof); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) (*Press-Enterprise II*) (involving the sealed transcript of a pretrial preliminary hearing); *accord El Vocero de Puerto Rico v. Puerto Rico*, 508 U.S. 147 (1993) (addressing a rule that closed probable cause hearings unless the defendant requested otherwise).

¹⁵⁶ *Globe Newspaper*, 457 U.S. at 604–05.

¹⁵⁷ *Press Enterprise II*, 478 U.S. at 13–14 (internal quotation marks omitted); *cf. Globe Newspaper*, 457 U.S. at 606–07 ("Where . . . the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.").

other aspects of criminal prosecution,¹⁵⁸ lower courts have extended presumptive public access to civil judicial proceedings.¹⁵⁹

These decisions might not conflict with *Houchins*. The Court relied on a long tradition, stretching back to the Norman Conquest, of public access to criminal trials. The same cannot be said for prisons or jails. On the other hand, these cases combined tradition with good policy: the idea that access would enhance the legitimacy and quality of judicial proceedings.¹⁶⁰ It is not known whether a less-lengthy tradition (a century? fifty years?) bars presumptive rights of access if the policy justification is persuasive.

There is reason to think that the broader access claim was on the table. In certain respects, these public access victories came in the least likely of places. Criminal trials raise legitimate fears about the influence of popular opinion. It is always possible that restrictions on state power posed by procedural and substantive law will weaken in the face of populist scrutiny, especially when their ephemeral systemic value is confronted by the concrete needs of the state in its effort to convict an identified defendant. Even if one believes that the criminal justice system was too insulated from popular sentiment, it is unclear why the need for popular pressure was greater in the courtrooms of the 1980s than anywhere else in American government. The court access cases suggested that a larger principle might be established.

c. Silence and some confusion. But that move was not made, at least not in the Supreme Court. The Court has been essentially silent on the matter for over a decade.¹⁶¹ Not surprisingly, lower courts have generated some disagreement over access to executive information and operations. Several courts refuse to push the constitutional law of access beyond federal courts regulating themselves (and the state courts).¹⁶²

¹⁵⁸ See, e.g., *Washington Post Co. v. Robinson*, 935 F.2d 282, 288 (D.C. Cir. 1991) (plea agreement).

¹⁵⁹ See, e.g., *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1067–70 (3d Cir. 1984) (civil trials); Lauren Gilbert, *When Democracy Dies Behind Closed Doors: The First Amendment and "Special Interest" Hearings*, 55 RUTGERS L. REV. 741, 759 & n. 105 (2003) (collecting cases).

¹⁶⁰ See *Globe Newspaper*, 457 U.S. at 606.

¹⁶¹ A limited exception is *Los Angeles Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32 (1999) (holding that a for-profit publishing company could not assert a facial challenge to a state law that demanded a promise of noncommercial use before disclosing arrestee addresses). Chief Justice Rehnquist's opinion did state that "California could decide not to give out arrestee information at all without violating the First Amendment." *Id.* at 40.

¹⁶² See, e.g., *ACLU of Mississippi v. Mississippi*, 911 F.2d 1066, 1072 (5th Cir. 1990) (denying complete public access to Mississippi State Sovereignty Commission records when pitted against constitutional privacy concerns); *Calder v. IRS*, 890 F.2d 781, 783 (5th Cir. 1989) (denying access to Al Capone's tax records); cf. *JB Pictures, Inc. v. United States Dep't of Defense*, 87 F.3d 236, 239 (D.C. Cir. 1996) (upholding a policy denying public access for viewing the arrival of deceased soldiers at Dover Air Force Base, which was adopted shortly before Operation Desert Storm, although assuming that judicial balancing was allowed); *Capitol Cities Media, Inc.*

Still, that view is not unanimous,¹⁶³ and several lower courts are willing to consider access arguments on the merits of individual cases.

A sharp conflict emerged when the executive closed hundreds of “special interest” deportation proceedings to the public. The people subject to these proceedings were assertedly connected to the government’s 9/11 investigation (although support for terrorism was certainly not the only basis for deportation). Because of the alleged connection between confidentiality and the needs of effective law enforcement, immigration policy, and national security, a fair prediction might have been a clear government victory. But the Sixth Circuit split with the Third,¹⁶⁴ and the Supreme Court denied review.¹⁶⁵ In the final analysis, the arguments for secrecy and access both suffered from critical weaknesses. For example, outsiders had some access to these detainees and knew that the proceedings were going on because the detainees were not held incommunicado—and because they were not held incommunicado it was difficult to see how much the executive gained by closing the hearings. The lesson is not about that particular controversy, but that there is judicial interest in boosting executive access claims.¹⁶⁶

v. Chester, 797 F.2d 1164 (3d Cir. 1986) (*en banc*) (rejecting a claim of access to files of a state environmental agency, but vindicating a claim of *unequal* access).

¹⁶³ See *Whiteland Woods, L.P. v. Township of West Whiteland*, 193 F.3d 177, 180–81 (3d Cir. 1999) (dicta regarding access to local planning board meetings); *Cal-Almond, Inc. v. United States Dep’t of Agriculture*, 960 F.2d 105, 109 (9th Cir. 1992) (using constitutional doubt in a case about access to a list of voters within an agricultural marketing order); *Society of Professional Journalists v. Secretary of Labor*, 616 F. Supp. 569, 573, 576–79 (D. Utah 1985) (formal agency fact-finding hearings to investigate a mining disaster), *remanded with instructions to vacate judgment as moot*, 832 F.2d 1180 (10th Cir. 1987); cf. *Cable News Network v. American Broadcasting Cos.*, 518 F. Supp. 1238, 1244–45 (N.D. Ga. 1981) (granting a preliminary injunction against the total denial of television access to pool coverage of White House events and presidential activities—an action taken by the White House to force plaintiffs into reaching their own rotation agreement); *Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177, 186 (Tex. Ct. App. 1975) (regarding arrest records).

¹⁶⁴ For what it’s worth, more federal judges voted to reject closure in the absence of (additional) determinations that secrecy was needed. See *North Jersey Media Group, Inc. v. Ashcroft*, 205 F. Supp. 2d 288 (D.N.J. 2002) (granting a preliminary injunction in favor of access), *rev’d*, 308 F.3d 198 (3d Cir. 2002) (2–1 vote), *cert. denied*, 538 U.S. 1056 (2003); *Detroit Free Press v. Ashcroft*, 195 F. Supp. 2d 937 (E.D. Mich. 2002) (granting a preliminary injunction in favor of access), *aff’d*, 303 F.3d 681, 711 (6th Cir. 2002) (3–0 vote) (“Open proceedings, with a vigorous and scrutinizing press, serve to ensure the durability of our democracy.”). Plus, the Third Circuit conceded that the experience-and-policy inquiry of the court access cases applied to these executive proceedings. It rested its decision on the narrower ground that the district court had underplayed the executive’s national security concerns. See *North Jersey Media*, 308 F.3d at 200–01.

¹⁶⁵ The executive opposed certiorari, partly on the ground that it was deporting these people so quickly that the case was about to lose practical significance. See Brief for Respondents in Opposition at 9–10, *North Jersey Media Group, Inc. v. Ashcroft*, 123 S. Ct. 2215 (2003).

¹⁶⁶ Cf. *ACLU v. United States Dep’t of Defense*, 339 F. Supp. 2d 501 (S.D.N.Y. 2004) (ordering certain executive agencies to respond to 11-month-old FOIA requests for documents regarding post-9/11 detainees; relying on the purposes of the Act).

d. *Leaks and confidential news sources.* There are other pockets of constitutional law affecting information access. The courts are usually happy to protect the dissemination of truthful information about government by those unaffiliated with government. Attempts to halt such dissemination by either subsequent punishment or prior restraint are extremely difficult to justify in court.¹⁶⁷ Hence the media's swift victory in the *Pentagon Papers* case could not be more different from the delicate and deferential treatment of national security concerns just one year later in *EPA v. Mink*. Granted, there must be limits to this immunity. Combat plans, weapons technology, and the identity of secret agents are almost certainly in a class of their own.¹⁶⁸ No one believes prosecuting true spies poses any constitutional difficulty. Otherwise, and as a matter of First Amendment law, information ordinarily may flow freely after it escapes the executive's efforts to withhold it. This protection reduces the threat of legal sanction against mass media and others who traffic in information about government, and should make them more interested in acquiring it.

But this immunity for *dissemination* is not necessarily immunity for *disclosure*. Will executive officials be as interested in revealing information as outsiders will be in asking for it? The answer is often yes, considering the regular reliance on unnamed sources in news reports.¹⁶⁹ Law plays some role here. True, insiders might disclose information purely on conscience or spite and regardless of other consequences. For other officials, legal protection for acts of disclosure may coax them into providing information to outsiders. For example, government employees possess a modest First Amendment protection from certain kinds of adverse employment action. "Public concern" for the information disclosed may overcome any legitimate government interest in

¹⁶⁷ See, e.g., *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 838 (1978) (subsequent punishment); *New York Times Co. v. United States*, 403 U.S. 713 (1971) (*per curiam*) (prior restraint, despite asserted national security concerns).

¹⁶⁸ See generally *Haig v. Agee*, 453 U.S. 280, 283–85 (1981) (involving exposure of foreign CIA agents and passport revocation); *United States v. The Progressive*, 467 F. Supp. 990 (W.D. Wis. 1979) (involving nuclear technology and a preliminary injunction); Sunstein, *supra* note 11, at 905–12.

¹⁶⁹ A recent survey by Project for Excellence in Journalism, *The State of the News Media 2004: An Annual Report on American Journalism* (content analysis of newspapers with tables and charts),

<http://www.stateofthenewsmedia.org/narrative_newspapers_contentanalysis.asp?cat=2&media=2> (reporting that 45 percent of sampled front-page stories from sixteen selected newspapers in 2003 included at least one unnamed source). A study by the Center for Media and Public Affairs found that use of anonymous sources was less frequent in 2001 compared to 1981 in network newscasts and the front-page stories of six selected newspapers. See Center for Media and Public Affairs, *Study Finds Big Drop in Anonymous Sourcing: "Off the Record" Quotes Down by 1/3 Since Reagan Years* (May 30, 2005) (available at <http://www.cmpa.com>) (reporting a 33 percent decline).

punishing the employee.¹⁷⁰ If a civil servant publicly discloses law violations or gross mismanagement, then she might have statutory protection from adverse personnel action.¹⁷¹ Furthermore, leaky officials can attempt to evade detection by those who would oppose disclosure. Current legal rules may help. Journalists sometimes enjoy a privilege against revelation of their confidential sources,¹⁷² while the First Amendment does not bar civil suits against those who break promises to maintain source confidentiality.¹⁷³

These rules are important in their own right, but they are not a substitute for a substantive law of public access. One critique is that current rules insufficiently protect insiders and their media outlets.¹⁷⁴ Government employees must be willing to risk professional, personal, and reputational injury,¹⁷⁵ without guarantee that they will be adequately rewarded according to the public benefit produced. A second concern persists even when government sources are fully immunized from retaliation. In this informal system of public access, reporters must be willing to build close relationships with government officials. Such nonadversarial interaction leads to risks of officials co-opting and

¹⁷⁰ See *Connick v. Meyers*, 461 U.S. 138, 146–48 (1983) (indicating deferential balancing).

