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Editor's Note

The Brechner Freedom of Information Project

[David Cuillier](#), Ph.D., Editor and Publisher, *University of Florida* *

Thank you, Jo Anne Smith, Bill Chamberlin, Sandra Chance, Frank LoMonte, and Clay Calvert.

All of you have done good for the world, as former leaders of the [Brechner Center](#) at the University of Florida College of Journalism and Communications. For nearly 50 years, the nonprofit organization has produced research, educated the public, and mentored dozens of students, many of whom have gone on to spread the importance of civic information. The center publishes this very journal, of which I have served as founding editor since 2019.

On July 3, I will step into the role of director of the Brechner Freedom of Information Project, honored to carry on the [legacy](#), and responsibility, of research and education in government transparency. I will miss my colleagues at the University of Arizona [School of Journalism](#), but it is an incredible opportunity to follow in the footsteps of [Frank LoMonte](#).

I will work alongside the new Brechner Eminent Scholar and Marion B. Brechner First Amendment Project Director, [Jane Bambauer](#), an outstanding legal scholar, coincidentally also hired away from the University of Arizona, who will carry on the work of [Clay Calvert](#).

Jane and I, working side-by-side, will constitute the Brechner Center for Advancement of the First Amendment, much like the [Wonder Twins](#) – activating better governance through the form of education, and through the shape of practical leading-edge research.

The Brechner Center will be even more important than ever, given increased government secrecy in the United States, and fewer organizations and resources available to push back.

With the strong support of College of Journalism and Communications [Dean Hub Brown](#), along with a nearly \$5 million endowment, the Brechner Freedom of Information Project has the opportunity to make a difference.

But what, exactly, should it do?

In the transition between jobs, I have sought input from the FOI community through more than 50 interviews and a survey of 77 thought leaders, journalists, government records custodians, scholars, nonprofits, students, and others. Just what should Brechner focus on, given the changing dynamics of government, journalism, and the ability for citizens to acquire accurate information to better self-govern?

Here is what they said:

1. Focus on issues concerning access to civic information *throughout* the United States, not just Florida, particularly at the state and local level.
2. Address issues that affect not just journalists, but also everyday citizens. Access is for everyone.
3. Produce practical research to help policy makers improve laws, and track state legislation that affects access to government information. Continue to provide online resources, promote model laws, advocate for FOI, and educate the public and lawmakers.

During the next few months, we will hone the mission and get to work. I am indebted to Janet Coats, director of the University of Florida's [Consortium on Trust in Media and Technology](#), who has kept the center running for the past year and a half, as well as the amazing [staff](#), Diana Mitsu Klos, Lila Greenberg, and Sara Ganim, who have continued to produce research, the Brechner Report, and the [Why Don't We Know](#) podcast.

So much to do, and so many possibilities.

And we can't do it alone. I welcome feedback and thoughts, at cuillierd@ufl.edu, on what the Brechner Freedom of Information Project, as well as the Journal of Civic Information, should focus on.

Together, we can work toward a more informed electorate and open, accountable government.

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Informed Dissent: Toward a Constitutional Right to Know

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Abstract

This article argues that the American judiciary should recognize a constitutional right of access to government information for purposes of self-government. This argument builds upon the “consent of the governed” ideals of John Locke. The consent of the governed requires access to information, leading to the “informed consent” that must be acknowledged by political leaders who operate under the oversight of the public. The article concludes that informed consent can encourage “informed dissent”, or the ability of citizens to criticize unsatisfactory leaders and to call for change in the press and at the ballot box.

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I. Introduction

“Information is the currency of democracy.” – Ralph Nader¹

When formulating