¹⁷¹ See 5 U.S.C. § 1221(a), (h) (authorizing employees to seek relief from the Merit Systems Protection Board, with judicial review); *id.* § 2302(a)(2)(B) (describing covered employees, who do not include those exempted by the President); *id.* § 2302(b)(8) (describing protected disclosures, which do not include public revelation of classified information).

¹⁷² The law of “reporter’s privilege” is complicated. The Supreme Court rejected a First Amendment privilege for journalists in the grand jury context more than thirty years ago. See *Branzburg v. Hayes*, 408 U.S. 665 (1972); *cf. id.* at 709–10 (Powell, J., concurring). But since then, most states enacted shield laws which apply in state judicial proceedings and federal diversity jurisdiction, see Laurence B. Alexander & Ellen M. Bush, *Shield Laws on Trial: State Courts’ Interpretation of the Journalist’s Statutory Privilege*, 23 J. LEGIS. 215, 217 & nn. 17–18 (1997) (collecting statutes and noting additional protection from state courts); FED. R. EVID. 501, and many lower federal courts have recognized a qualified privilege as a matter of First Amendment law, or under their authority to generate privileges in the Rules of Evidence, or both, see, e.g., *Riley v. Chester*, 612 F.2d 708, 713, 715 (3d Cir. 1979); *infra* Part III.C.1. There is no simple restatement that captures the substance of these various sources of law.

¹⁷³ See *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669–71 (1991).

¹⁷⁴ See, e.g., *Snepp v. United States*, 444 U.S. 507 (1980) (*per curiam*) (endorsing a constructive trust on profits from a former agent’s book, which was not pre-screened by the CIA—even though the government did not contend that classified information was disclosed); *Barnard v. Jackson County*, 43 F.3d 1218, 1224–25 (8th Cir. 1995) (doubting a public employee’s First Amendment right to leak information, and denying it to a county auditor); Cheh, *supra* note 9, at 701–02, 709, 712, 719.

¹⁷⁵ See *Thomas v. Douglas*, 877 F.2d 1428, 1432 (9th Cir. 1987) (“The first amendment neither guarantees that a whistle-blower can engage in a cost-free exercise of his right of free expression, nor requires appellees to guarantee good feelings at all times between employees.”); see also U.S. MERIT SYSTEMS PROTECTION BD., *THE FEDERAL WORKFORCE FOR THE 21ST CENTURY: RESULT OF THE MERIT PRINCIPLES SURVEY 2000*, at 35, 50 (2003) (reporting that 44 percent of respondents who had made disclosures regarding misconduct or dangers felt that they were then retaliated against or threatened with retaliation); *Family of Iraq Abuse Whistleblower Threatened*, REUTERS, Aug. 16, 2004.

manipulating news coverage for their personal or political objectives. This issue points to the most fundamental problem. Informal systems of public access are ultimately unambitious. They lack a normative standard for judging when disclosure is appropriate, either in individual cases or overall.¹⁷⁶ The mix of information will reflect a confluence of incentives and opportunities, some of which will be temporary and unpredictable, none of which is calibrated to a standard of socially desirable openness or secrecy. Disclosure will be driven by the individual judgment of government employees—acting on motivations such as vanity and intrabrand factional warfare,¹⁷⁷ as well as their subjective estimation of the public good—with additional filtering by those offered the information for distribution. We would not have to worry about differing individual standards if this system disclosed to the public *all information* about government operations. But it will not, and we would not want it to.

There is one proper purpose for which informal channels of disclosure are uniquely suited: combating deep secrecy.¹⁷⁸ Sometimes information outsiders are too ignorant to know that relevant information is being concealed. Even formulating the right questions may require assistance from an insider. Once suspicions arise, nonjudicial pressure might achieve a swift, inexpensive, and appropriate degree of public access. But no pressure point in the executive branch can be exploited without reason to believe that there is more to know.¹⁷⁹ Investigative reporting, source confidentiality, and the law that protects them are therefore important components in an acceptable system of public access. They should not be the only components.

B. Unsatisfying Defenses

This state of affairs presents a few puzzles. Our constitutional law, as declared by our courts, affects public access to government information. Sometimes it speaks to the subject directly. And yet on other occasions it is silent. Can we account for a system in which courts wield constitutional law to protect the executive from disclosures demanded by citizens and authorized by Congress—*but* that leaves public access

¹⁷⁶ This point was argued forcefully in Sunstein, *supra* note 11, at 902–03.

¹⁷⁷ See STEPHEN HESS, *THE GOVERNMENT/PRESS CONNECTION* ch. 7 (1984); HEDRICK SMITH, *THE POWER GAME: HOW WASHINGTON WORKS* 432–37 (1988).

¹⁷⁸ See *supra* note 42 (distinguishing deep from shallow secrets).

¹⁷⁹ Disclosure to internal investigatory groups, such as an Office of Inspector General, might suffice. This course does, however, identify the complaining party to at least one element of the executive. Another option is disclosure to Congress, although it is less likely to prompt action if the President's party has a working majority, especially in the relevant committee.

claims without constitutional backing—*except* when judicial proceedings are at issue?

It is highly unlikely that narrowly conventional sources of constitutional meaning entail this arrangement. The text of the Federal Constitution certainly does not track the distinctions we find in precedent. In fact, it provides little guidance. Consider first the document's references to disclosure. The President must provide "Information of the State of the Union," but only "from time to time," and the addressee is Congress.¹⁸⁰ The text also signals a governmental commitment to inform the public about taxes and spending. Article I declares that "a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published"—but again, "from time to time."¹⁸¹ The Sixth Amendment guarantees "the accused" the right to a public trial;¹⁸² and few will object if we read "due process of law"¹⁸³ to require some effort to notify a private party before the government takes that party's liberty or property.¹⁸⁴ The information demands of other citizens or voters could be distinguished and rejected.¹⁸⁵ But sometimes they are not. The Supreme Court has mandated public access to criminal judicial proceedings, and lower courts have extended that analysis to other forms of adjudication, without even restricting those claims to "the press." Constitutional text is not driving access rights.

Openness is not the only idea sparingly addressed by the text. The Constitution mentions *secrecy* only once. Article I obligates the House and Senate to keep Journals of their proceedings and to publish them "from time to time . . . excepting such Parts as may in their Judgment require Secrecy."¹⁸⁶ A subsequent provision might require Journal pub-

¹⁸⁰ U.S. CONST. art. II, § 3. In *Federalist No. 77*, Hamilton refers to this activity as a "power" of the President, while portraying the executive's prerogatives as modest. See FEDERALIST NO. 77, at 463 (Clinton Rossiter ed., 1961). "Duty" sounds more like it.

¹⁸¹ U.S. CONST. art. I, § 9, cl. 7; cf. *United States v. Richardson*, 418 U.S. 166 (1974) (denying taxpayer standing to assert this clause against secrecy in CIA appropriations and expenditures); *Halperin v. CIA*, 629 F.2d 144, 152–56 (D.C. Cir. 1980) (denying that FOIA solves the standing problem). *But cf.* *FEC v. Akins*, 524 U.S. 11 (1998) (granting a group of voters standing under federal election law to demand access from the FEC to information about a competing interest group); *infra* Part III.B.

¹⁸² See *Gannett Co. v. DePasquale*, 443 U.S. 368, 379–80 (1979).

¹⁸³ U.S. CONST. amends. V & XIV, § 1.

¹⁸⁴ See, e.g., *Phillips Petroleum v. Shutts*, 472 U.S. 797, 811–12 (1985) (involving notice to class members in damages class actions); *Greene v. Lindsay*, 456 U.S. 444, 445 (1982) (involving notice of eviction actions to public housing tenants); *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (involving the state's duty to disclose material exculpatory evidence to the criminally accused). I leave aside the validity of gaps between primary conduct rules for private parties and decision rules for government officials. See Dan-Cohen, *supra* note 53.

¹⁸⁵ Cf. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 317, 320 (1950) (addressing notice by publication as a substitute for individualized notice, not as a public right).

¹⁸⁶ U.S. CONST. art. I, § 5, cl. 3; see also *id.* (providing for recording of the yeas and nays upon a one-fifth vote); 2 FOUNDERS' CONSTITUTION, *supra* note 29, at 290, 292–94, 301.

lication of the names of those voting for and against a veto override.¹⁸⁷ The portions of congressional Journals kept secret otherwise seem to be within legislative discretion. A formalist conceivably could infer that the federal government lacks discretion to withhold information about its operations beyond such explicit authority. The First Amendment could support that negative inference. It is the textual basis for opening certain judicial proceedings, but its words do not distinguish among components of the state.¹⁸⁸ And yet contemporary law doesn't work this way either. The President, for example, enjoys some authority to withhold information as a matter of executive privilege. Likewise, FIOA and FACA have been judicially adjusted (or contorted) to serve executive interests, without an explicit constitutional command.

Arguments from history or tradition better reflect contemporary doctrine. They were, after all, some of the reasons given for mandating open trials.¹⁸⁹ That practice is older than the Constitution. Furthermore, current federal constitutional law does not include justiciable public access claims for congressional proceedings.¹⁹⁰ Here, too, early founding era history seems consistent with contemporary law. The Senate met in closed session for its first several years of operation.¹⁹¹ Indeed, the Constitutional Convention was closed to the public.¹⁹² And *Publius* recognized the value of secrecy to the effective conduct of di-

¹⁸⁷ See U.S. CONST. art. I, § 7, cl. 2 (stating that the names “shall be entered on the Journal of each House respectively”). This clause does not explicitly prohibit a majority vote in Congress to keep those parts of the Journals secret under Article I, § 5. But that authority would make it easier for Members of Congress to remain anonymous than the text of Article I, § 7, seems to contemplate. *Accord* Vermeule, *supra* note 44, at 414 n. 171 (addressing votes to keep secret Journal entries on roll call votes).

¹⁸⁸ The Amendment does single out “Congress” as the institution prohibited from making laws abridging the freedom of speech and press. U.S. CONST. amend. I. This makes limitation of rights of public access to judicial proceedings even more difficult to explain with constitutional text.

¹⁸⁹ See *supra* Part II.A.2.b.

¹⁹⁰ *Cf.* *United States v. Richardson*, 418 U.S. 166 (1974) (denying taxpayer standing to assert the accounts clause of Article I, § 9, cl. 7).

¹⁹¹ See Steven F. Huefner, *The Neglected Value of the Legislative Privilege in State Legislatures*, 45 WM. & MARY L. REV. 221, 281 & n. 229 (2003).

¹⁹² See CHARLES WARREN, *THE MAKING OF THE CONSTITUTION* 134–39 (1928).

plomacy by the executive.¹⁹³ These sources could yield public access to judicial proceedings and nothing else.¹⁹⁴

But several arguments counsel against ending the discussion here. First is the point that courts have not confined their reasoning to historical analysis. Executive privilege was recognized as a matter of constitutional structure, and access to judicial proceedings was triggered by a combination of tradition and good policy in light of institutional function. A second objection covers those who ignore history in constitutional interpretation. That group might be small, but certainly there are several other sources with which to construct constitutional law in this area.

More important, the history that we do have can be used for a lot or a little. We could restrict the significance of the historical record to only conservative inferences. The closure of the Constitutional Convention might be dismissed as the stand-alone choice of a deliberative body that produced a proposal for public consideration, not a model for practices under the proposed government. Pockets of secrecy for deliberation, diplomacy, and foreign affairs could be constitutionally guarded without extending the protection to every activity in the executive and legislative branches. Conversely, public access to judicial proceedings need not be immunized from arguments for closure based on contemporary needs. Finally, two developments since the founding should be considered. The Senate opened to the public in 1795,¹⁹⁵ and openness-in-government efforts have been an important part of our tradition since then. Moreover, the founding generation did not confront a large federal bureaucracy built for modern society. Our post-New Deal federal

¹⁹³ See FEDERALIST NO. 64, at 392–93 (Clinton Rossiter ed., 1961) (Jay) (discussing the President’s power to negotiate treaties); FEDERALIST NO. 70, at 424 (Hamilton) (“Decision, activity, secrecy, and dispatch will generally characterize the proceedings of one man, in a much more eminent degree, than the proceedings of any greater number.”); FEDERALIST NO. 75, at 452 (Hamilton) (arguing against a House role in treaty ratification: “[a]ccurate and comprehensive knowledge of foreign politics; a steady and systematic adherence to the same views; a nice and uniform sensibility to national character; decision, secrecy, and dispatch, are incompatible with the genius of a body so variable and so numerous”).

¹⁹⁴ Cf. O’BRIEN, *supra* note 9, ch. 2 (contending that the history of the First Amendment indicates not access rights, but rather a fight over more rudimentary rights to publish); Martin D. Halstuk, *Policy of Secrecy—Pattern of Deception: What Federalist Leaders Thought About a Public Right to Know, 1794–98*, 7 COMM. L. & POL’Y 51 (2002) (reviewing events surrounding Jay’s Treaty and the XYZ affair). *But cf.* LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 110 (1985) (quoting a passage from Cato’s Letters developing a trustee conception of government officials, who should want their deeds publicly examined); Dyk, *supra* note 11, at 959 (quoting James Madison, *Report of the Committee to Whom Were Referred the Communications of Various States, Relative to the Resolutions of the Last General Assembly of this State, Concerning the Alien and Sedition Laws* (Virginia House of Delegates, 1799–1800)).

¹⁹⁵ See 1 ANNALS OF CONG. 16 (Joseph Gales ed., 1789). A pre-1795 exception was made for a Senate election contest. *See id.*

government has a scope and character unforeseen by those involved in eighteenth-century constitution making. Significant accountability concerns are raised by the new government.

If neither text nor history explains current law, the debate might turn to inferences from constitutional structure. We have already sketched the terms of that discussion.¹⁹⁶ But the conclusion is painfully opaque. Plausible inferences point in more than one direction. Executive efficacy demands confidentiality for certain circumstances, and that same immunity from public scrutiny generates conflict with democratic premises. The same might be said of judicial operations.¹⁹⁷ It takes little imagination to see information access and executive secrecy as necessary components of the federal government. It takes much more to reconcile them.

Finally, a popular argument against public access claims should be noted and rejected. Some commentators find it helpful to characterize the U.S. Constitution as guaranteeing “negative” as opposed to “positive” or “affirmative” rights. The second category, which involves lawsuits demanding that the state take action for the benefit of a complaining citizen, is assertedly left to political discretion. In fact, this bifurcation of rights claims worked its way into the public access field at a fairly early stage.¹⁹⁸ And it is not a bad way of describing many constitutional case outcomes,¹⁹⁹ particularly where citizens have asked federal courts to establish social welfare rights.²⁰⁰

But the positive/negative rights distinction is more distracting than helpful for present purposes. Most broadly, it just seems wrong to say that liberal democracy entails no affirmative constitutional obligations on the part of government officials. If nothing else, they surely have a duty to facilitate elections. Providing information about government operations might not be far off. But even if all judicially enforceable constitutional law must involve “negative rights,” many public access claims fit that category. Secrecy takes effort.²⁰¹ Among other measures,

¹⁹⁶ See *supra* Parts I, II.A.1 & II.A.2.b.

¹⁹⁷ However, the purposeful lack of electoral accountability in federal courts might weaken the defense of the *Richmond Newspapers* line of cases. For an argument nevertheless favoring presumptive access to adjudicative proceedings in the federal executive, see Kitrosser, *supra* note 11, at 100.

¹⁹⁸ See, e.g., O'BRIEN, *supra* note 9, at 145–46; see also Lillian R. BeVier, *The First Amendment on the Tracks: Should Justice Breyer Be at the Switch?*, 89 MINN. L. REV. 1280, 1285 (2005) (“[T]he [First] Amendment is a shield, not a sword.”).

¹⁹⁹ See, e.g., *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189 (1989).

²⁰⁰ See *infra* note 269.

²⁰¹ Cf. STEWART BRAND, *THE MEDIA LAB: INVENTING THE FUTURE AT MIT* 202 (1987) (“Information wants to be free because it has become so cheap to distribute, copy, and recombine—too cheap to meter. It wants to be expensive because it can be immeasurably valuable to the recipient.”); *id.* at 211.

access to information is restricted by closing doors, soundproofing committee rooms, adding electronic firewalls, and firing loose-lipped employees. The positive/negative line will not help us make intelligent decisions about justiciable public access claims. Now, it might be that the distinction is actually driven by a lack of confidence in the judiciary. One might oppose the judicial definition and enforcement of certain types of constitutional values, especially when they impose serious costs on other institutions. This objection is undeniably powerful. But it should start an argument about institutional choice and design,²⁰² rather than end the discussion with a crude generalization of U.S. constitutional law.

C. Institutional Competence

There are no simple answers for the panoply of substantive access issues—when access demands are legitimate and substantial, when they are overridden by individual privacy concerns or law enforcement needs, and so on. There is another angle from which to approach the matter, however. It shifts attention from particularized disputes to questions about who should resolve them.²⁰³ We might not know exactly how to solve a given access dispute, but it might be easier to figure out the best allotment of authority to decide access issues. Ideas about constitutional structure matter here, too.²⁰⁴

Courts themselves have used questions about institutional competence to foreclose some access claims. The plurality opinion in *Houchins v. KQED, Inc.*²⁰⁵ is a good start. Chief Justice Burger’s basic message was that the rules for access to government information should be a policy question for the political process.²⁰⁶ We can break out two gen-

²⁰² See *infra* Parts II.C. & III.

²⁰³ See, e.g., NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 5 (1994); David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 208 (1988) (“[T]he courts must be authorized—indeed, required—to consider their own, and the other branches’, limitations and propensities when they construct doctrine to govern future cases.”); Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 886 (2003).

²⁰⁴ Notions of constitutional structure are used for a different purpose in this section. In the last section, structure provided little help in resolving *substantive access disputes*—that is, whether a given part of the government should be open or closed as a matter of constitutional law. Here, structure is relevant to comparative institutional capacities, which help us choose an *institutional arrangement* for addressing substantive access disputes. A constitution might be vague about substantive outcomes yet more instructive about where disputes should be resolved.

²⁰⁵ 438 U.S. 1 (1978).

²⁰⁶ *Id.* at 12 (plurality opinion of Burger, C.J.) (“[Respondents’ argument] invites the Court to involve itself in what is clearly a legislative task which the Constitution has left to the political processes.”); see *id.* at 12–16. Similarity to the political questions doctrine is obvious.

eral reasons for this allocation of responsibility away from the federal judiciary.

First, there is skepticism about the courts' own competence. There are no obvious constitutional rules for adjudicating public access claims, and the judiciary has reservations about generating these rules. Part of the concern involves transition costs. As the plurality put it, "[b]ecause the Constitution affords no guidelines, absent statutory standards, hundreds of judges would . . . be at large to fashion ad hoc standards, in individual cases, according to their own ideas of what seems 'desirable' or 'expedient.'"²⁰⁷ Another part of the incompetence argument is a doubt that courts will be able to see and accommodate all significant interests. Many legitimate interests must be reconciled to build an acceptable system of public access. The most obvious candidates are national defense, law enforcement, personal privacy, trade secrets, and candid deliberation within the executive branch. But there might be more. Even if these interests are recognized, it could take considerable time and effort before courts produce something more than ad hoc results. It is thus reasonable to conclude that courts should be disqualified from the job of system design.²⁰⁸ Finally, in certain classes of cases, courts might be incompetent to adjudicate *even if* they have a test to use. That is the theme of FOIA Exemption 1 cases, which involve national security.²⁰⁹

Second, information about government operations might be obtained by alternative means. The plurality stressed this point in *Houchins*, where the alternatives included legislation, oversight and investigation by other officials, judicial inquiry during criminal proceedings, media or public pressure on politicians for disclosure, and access to human sources other than the inmate population.²¹⁰ A similar set of alternatives is often available for federal executive operations. Informa-

²⁰⁷ *Id.* at 14; *see also id.* at 16 (Stewart, J., concurring); BICKEL, *supra* note 9, at 87 ("The First Amendment offers no formula describing the degree of freedom of information that is consistent with necessary privacy of government decision-making."); BOLLINGER, *supra* note 9, at 146 (worrying about "the massiveness of the enterprise"); BeVier, *supra* note 9, at 506–08.

²⁰⁸ *Cf.* SUNSTEIN, *supra* note 19, at 105–07 (recognizing that "[g]overnment can compromise public deliberation at least as effectively through secrecy as through censorship" but suggesting access as a judicially underenforced First Amendment norm, and FOIA as a reasonable response); Strauss, *supra* note 19, at 358–59 (arguing that access is underenforced by courts for constitutional reasons).

²⁰⁹ *See supra* Part II.A.1.c. Judicial reticence might be simple shirking. Public access claims are more work regardless of court competence. I have no good way of assessing this problem. It is also conceivable that federal courts are lackeys for the executive, to which they owe life tenure. This might be true at times, but its strong form is inconsistent with, for example, recent cases involving the war on terrorism. *See* *Rasul v. Bush*, 124 S. Ct. 2686 (2004); *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004).

²¹⁰ *See Houchins*, 438 U.S. at 12–13 & n.7 (plurality opinion of Burger, C.J.) (citing FOIA); *see also id.* at 16 & n.* (Stewart, J., concurring).

tion might become public from internal investigations by the executive itself, leaks and whistleblowers, congressional oversight,²¹¹ and individualized due process rights to notice. Similar arguments can be made insofar as the concern is too much disclosure. If identified, employees making unauthorized disclosures risk professional, personal, and reputational injury. The executive does not need judicial approval before taking these actions.

These two reasons— incompetence and alternatives—are powerful in certain respects and incomplete in others. Surely courts are unsuitable arbiters when all of these considerations point in the same direction. It makes practical sense to restrict judicial authority when constitutional text provides little substantive guidance, court competence is otherwise in question, and reliable alternative methods of dispute resolution are available. A freestanding constitutional claim to information about legally authorized military or intelligence operations, for example, is fanciful. But public access to judicial proceedings is qualitatively different. Courts are rightly comfortable managing their own operations (and probably *uncomfortable* recognizing unofficial methods of extracting information about their business). Putting aside objections to the U.S. Supreme Court managing access to *state* judiciaries, it is not shocking that federal courts have generated constitutional tests for judging court closure. Neither FOIA nor any other federal access legislation covers the judiciary; the *Richmond Newspapers* line of cases can be seen as an effort by the courts to self-regulate public access without the kind of congressional interference suffered by the executive.

Not every judicial move is as easily explained, however. How can institutional competence concerns underwrite the Supreme Court's recognition of executive privilege as constitutional law? Denying the privilege in *Nixon* fits with an account of courts striving to preserve their own prerogatives. Yet the underlying endorsement of executive privilege could interfere with congressional demands for executive information, and in any case displays a confidence in designing access rules that is lacking in other areas. Why would a court feel competent to fashion an executive privilege—perhaps a set of overlapping privileges²¹²—but incompetent to articulate the elements of a public access claim to executive-held documents? Was there good reason to believe that presidents lack alternative defenses to improper congressional (or

²¹¹ Cf. Ferejohn, *supra* note 41, at 134 (indicating that legislatures have more leverage over executive agencies than voters have over elected officials, because of advantages in organization, reward/punishment options, and information about government institutions).

²¹² See *supra* text accompanying note 100.

judicial) demands? And if courts are built in a way that makes them incompetent to judge access claims, can they constitutionally adjudicate FOIA claims at all?²¹³

Perhaps the 1970s presented uncommon risks to the presidency and called for action to prevent congressional supremacy. On that theory, the federal judiciary might have been justified in promoting executive privilege while confining legislation like FOIA and FACA. Opening courtrooms could then be described as a defensive maneuver to forestall external regulation, or an unimportant sideshow to the central struggle over executive power. However persuasive this is, the need for such judicial intervention changes over time. If the federal courts may legitimately attempt to moderate power swings favoring Congress, the same is probably true when power swings the other way.²¹⁴ And if instead the federal courts have no business performing a checking function in this context, then it becomes difficult to defend the executive privilege entrenched by the Supreme Court.

Nevertheless, considerations of institutional competence probably explain, as well as any other factor, our constitutional law of information access. Courts have relied on these ideas, and their reluctance to outright design a system of access and secrecy is understandable.²¹⁵ Institutional competence cannot account for every judicial decision, but it has some explanatory power.

III. PLATFORMS FOR JUDICIAL INTERVENTION

The foregoing explains why access law makes sense in a democracy. Some parts of the world use constitutional law and judicial review; some parts of our domestic law follow suit. But it is hard to understand why one piece of our law is judicially enforceable and constitutionally entrenched while another might not be. Constitutional text is not the answer, and history is only a start. Moreover, defending our conventional constitutional order becomes more challenging in light of court willingness to engage in large-scale structural reasoning: executive needs justified executive privilege, and democracy's needs helped

²¹³ The objection would go beyond Exemption 1. *See, e.g.*, 5 U.S.C. § 552(b)(7) (exempting "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, . . . (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, . . . or (F) could reasonably be expected to endanger the life or physical safety of any individual").

²¹⁴ Even if there is a systematic difference between threats to secrecy and threats to public accountability, along with a good way to measure it (which has not been demonstrated), the gap would still have to be substantial enough to warrant categorically different treatments of access and secrecy.

²¹⁵ *Accord supra* Part I.B.2. (canvassing foreign court decisions).

justify courtroom openness. But these sorts of justifications sweep across institutional boundaries. So the analysis turned to issues of institutional competence. Such practical considerations offered hope for rationalizing the patterns in U.S. law. But in this final section, I suggest that the hope is false. There is no practical reason to deny constitutional status and judicial enforcement to public access claims involving the executive—if we are prepared to weaken the boundary between constitutional and other forms of law.

A. Competence Reexamined

There is something missing from the institutional competence account. Part of that account turns on the absence of easily ascertainable standards for adjudicating public access claims. This gap in substance seemed obvious in *Houchins*, which dealt with a county jail. No brand of federal law already spelled out the access rules for that situation. Yet *federal* executive operations look different. Even if constitutional text is equally ambiguous, there are legislative, administrative, and attendant judicial standards for resolving this kind of dispute. FOIA, FACA, executive orders, administrative regulations, and a growing pool of case law help adjust the flow of information to the public, despite the preferences of individual executive officials. Is this relevant to constitutional law and judicial review?

One answer is “obviously yes,” but in a way already addressed by the institutional competence account. Recall that it broke into two reasons for judicial abstinence: incapacities within the courts plus alternatives beyond them. The second reason is *grounded* in the existence of nonjudicial or nonconstitutional mechanisms. These alternatives are cited to ease worries about insufficient disclosure, and thereby undercut the need for freestanding constitutional claims. Hence the two component justifications are complementary—judicial incapacity heightens the desire for alternative methods of dispute resolution, and existing alternatives minimize the demand for a more assertive judicial role. In this respect, it is crucial to understand that statutes like FOIA provide standards for public access; but this adds nothing interesting to the institutional competence account.

The better question is whether the two justifications for judicial reticence can turn on each other—whether the alternatives somehow *enhance* court competence. And in a practical sense, they do. Some of the alternatives to constitutional claims actually make constitutional intervention more feasible.

Consider first the understandable opposition to standardless judicial action. If drawn on for constitutional purposes,²¹⁶ a *nonconstitutional* system can reduce fears that hundreds of federal judges would create their own personal lists of adequate reasons for secrecy. Among other sources, FOIA provides a set of exemptions from the ordinary presumption of public access to records.²¹⁷ Courts could work from that set²¹⁸—adjusting how the statutory and administrative components operate, or extending their application to uncovered fields of executive action.²¹⁹ Working from existing nonconstitutional law not only reduces concerns about judicial ability to see all legitimate competing interests, it also helps solve the problem of transition from executive discretion to court-elaborated standards. Federal courts might be unsuited to design a system of access and secrecy from scratch, but they do not have to. Ordinary law could provide a safe baseline.

Doubts about judicial expertise are also diminished by the current nonconstitutional access system. It already enlists the federal courts.²²⁰ They now have substantial training in adjudicating executive access disputes, elaborating on access rules promulgated by other institutions. And those rules are by no means self-executing. The FOIA exemptions are examples. Some of them require tricky case-specific risk assessments;²²¹ others merely refer to generic categories of information that can be withheld from public view.²²² Experience in ordinary litigation makes it more difficult to see the judiciary as a hapless incompetent. If the expertise objection persists, moreover, it seems equally applicable to ordinary access statutes. Sustaining the objection therefore requires us to seriously question the constitutionality of judicial involvement with

²¹⁶ Cf. *supra* text accompanying notes 83–85 (describing the Indian Supreme Court’s decision to borrow from executive proposals in order to effectuate a constitutional access norm).

²¹⁷ See 5 U.S.C. § 552(b).

²¹⁸ Cf. *FEC v. Akins*, 524 U.S. 11, 22 (1998) (distinguishing the statutory access claim at issue from the treatment of the accounts clause claim in *United States v. Richardson*, 418 U.S. 166, 178 n. 11 (1974) (dicta) (referring to “general directives” in the Constitution)); Note, *The First Amendment Right of Access to Government-Held Information: A Re-Evaluation After Richmond Newspapers, Inc. v. Virginia*, 34 RUTGERS L. REV. 292, 343 (1982).

²¹⁹ See *infra* Part III.C.3. (presenting limits to FOIA as illustrative). Application of these federal standards, modified or not, seems more dangerous with respect to state and local operations. Those governments have their own access systems, and federal courts are less likely to be familiar with them.

²²⁰ See, e.g., 5 U.S.C. § 552(a)(4)(B)–(G).

²²¹ See, e.g., *id.* § 552(b)(7)(F) (exempting “records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to endanger the life or physical safety of any individual”).

²²² See *id.* § 552(b)(6) (exempting “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy”).

the *current* system.²²³ The idea that courts are constitutionally barred from any part of this decades-long role seems both extravagant and without a serious proponent.

Finally, insofar as institutional competence arguments are based on feasibility concerns, existing practice is at least a partial response. The statutory and regulatory system confirms that public access claims are manageable, if hardly cost-free. Annually the executive branch receives about three million FOIA and Privacy Act²²⁴ requests. It spends approximately \$320 million responding, with something less than \$10 million in litigation costs for the 300 to 400 cases filed in court each year.²²⁵ These numbers are significant, and they might increase with the judicial elaboration under consideration,²²⁶ but these costs are not staggering. Experience indicates that it is feasible to open a wide scope of material to a virtually unlimited class of potential requestors.

These contentions are not enough to recommend judicial intervention. The practical ability to act is not sufficient reason to do so, unless power is confused with legitimacy. That distinction is where this project began.²²⁷ If the difference between ability and justification is important for restraining executive action in a democracy, it is just as critical for evaluating judicial action. But equally apparent are the fundamental deficiencies in the institutional competence account. This explanation for our current practice offers up alternative access systems to confirm that judicial intervention is unwarranted. And yet some of those systems relieve judicial burdens. The existing framework provides a good start on substance, judicial training, and demonstrated feasibility. The remaining task, then, is to think more broadly about the connection of ordinary to constitutional law, and the relationship it fosters between courts and other institutions.

B. Approaches to Systems

²²³ See also *supra* note 213 and accompanying text

²²⁴ 5 U.S.C. § 552a(b), (d) (permitting individuals to request certain records pertaining to them and held by agencies); see also *id.* § 552a(g)(1)(A), (2) (providing for civil suits).

²²⁵ See U.S. Dep't of Justice, Office of Information & Privacy, *Summary of Annual FOIA Reports for Fiscal Year 2003* (2004), <<http://www.usdoj.gov/oip/foiapost/2004foiapost22.htm>>. Even with the prospect of recovering attorney's fees, private party use of FOIA's litigation opportunity is capped by the procedural costs of pressing on after agency denial. For one indication of benefits—a sample of published news articles making use of FOIA requests—see the National Security Archive's collection at <http://www2.gwu.edu/~nsarchiv/nsa/foia/stories.htm>. See also Sam Dillon & Diana J. Schemo, *Charter Schools Fall Short in Public Schools Matchup*, N.Y. TIMES, Nov. 23, 2004; Eric Lichtblau, *Justice Department Opens Inquiry into Abuse of U.S. Detainees*, N.Y. TIMES, Jan. 14, 2005, at A14.

²²⁶ This would depend on several factors, of course, such as the degree to which entirely new claims become available as opposed to existing claims becoming more potent.

²²⁷ See *supra* Part I.A.

Building the case for modification of the current system depends on unconventional thinking. Constitutional norms must work in conjunction with sub-constitutional systems. That this sort of solution has been overlooked indicates an open space in ordinary constitutional analysis. Thus if constitutional law should be at work in this field, a larger re-evaluation of the options for judicial intervention is in order. To get that effort started, several conceivable judicial reactions to existing systems can be identified, each subject to a different set of normative objections.

At the extremes, courts might attempt to *destroy* or *entrench* an existing system. Either is likely to be controversial and practically difficult but once in a while the objective might be defended. On the destruction side, assisting in the Thirteenth Amendment's goal of eradicating slavery could be a good example.²²⁸ Yet no one seems to contend that statutes like FOIA and FACA are totally forbidden by the Constitution. Courts do, and should, provide some freedom to legislate access. On the entrenchment side, there is even less traction. The judiciary must be confident that the system in question is mandated by the Constitution, that this version of the system must be impervious to change, and that courts should make these assessments. Rarely will all of this be true. Thus the Constitution plainly contemplates a functioning "Congress of the United States,"²²⁹ but no particular committee structure is dictated by the language in Article I,²³⁰ and no court could defend an injunction permanently freeze-framing the current organization.²³¹

Less invasive options are available. The judiciary might practice *abstinence*, refusing to participate in a system even when called on.²³² Consider the judicially declared boundaries of Article III. Federal courts may avoid difficult issues by imposing requirements for litigant standing,²³³ by refusing to issue advisory opinions,²³⁴ and by outsourc-

²²⁸ *But cf.* U.S. CONST. amend. XIII, § 2 (granting enforcement power to Congress).

²²⁹ *Id.* art. I, § 1; *see id.* § 4, cl. 2 (requiring Congress to assemble at least once a year).

²³⁰ *Cf. id.* § 5, cl. 2 (stating that "[e]ach House may determine the Rules of its Proceedings").

²³¹ More modest versions of entrenchment are easier to understand. For example, courts have indicated that long-standing methods or public places for communication should not be obliterated by regulation. *See, e.g.,* *City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994); Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 95–98 (1987) (discussing tradition). In these areas the judiciary is not locking in a regulatory regime, but locking down elements of a system.

²³² Abstinence might be temporary, allowing for experimentation or data collection before a final judicial conclusion is reached. *Cf. Grutter v. Bollinger*, 539 U.S. 306, 342 (2003) (based on an understanding of the goal of the equal protection clause, "race-conscious admissions policies must be limited in time"); *Vieth v. Jubelirer*, 124 S. Ct. 1769, 1799 (2004) (Kennedy, J., concurring) (awaiting "workable standards" for impermissibly partisan gerrymanders). In the text, I refer to more permanent versions.

²³³ *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562–63, 573 (1992).

ing political questions.²³⁵ Abstinence resembles the institutional competence account, but the fit is imperfect. The judiciary has *not* abstained from access disputes. As detailed above, the courts occasionally generate constitutional law in the field and they regularly adjudicate statutory claims. Second, the personal injury requirement for Article III standing is sufficiently loose that statutory access claims are no longer at risk. This was not always clear. Federal courts have shied from non-physical, non-monetary injuries shared by many people—grievances so generalized that overtly political institutions might be better suited to respond.²³⁶ Today, *FEC v. Akins*²³⁷ establishes that Article III standing does not prevent adjudication of demands for public disclosure. Information deprivation, backed by nothing more concrete than the interest of a voter in understanding the political process, is justiciable with Congress’s blessing.²³⁸ FOIA claims are safe from Article III assaults.²³⁹

Contrast judicial *respect* for a system. This option is less aggressive than the first three, and it makes sense for a range of situations in which constitutional norms are difficult to find. On this course the judiciary simply defers to the judgment of other actors regarding substance, institutional choice, and institutional design. Courts thereby work to avoid undermining or embedding a system for which others are responsible, but they remain free to participate in the system when it so demands. Such respect might be undependable when the design in-

²³⁴ See, e.g., Response of the Justices to President Washington (Aug. 8, 1793) (refusing to respond to legal questions posed by the President through his Secretary of State), *reprinted in* 15 PAPERS OF ALEXANDER HAMILTON 111 n.1 (1969); *Hayburn’s Case*, 2 U.S. (2 Dall.) 408 (1792) (reprinting an opinion and letters by federal judges refusing to participate as courts in a veterans’ benefits program).

²³⁵ See *Baker v. Carr*, 369 U.S. 186, 217 (1962). Impeachment is a leading example. See *Nixon v. United States*, 506 U.S. 224 (1993) (refusing to interfere with certain Senate procedures for the impeachment “trial” of a federal district judge).

²³⁶ See *Defenders of Wildlife*, 504 U.S. at 576 (“Vindicating the *public interest* . . . is the function of Congress and the Chief Executive.”); *United States v. Richardson*, 418 U.S. 166, 174–79 (1974) (denying standing to claim that a statute permitting CIA expenditures to remain secret violated the accounts clause); 1 *TRIBE*, *supra* note 100, § 3-14, at 387–92; Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 *SUFFOLK L. REV.* 881, 894 (1983).

²³⁷ 524 U.S. 11 (1998).

²³⁸ See *id.* at 24–25 (recognizing voter standing to challenge an FEC refusal to require an association to disclose information regarding its membership, contributions, and expenditures); *accord* *Public Citizen v. United States Dep’t of Justice*, 491 U.S. 440, 449 (1989) (holding that failure to obtain information subject to disclosure under FACA is a distinct injury providing standing); see also *Defenders of Wildlife*, 504 U.S. at 580 (Kennedy, J., concurring); Cass R. Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 *U. PA. L. REV.* 613, 616–17 (1999) (“[A]t least in information cases, the question of standing is for congressional rather than judicial resolution.”).

²³⁹ Whether constitutionally inspired claims are similarly sheltered could be another matter. But the notion of judicial platforms, outlined below, is that courts’ use of constitutional law sometimes may work from, and only because of, a non-constitutional system generated by others.

cludes judicial action within it. A court's sense of propriety and practicality could well overrun the designers' plans. Conceptually, however, judicial respect is a discrete alternative. But federal courts have not made this choice in access cases, either. Executive privilege and restraints on FOIA and FACA make it impossible to believe that courts are merely enforcing results reached in the political process; as do decisions regulating public access to courts under the First Amendment. The judiciary *is* intervening in the access system, and using constitutional law to do it.

The last approach is *modification*. It is the most difficult to evaluate at wholesale because it covers so much: restricting a system's scope, extending its reach, or otherwise altering the manner in which it operates.²⁴⁰ In each form, however, judicial activity is usually more like adjusting than redesigning. While less ambitious than destruction or entrenchment, judicial modification is more active than abstinence or respect. Judicially imposed restraints are probably the most recognizable type of system modification. One was described above: the use of constitutional inferences to restrict public access under FOIA and FACA.²⁴¹ Another kind of modification is illustrated by due process requirements. Federal courts will not mandate cash transfers to the poor, for example, but termination of payments may depend on the government's willingness to provide recipients notice and an opportunity to be heard.²⁴² Other than additional process, overt judicial "expansion" of existing systems is harder to identify. But it happens. Enforcing constitutional equality norms can have this effect. Other institutions sometimes prefer to grant opportunities (to vote or to receive public education or to speak on public property, for example) only to a subset of the population on a constitutionally impermissible basis (religion or race or political ideology, for example). If courts forbid such lines, extension of the opportunities can follow.²⁴³ In any event, the judiciary regularly modifies non-judicial systems for constitutional purposes. And there is no easily detectible rule permitting courts to cut back on existing systems, but not to push onward.

C. Platforms

²⁴⁰ By this explanation, I mean to distinguish ordinary statutory interpretation.

²⁴¹ See *supra* Part II.A.1; see also, e.g., *Brown v. Socialist Workers '74 Campaign Comm.* (Ohio), 459 U.S. 87, 88 (1982) (exempting a particular political organization from campaign finance disclosure regulations).

²⁴² See *Mathews v. Eldridge*, 424 U.S. 319, 333–35 (1976).

²⁴³ Extension need not follow. Sometimes government will be permitted to withdraw the benefit altogether.

Judicial elaboration from constitutionally optional platforms is a generative type of system modification. Courts would pay attention to nonconstitutional systems constructed elsewhere without taking current boundaries as given. As in some foreign nations,²⁴⁴ it involves courts building on the work of other institutions, borrowing their ideas and using the mechanisms they have constructed, to accomplish constitutional goals that the judiciary could not have attempted otherwise. This is different from imposing equality norms. Equality norms might direct legislators to choose “both *x* and *y*” or “neither *x* nor *y*.” The platform idea amounts to the declaration from courts to nonjudicial actors: “Now that you have provided a system addressing *x*, we may invoke the Constitution to alter the operations surrounding *x*, or to add *y*, or to subtract *z*.”²⁴⁵ It is neither free-form common lawmaking nor simple legislation. Can it be defended?

In considering this question, keep in mind the space occupied by judicial platforms. The idea applies to situations in which *existing* constitutional norms, for *practical* reasons, cannot be judicially enforced until nonjudicial actors move toward the constitutional goal. There are countless systems operated without substantial judicial involvement; few think courts ought to consciously alter them without constitutional cause. So if secrecy and public access are foreign to the Constitution, the argument is over. This point distinguishes William Eskridge and John Ferejohn’s “super-statutes,” which “seek[] to establish a new normative or institutional framework for state policy.”²⁴⁶ The judicial platforms concept shares the notion that fundamental or constitutional law need not be separate from other types of law,²⁴⁷ but it does not entail that legislation itself adds to our list of fundamental norms.²⁴⁸ Platforms facilitate judicial implementation of norms drawn from the Constitution, by conventional interpretive method, and these norms are new only in that sense. In this way, judicial platforms are more like

²⁴⁴ See *supra* Part I.B.2.

²⁴⁵ The idea can work the other way around. Nonjudicial institutions might build from a platform created by the judiciary. This is consistent with the virtues of cross-institutional borrowing.

²⁴⁶ William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1216 (2001) (adding that such a statute must also “over time . . . ‘stick’ in the public culture such that . . . the super-statute and its institutional or normative principles have a broad effect on the law—including an effect beyond the four corners of the statute”); see *id.* at 1275–76. Another version of the idea appeared in Peter M. Shane, *Voting Rights and the “Statutory Constitution,”* 56 LAW & CONTEMP. PROBS. 243, 244 & n.3, 269 (1993) (exploring statutes, such as the Voting Rights Act of 1965, that “may lay claim to expressing our fundamental law in a way that entitles them to be included within the range of material relevant to constitutional interpretation”); *id.* at 252 (listing six conditions for such statutes).

²⁴⁷ See Eskridge & Ferejohn, *supra* note 246, at 1266.

²⁴⁸ See *id.* at 1267–75 (distinguishing Bruce Ackerman’s work on constitutional moments).

Gerhard Casper’s “framework legislation” — which implements structural values already in our Constitution²⁴⁹ — but supplemented by some form of judicial review.²⁵⁰

1. Forerunners

In a general sense, judicial platforms are actually ubiquitous. *All* federal court action rests on a statutory foundation. Congress was not obligated to create any lower federal courts; their jurisdiction requires an affirmative statutory grant; and the Supreme Court’s appellate jurisdiction is subject to statutory exceptions.²⁵¹ It is perfectly conventional to believe that Article III tribunals wield constitutional law only when enabled by valid legislation.²⁵² But once Congress designed the basic statutory platform on which federal courts operate, it lost discretion to dictate outcomes on constitutional issues.²⁵³ Judicial use of constitutional law both depends on and enjoys some independence from political institutions.

In addition, there is no doubt that nonjudicial branches operate in constitutional territory shared with courts. Think about constitutional remedies. The text of the Federal Constitution rarely describes the mechanisms for its enforcement,²⁵⁴ and so courts might generate a

²⁴⁹ “By providing for information, consultation, and the legal consequences in cases of disagreement between the [President and the Congress], such legislation provides greater specificity to the notion of legal constraints and attempts to stabilize expectations about the ways in which governmental power is exercised.” Gerhard Casper, *The Constitutional Organization of the Government*, 26 WM. & MARY L. REV. 177, 187–88 (1985), citing Gerhard Casper, *Constitutional Constraints on the Conduct of Foreign and Defense Policy: A Nonjudicial Model*, 43 U. CHI. L. REV. 463, 482 (1976); see also BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 107 & n.* (1991).

²⁵⁰ Cf. HAROLD KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 69–72 (1990) (relying on the framework legislation idea and commending “balanced institutional participation” that includes courts).

²⁵¹ See, e.g., U.S. CONST. art. III, § 1 (indicating that inferior federal courts may be established by Congress at its option); *id.* § 2, cl. 2 (permitting congressionally mandated exceptions to Supreme Court appellate jurisdiction); *Kline v. Burke Constr. Co.*, 260 U.S. 226, 233–34 (1922) (stressing congressional discretion over federal jurisdiction); *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850) (indicating that Congress is free to confer federal jurisdiction short of that authorized by Article III, § 2).

²⁵² There is an old debate about the authority of Congress to strip federal jurisdiction, especially for constitutional questions. See RICHARD H. FALLON, DANIEL J. MELTZER & DAVID L. SHAPIRO, *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* ch. 4 (5th ed. 2004). But nobody seems to argue federal courts could have materialized without congressional action.

²⁵³ See, e.g., MARTIN H. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 48–49 (2d ed. 1990) (reading *United States v. Klein*, 80 U.S. (13 Wall.) 128, 145–48 (1872), narrowly to limit Congress’s authority to direct federal courts to apply an independently unconstitutional rule); Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1373 (1953); see also *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218–19 (1995) (preserving final federal judgments).

²⁵⁴ An exception is the just compensation clause of the Fifth Amendment.

scheme of remedies in the absence of applicable statutes or administrative regulations.²⁵⁵ And yet federal courts sometimes accept congressional or executive alternatives. Modern cases are especially reluctant to authorize damages remedies when another branch of government has spoken to the question.²⁵⁶ At the same time, federal courts have not unconditionally retreated. Even with respect to complex administrative dispute resolution systems, and ignoring equitable relief, the Supreme Court tests these systems for constitutional adequacy.²⁵⁷ One way to understand these cases is to distinguish complete relief for individual claimants (which is only sometimes judicially mandated) from “a general structure of constitutional remedies adequate to keep government within the bounds of law.”²⁵⁸ In this sense, the constitutional remedies cases are at least compatible with platforms for judicial elaboration. Although courts are not always assertive here, multiple entities are working on the same constitutional problems.

With effort, tighter analogs can be found. Three touch on democratic structure: disclosure requirements for informal federal rulemaking, state court improvisations on election law, and federal court interest in developing a qualified reporters’ privilege. In these examples, courts are driven by a sense of constitutional value but their ability to act alone is plainly restricted.

In the rulemaking context, the Supreme Court has long held that due process does not require a particular form of public participation.²⁵⁹ Lower courts were apparently unsatisfied. They began to generate public participation requirements for informal federal agency rulemaking, beyond what could be found in the Administrative Procedures Act.²⁶⁰ Although these efforts were largely stymied by the Supreme

²⁵⁵ See, e.g., *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 396–97 (1971) (addressing damages claims); *id.* at 400, 404–06 (Harlan, J., concurring) (stressing the traditional presumption that equitable relief is available in cases of constitutional violation); *Mapp v. Ohio*, 367 U.S. 643, 654–55 (1961) (addressing the exclusionary rule).

²⁵⁶ See *Schweiker v. Chilicky*, 487 U.S. 412 (1988) (refusing to require awards of consequential damages for the improper denial of cash benefits); *Bush v. Lucas*, 462 U.S. 367 (1983) (addressing government employee claims for monetary relief beyond that authorized in ordinary law).

²⁵⁷ See *Bush*, 462 U.S. at 378 n. 14 (concluding that the nonjudicial scheme was “clearly constitutionally adequate”); see also *Chilicky*, 487 U.S. at 425 (concluding that Congress did not fail to provide “meaningful safeguards or remedies”).

²⁵⁸ Richard H. Fallon & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1733, 1736 (1991).

²⁵⁹ See *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915) (“Where a rule of conduct applies to more than a few people, it is impracticable that everyone should have a direct voice in its adoption.”); accord *Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271, 285 (1984) (claiming that courts could not define and enforce such a right).

²⁶⁰ See generally STEPHEN G. BREYER ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY* 685–705 (5th ed. 2002); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV.

Court,²⁶¹ federal courts continue to tack on procedural requirements to informal rulemaking. Courts do seem chastened, however, and wisely so. Information disclosure can be inclusive without the cost and disruption of public rights to cross-examine experts or enter evidence into the agency record. Accordingly courts will sometimes demand that agencies disclose data underlying their rulemaking decisions.²⁶² This disclosure preference is not easy to see in statutory text, but it does comport with some versions of due process and central components of democratic accountability. In this situation, a proper reading of the Constitution might not require public participation, but the procedures for rulemaking still trigger information disclosure obligations as a judicially mandated supplement.

Another model comes from state election law. No one argues that state courts should fabricate an entire election code governing ballot access, districting, counts and recounts, election contests, and so on. And yet these exercises make up a core feature of democracy. State legislatures are doing constitutional work with election statutes. And such legislation marks the regulatory starting line but not always the final word on election disputes. Thus state courts sometimes explicitly recognize that the legislature is operating within the area of constitutional values and, at least partly for that reason, become assertive in adjudicating election law cases.²⁶³ Courts are aptly situated to tweak statutory and administrative systems as a way of promoting given constitutional norms, without appropriating the system outright. This is not an un-

29, 61–65 (1985) (attributing the judicial innovations to a form of statutory interpretation or common law, rather than constitutional law).

²⁶¹ See *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524 (1978) (“But such circumstances, if they exist, are extremely rare.”); *id.* at 542–43 & n. 16; see generally ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, *ADMINISTRATIVE LAW* § 2.2 (2d ed. 2001) (emphasizing the problem of agency decision costs).

²⁶² See, e.g., *National Black Media Coalition v. FCC*, 791 F.2d 1016, 1023 (2d Cir. 1986) (citing nondisclosure as one reason for remand to the agency); 1 RICHARD J. PIERCE, *ADMINISTRATIVE LAW TREATISE* 434–38, 496–97 (4th ed. 2002) (discussing adequate public notice of rulemaking and agency explanation); see also *Solite Corp. v. EPA*, 952 F.2d 473, 499–500 (D.C. Cir. 1991). An important but pre-*Vermont Yankee* case is *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 393 (D.C. Cir. 1973) (“It is not consonant with the purpose of a rulemaking proceeding to promulgate rules on the basis of inadequate data, or on data that, [in] critical degree, is known only to the agency.”).

²⁶³ See, e.g., *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1220, 1236–37 (Fla. 2000) (imposing a relaxed deadline for certain recounts in light of a state constitutional right to vote), *vacated sub nom.* *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000), *on remand*, *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1273 (Fla. 2000). Some state courts have declared that their election statutes must be construed liberally to enfranchise voters. See, e.g., *In re Gray-Sadler*, 164 N.J. 468, 474–75, 753 A.2d 1101, 1105 (2000) (referring to constitutional law and statutory objectives of enfranchisement, deterring fraud, and protecting ballot secrecy); *Appeal of James*, 377 Pa. 405, 408, 105 A.2d 64, 66 (1954). Sometimes the canon is codified. See COLO. REV. STAT. § 1-1-103 (2000).

wavering pattern and the idea surely was controversial even before *Bush v. Gore*.²⁶⁴ Judicial elaboration from election statutes nevertheless survives.²⁶⁵

Judicial experience with a reporter's privilege is a final example. Despite *Branzburg*, many lower federal courts recognize a qualified privilege for reporters who object to disclosing the identity of their sources.²⁶⁶ Although it is not always clear whether and why this privilege is based on the First Amendment rather than federal common law, a few courts have taken into account federal guidelines on prosecutorial demands for information from the news media.²⁶⁷ In general, these guidelines require consideration of need and alternative sources, negotiation, and permission from the Attorney General before compulsory process is used against journalists in either civil or criminal proceedings. Borrowing from that process and those standards can help ensure that court-preferred rules are at least feasible. The guidelines were not

²⁶⁴ 531 U.S. 98, 115 (2000) (Rehnquist, C.J., concurring) (contending that the Florida state courts had departed from the state statutory scheme sufficiently to violate Article II).

²⁶⁵ See, e.g., *Gaddis v. McCullough*, 827 N.E.2d 66, 74 (Ind. Ct. App. 2005) (quoting *Dobbyn v. Rogers*, 225 Ind. 525, 544–45, 76 N.E.2d 570, 582 (1948) (“We should at all times have before us the fundamental principle that no voter should be deprived of his franchise for the infringement of any technical requirements in casting his ballot.”)); *Tillis v. Wright*, No. 32044, 2004 WL 3403646 (W. Va. July 7, 2005) (addressing ballot access for party-nominated candidates); cf. *Erlandson v. Kiffmeyer*, 659 N.W.2d 724, 727 (Minn. 2003) (involving access to absentee ballots).

²⁶⁶ See, e.g., *McKeivitt v. Pallasch*, 339 F.2d 530, 532 (7th Cir. 2003) (collecting cases, though denying protection on the facts); *LaRouche v. National Broadcasting Co.*, 780 F.2d 1134, 1139 (4th Cir. 1986) (civil context); *United States v. Burke*, 700 F.2d 70, 76–77 (2d Cir.) (involving a subpoena from a criminal defendant), *cert. denied*, 464 U.S. 816 (1983); see also *Gonzales v. National Broad. Co.*, 194 F.3d 29, 36 (2d Cir. 1999) (setting out a test for protecting non-confidential information, though leaving a First Amendment basis for the privilege unclear). *But cf. In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964, 965 (D.C. Cir.) (denying a First Amendment privilege and holding that any common-law privilege was qualified and overcome in this case, involving a grand jury investigation into the leak of a CIA operative's identity), *cert. denied*, 125 S. Ct. 2977 (2005).

²⁶⁷ See *In re Williams*, 766 F. Supp. 358, 370–71 (W.D. Pa. 1991) (noting the court's consideration and the prosecution's alleged violation of 28 CFR § 50.10), *aff'd by an equally divided court*, 963 F.2d 567 (3d Cir. 1992) (*en banc*); *United States v. Blanton*, 534 F. Supp. 295, 296–97 (S.D. Fla. 1982) (indicating that the guideline “must” be followed by the United States, in addition to the similar demands of a court-articulated qualified privilege); *Maurice v. NLRB*, 7 Media L. Rep. 2221, 2224 (S.D. W. Va. 1981), *vacated on other grounds*, 691 F.2d 182 (4th Cir. 1982); *Adam Liptak, The Hidden Federal Shield Law*, 1999 ANN. SURV. AM. L. 227, 232–33; see also *Baker v. F & F Investment*, 470 F.2d 778, 781–82 (2d Cir. 1972) (post-*Branzburg*) (indicating approval of the district court's reference to state shield statutes to inform federal policy). A prior version of the regulation was used in *Branzburg* as a reason to deny a reporter's privilege under the First Amendment. See *Branzburg v. Hayes*, 408 U.S. 665, 706–07 (1972) (“These rules . . . may prove wholly sufficient to resolve the bulk of disagreements and controversies between press and federal officials.”). For contentions that the regulation is too weak in the hands of executive officials, and may be underinclusive in its application to the category of “journalists,” see Jennifer Elrod, *Protecting Journalists from Compelled Disclosure: A Proposal For a Federal Statute*, 7 N.Y.U. J. LEGIS. & PUB. POL'Y 115, 154–58 (2004).

written for judicial enforcement, of course.²⁶⁸ But we are not automatically beyond the realm of constitutional law just because a nonjudicial actor creates a rule of decision that is compatible with judicial opinion. Concluding otherwise indefensibly equates courts with constitutional law, while depriving the former of useful sources for practical implementation of the latter.

2. Warnings

While it is wrong to insulate constitutional law from other law, we do need a standard that distinguishes acceptable elaboration from dangerous flights of fancy. Courts often (and thankfully) refuse to superimpose constitutional law on existing systems. In the federal courts, social welfare cases are poignant examples.²⁶⁹ The problem is not simply an ethereal conception of legitimate court action. Ill-advised judicial intervention can do real-world damage. And because platforms are solutions to pragmatic limits on judicial action, a range of practical concerns deserves attention.

First is the persistent risk of unintended consequences. Complex-systems theorists warn that, for certain types of systems, even discrete interventions can have nonlinear effects.²⁷⁰ If courts are incompetent to outright design the relevant system, there is reason to doubt their ability to skillfully tinker with it.²⁷¹ Part of the worry is the feasibility of modifications, and another part might be fiscal.

Second, plausible nonjudicial responses should be assessed. The modifications under consideration, at least in the first instance, are beyond the control of Congress and the executive. If these institutions are aware that a system can become a platform for court creativity, they might not construct it in the first place. Net-positive systems might never be initiated—or be abolished once judicial modification becomes apparent.

²⁶⁸ See 28 CFR § 50.10(n) (denying intent to create or recognize legally enforceable rights); *In re Shain*, 978 F.2d 850, 853–54 (4th Cir. 1992) (alternative holding); *In re Special Counsel Investigation*, 332 F. Supp. 2d 26, 32 (D.D.C. 2004) (same). Justice Department employees may be administratively sanctioned for violations, however.

²⁶⁹ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 41–44 (1973) (refusing to interfere with public school financing systems to try to equalize educational opportunity); *Lindsey v. Normet*, 405 U.S. 56, 74 (1972) (declining to recognize a constitutional guarantee of adequate housing); *Dandridge v. Williams*, 397 U.S. 471, 487 (1970) (upholding caps on welfare payments to families); *infra* text accompanying notes 296–297.

²⁷⁰ See, e.g., AUYANG, *supra* note 10, at 234 (describing nonlinearity); Charles J. Kibert, *Green Buildings: An Overview of Progress*, 19 J. LAND USE & ENVT'L L. 491, 494 (2004) (discussing climate); J.B. Ruhl, *Complexity Theory as a Paradigm for the Dynamical Law-and-Society System: A Wake-Up Call for Legal Reductionism and the Modern Administrative State*, 45 DUKE L.J. 849, 854 (1996).

²⁷¹ Cf. SUNSTEIN, *supra* note 32, at 11 (stressing that courts are complex-system participants).

Third, reliance on judicial modification can turn into an unhealthy dependence on the courts. In the long run, it is almost by definition better that democracies solve most public problems through nonadjudicatory politics. Recurrent court fixes for errant systems, even if successful within each system, might end up damaging democracy. Such rescues could lower the stakes of ordinary politics, and thereby dampen any existing commitment to careful design by politicians and civil servants.

Finally, courts should look for a demonstrated need. This follows from the dangers identified. Taking these risks seriously entails the ability to target a significant achievement that could result from judicial intervention. At the same time, willingness to endorse departures from existing systems should be a function of the mission's importance. A less dispensable objective will increase tolerance for experimentation, if the goal is otherwise in jeopardy.

Each of these considerations suggests that platforms ought to be used with caution—not only as to the form of judicial modification, but also in selecting occasions for any improvisation at all.

3. Translucent government

The discussion above amounts to an analytical structure for evaluating the usefulness of judicial platforms. It can be outlined in four points. First, a *constitutional value* must be at stake. If it is, the issue is how best to implement that value. Second, a *practical problem* must undercut the ability of courts to elaborate or enforce the constitutional norm. Otherwise, courts might simply exercise independent judgment. Third, an *existing system* must help solve the hindrance to judicial participation. If there is no such platform, nothing will be gained by pointing to intervention by others. And fourth, the *possible dangers* of judicial action must be considered. Unintended adverse consequences, backlash or other problematic nonjudicial response, and an unbalanced reliance on litigation over ordinary politics should be accounted for and compared to the need for action and the significance of the objective. These four inquiries might be used in a number of fields—from voting rights, to campaign finance, to welfare reform—where they can produce quite different conclusions. For present purposes, the question is public access to information about the executive. Much of the case for using platforms in that context has now been made.

For both executive secrecy and public access, which are points along a single axis, constitutional status turns on structural logic. Every democracy develops a system for distributing and withholding information about government operations. Popular accountability depends on

information access, while effective and sensible action requires secrecy on occasion.²⁷² In addition, information about government facilitates a central function of the First Amendment: public discussion of political issues. And a law of access provides guidelines rather than relying on individualized official discretion. These ideas are reflected in the constitutional text and practices of many new democracies;²⁷³ and they are embedded in our own governmental order. U.S. courts already understand this. They have invoked structural and democratic arguments to justify restrictions on access statutes, along with openness in judicial proceedings.²⁷⁴

A contrary conclusion—that, at least in general, our Constitution has nothing to do with secrecy or access—might be possible. If that is correct, however, executive privilege and any other implied constitutional protection for government secrecy would be on the chopping block. It is also conceivable that executive discretion to withhold information is more critical to executive operations than public disclosure is to democratic governance. But this is a very ambitious claim with contestable normative and descriptive aspects.²⁷⁵ In any event, the contemporary dispute is more about the propriety of judicial intervention than the fundamental or constitutional character of the values in controversy.²⁷⁶

Platforms fit this dispute. Critics on and off the bench assert that courts are incompetent to grapple with the delicate issues of information access. Setting aside the legitimacy of executive privilege, judicial design of an access system does seem difficult at best. But a foundation already exists. As detailed above,²⁷⁷ statutes and regulations can be used as a baseline for substantive judgment; they have been the basis for judicial training in the field, and they indicate that widespread public access rights are feasible and valuable. Of course, borrowing from nonjudicial sources to construct constitutional law departs from some traditional thinking. But the integration of constitutional and nonconstitutional law can be powerfully useful and it is not entirely new,²⁷⁸ even if it is largely unheralded.

Because judicial intervention might produce undesirable consequences, however, access advocates should identify a substantial need

²⁷² See *supra* Part I.A.

²⁷³ See *supra* Part I.B.

²⁷⁴ See *supra* Part II.A.

²⁷⁵ See *supra* notes 212–214 and accompanying text.

²⁷⁶ See *supra* Part II.C.

²⁷⁷ See *supra* Part III.A.

²⁷⁸ See *supra* Part III.C.1.

for reform.²⁷⁹ This is a challenging task, foremost because information outsiders have no good way of measuring what is being withheld. Moreover, the optimal substantive standards for access are not a matter of consensus. On the other hand, waiting for a (possibly fanciful) global measure of adequate access is a mistake. Instead we should begin with a sensible skepticism about the government's use of information,²⁸⁰ and then look for particular deficiencies in the formal system for resolving access disputes. Although my purpose is not to detail every shortcoming in the existing system, attention to a few specifics is useful and consistent with a lower-level focus that courts should be using. Anyway, using a nonjudicial platform forecloses full-scale restructuring by the courts.

The *least* likely candidate for greater access, in my view, is executive deliberation. In its simple form, deliberation formulates a course of action without executing it. Permitting the executive, like Congress and the courts, to choose who participates has obvious value and little immediate threat to the public at large. Certainly there are risks of untoward behavior here. But for all the complaints about the energy and health care policy task forces, the executive gained openness within the deliberations, which resulted in proposals subject to public critique and prolonged debate.²⁸¹

Access to other sorts of information is another matter. Using FOIA as an example, four weaknesses stand out. First, the statute is mistitled. It is not a freedom of "information" law. It only reaches agency "records." The definition thereof is subject to interpretation but it most clearly refers to surviving artifacts of past communication.²⁸² Thus the statute is not a tool for obtaining explanations from government officials, or for receiving aggregate data as yet unassembled, no matter how publicly important the issue.²⁸³ Second, these records must be in the possession of the executive. Individuals can move records beyond

²⁷⁹ See *supra* Part III.C.2.

²⁸⁰ See *supra* Part I.A. Concerns should probably be heightened when opposition parties lack important tools for executive oversight, such as congressional subpoenas. One-party government can be more productive but it also weakens nonjudicial mechanisms of disclosure.

²⁸¹ See NATIONAL ENERGY POLICY DEVELOPMENT GROUP, NATIONAL ENERGY POLICY 3-8 (2001), <<http://www.whitehouse.gov/energy/National-Energy-Policy.pdf>> (discussing oil drilling in Alaska, and displaying a photograph of what appear to be antelope grazing in front of a power plant); Association of Am. Physicians & Surgeons v. Clinton, 997 F.2d 898, 900-01 (D.C. Cir. 1993) (discussing the deliberations of the Task Force on National Health Care Reform and its mission to present a proposal to the President, which later failed in Congress).

²⁸² See, e.g., NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 161-62 (1975) (indicating that FOIA does not obligate agencies to create records).

²⁸³ Cf. Judith Resnick, *Migrating, Morphing, and Vanishing: The Empirical and Normative Puzzles of Declining Trial Rates in Courts*, 1 J. EMPIR. L.S. 783, 797-98 (2004) (explaining that researchers must collect data about administrative adjudication agency-by-agency).

FOIA's reach by removing them to a privately controlled location²⁸⁴—or by destroying them. Such conduct might well violate the Federal Records Act,²⁸⁵ but that legislation lacks a private right of action.²⁸⁶ Third, parts of the executive are categorically off-limits to FOIA requests. The White House staff is a prominent exclusion,²⁸⁷ and the executive's advantage in Exemption 1 cases is stifling. Finally, even if FOIA and its judicial implementation hit the appropriate degree of public access, the system is subject to roll back. The most recent directive from the Attorney General is to be more careful about disclosure;²⁸⁸ and in Fiscal Year 2003, the Justice Department invoked about 140 statutes as specific authority to withhold records under FOIA's Exemption 3.²⁸⁹ Absent constitutional protection, that number has no ceiling.

These limitations justify judicial action, given the right case and conditions. Removing documents from the executive does not neces-

²⁸⁴ See *Kissinger v. Reporters' Comm. for Freedom of the Press*, 445 U.S. 136, 154–55 (1980); *United We Stand Am., Inc. v. IRS*, 359 F.3d 595 (D.C. Cir. 2004) (explaining that “agency records” must be created or obtained by an agency, as well as in the agency’s control); see also *United States Dep’t of Justice v. Tax Analysts*, 492 U.S. 136, 144–45 (1989) (distinguishing personal items of government employees); *Judicial Watch, Inc. v. Clinton*, 880 F. Supp. 1, 11 (D.D.C. 1995) (explaining that staff notes “ordinarily need not be disclosed unless they are intended for distribution through normal agency channels or can be said to be within the ‘control or dominion’ of an agency”).

²⁸⁵ 44 U.S.C. §§ 3101–3107, 3301–3314; see also *id.* §§ 2101 *et seq.* (Presidential Records Act).

²⁸⁶ See *Kissinger*, 445 U.S. at 148 (regarding improper removal of records). *But cf.* *American Friends Serv. Comm. v. Webster*, 720 F.2d 29, 40–41 (D.C. Cir. 1983) (attempting to distinguish *Kissinger*, and permitting APA review to prevent destruction of documents by agencies charged with enforcing the records retention statutes).

²⁸⁷ The statute specifies the “Executive Office of the President,” 5 U.S.C. § 552(e), but was apparently not intended to reach “the President’s immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President.” H.R. CONF. REP. NO. 1380, at 14–15 (1974); see *Kissinger*, 445 U.S. at 156 (endorsing this limitation); *Armstrong v. Executive Office of the President*, 90 F.3d 553, 557–59 (D.C. Cir. 1996) (holding that the National Security Council is not an “agency” subject to FOIA, and listing other like entities).

²⁸⁸ See Memorandum of Attorney General John Ashcroft Regarding the Freedom of Information Act (Oct. 12, 2001), <<http://www.usdoj.gov/oip/foiapost/2001foiapost19.htm>> (“When you carefully consider FOIA requests and decide to withhold records, in whole or in part, you can be assured that the Department of Justice will defend your decisions unless they lack a sound legal basis . . .”).

²⁸⁹ 5 U.S.C. § 552(b)(3) (stating that “[t]his section does not apply to matters that are . . . specifically exempted from disclosure by statute” if the statute leaves no discretion to disclose or “establishes particular criteria for withholding or refers to particular types of matters to be withheld”); U.S. Dep’t of Justice, Office of Information & Privacy, *Summary of Annual FOIA Reports for Fiscal Year 2003*, <<http://www.usdoj.gov/oip/foiapost/2004foiapost22.htm>> (quantifying agency use of Exemption 3). Exemption 3 statutes are scattered throughout the U.S. Code. A regularly used provision is 41 U.S.C. § 253b(m) (prohibiting release of certain proposals for government contracts). A troubling provision is part of the Ethics in Government Act, 5 U.S.C. App. 4 § 107(a)(2) (prohibiting release of conflict of interest disclosure statements from certain part-time and temporary government employees, where an administrative regulation requires these statements). See *Meyerhoff v. EPA*, 958 F.2d 1498 (9th Cir. 1992) (unanimously concluding that conflict of interest disclosures required of EPA science advisors could be withheld, but splintering over the grounds).

sarily remove knowledge of wrongdoing or controversial action. At some point public accountability will dictate the inconvenience of officials explaining their actions rather than simply disclosing remnants of an official record. Similar problems follow from exempting parts of the executive from public access regulation. The statutes and court-made constitutional law already protect most high-level deliberation and national security-related information. A flat prohibition on all formal information requests does save the work of articulating reasons for nondisclosure. But the articulation itself is a useful exercise, and the difference between zero access under current law and partial access under FOIA and its exemptions does not seem devastating. This is particularly true when congressional oversight is slack. Perhaps equally important are lower-level operations and the proliferation of statutory exceptions. Judicial recognition of a constitutional access norm can halt unjustified retrogression of statutory access rights. Finally, courts themselves bear responsibility for neutering FOIA in the Exemption 1 context. This overcommitment is present in the 9/11 detainee records case, in which judicial scrutiny was essentially absent.²⁹⁰ Often judicial deference is appropriate. But the operation of Exemption 1 has crossed into a constitutional danger zone, especially considering widespread agreement that the executive classifies too much information in the first place.²⁹¹

As for the dangers identified above—unintended consequences, effects on nonjudicial actors, and an undue dependence on courts²⁹²—they seem manageable in this context. Some measure of unforeseen effects of intervention is probably unavoidable. Complex systems theory should not, however, be converted into automatic opposition to judicial intervention—a conclusion that would counsel repudiation of executive privilege as much as judicially crafted extensions of access claims. Given court experience with the existing access system, and confining judicial intervention to modest attempts at reform, significant injury to the system can be prevented.

The deterrence problem might be defused in two ways. First, judicial enhancement of public information about executive operations is unlikely to generate serious political backlash. Legislation like FOIA can take years or decades to enact because of executive resistance; but

²⁹⁰ See *Center for Nat'l Sec. Studies v. United States Dep't of Justice*, 331 F.3d 918, 920, 932 (D.C. Cir. 2003) (relying on a law enforcement exemption and relatively conclusory paper declarations from executive officials), *cert. denied*, 124 S. Ct. 1041 (2004); Cass R. Sunstein, *Minimalism at War*, 2004 SUP. CT. REV. 47, 61–62 (describing the decision as an instance of “National Security Maximalism”).

²⁹¹ See *supra* note 139.

²⁹² See *supra* Part III.C.2.

despite continuing presidential objections, access legislation is politically difficult to confront and seriously circumscribe in Congress. Second, judicial modifications could be made subject to legislative or even executive revision. They might be the kind of constitutional common law that should not qualify for entrenchment by judicial preference alone.²⁹³ Although not without controversy, federal courts at times have established such norms. Leading examples are dormant commerce clause jurisprudence, *Miranda* warnings,²⁹⁴ and the prudential strand of standing doctrine.²⁹⁵ When this mutable form of doctrine is generated, both judicial mistakes and ex ante deterrence of nonjudicial system building become less troubling.

Finally, the threat to vibrant democratic politics is less severe in this situation, even if judicial modifications are irreversible. The object of intervention is to improve public access to information about government operations. There is good reason to believe ordinary politics cannot always maintain a well-functioning political system, one that subjects people in power to adequate scrutiny and accountability without seriously impeding executive functions.

Contrast situations in which the reliance on platforms is tougher to defend. Social welfare rights—such as income support, education, housing, and healthcare—are useful for this purpose. Here the presence of a constitutional norm is at least equally debatable. One might believe that democracy will fail unless members of the polity are adequately paid, educated, and so forth. At the same time, explicit protection of property rights is among the reasons for reaching something like the opposite conclusion.²⁹⁶ As with information access, it is difficult to

²⁹³ Cf. Henry P. Monaghan, *Forward: Constitutional Common Law*, 89 HARV. L. REV. 1, 2–3 (1975) (exploring “a substructure of substantive, procedural, and remedial rules drawing their inspiration and authority from, but not required by, various constitutional provisions”); *id.* at 29 (explaining that “constitutional common law contains built-in safeguards—where the Court’s rule is perceived to have gone too far, it can be rejected or modified by the political process without the necessity of a constitutional amendment”). Professor Monaghan suggested that the category of constitutional common law could itself depend on the presence of “debatable policy choices or uncertain empirical foundations.” *Id.* at 34; see also Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue*, 42 WM. & MARY L. REV. 1575, 1737–53 (2001).

²⁹⁴ See Monaghan, *supra* note 293, at 2, 15–17, 20–21; *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 87–88 (1984) (confirming congressional authority to permit state regulation that would otherwise flunk the Court’s dormant commerce clause doctrine); *Miranda v. Arizona*, 384 U.S. 436, 467 (1966) (“[U]nless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it, the following safeguards must be observed.”); see also *Dickerson v. United States*, 530 U.S. 428, 440 (2000).

²⁹⁵ See *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 551, 558 (1996).

²⁹⁶ See U.S. CONST. amend. V (regarding takings and due process); THE FEDERALIST NO. 10 (discussing the problem of faction and property rights); CHARLES BEARD, AN ECONOMIC INTER-

imagine courts independently designing a system of social welfare; and yet nonjudicial actors have created an elaborate system for providing these benefits, relying on both public and private resources. There are, however, other important differences in these systems.

Even if we should grant that minimum welfare is an existing commitment within the United States Constitution, judicial intervention into social welfare systems is more difficult as a practical matter. Current systems reflect priority choices and resource constraints that are more brittle than comparable choices about information access. Governments must choose not only a mix of public and private market approaches to social welfare, but also an appropriate level of funding in light of these and other commitments.²⁹⁷ Information works differently. The game does not so closely approach zero-sum. With current communications technology, access for one quickly becomes access for all. Operating information access systems requires public resources, of course, but the trade-offs are less taxing. The platform for social welfare rights is less stable. If elaboration from nonjudicial platforms is defensible in any instance, public access is one.

CONCLUSION

Our approach to government secrecy and public access is flawed. It incorporates poorly reconciled patches of constitutional law, accompanied by theoretical justifications that could support either full-press constitutionalization or complete judicial retreat. In this Article, I have claimed that constitutional law and judicial review can play a positive role in mediating the demands of access and the conditions for executive efficacy. That role requires recognition that both secrecy and openness are indispensable components of a successful democracy, and that the test for judicial intervention should take account of existing nonconstitutional access systems. Both of these lessons are reflected in the law and practices of many new democracies.

PRETATION OF THE CONSTITUTION OF THE UNITED STATES 14–18 (1913); *cf.* Fallon, *supra* note 27, at 1808–09 & n. 78 (noting that social welfare rights are not directly addressed, and that their inclusion in constitutional law is philosophically debatable).

²⁹⁷ See SAGER, *supra* note 19, at 87 (wondering how, to what extent, and by whom medical care should be provided and funded); CASS R. SUNSTEIN, THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER 210–13, 227–29 (2004); Mark Tushnet, *Social Welfare Rights and the Forms of Judicial Review*, 82 TEX. L. REV. 1895, 1896–97 (2004) (specifying an argument against judicially enforceable social welfare rights that emphasizes large budgetary consequences and displacement of politically selected priorities); *see also* Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131 (1999) (suggesting justifications and forms for state court enforcement of state social welfare rights).

Yet the pertinence of existing systems turns out to be nonobvious. Contentions about judicial incompetence are not perfectly aligned with the viability of nonjudicial alternatives. In certain respects, these two arguments conflict. The largely successful operation of a legislative and administrative system for public access offers practical opportunities for judicial elaboration, rather than an easy reason to forbid it. The general issue—how courts should interact with systems generated by others—requires ongoing attention. But information access is one field where that relationship enables legitimate, desirable, and feasible judicial assistance.

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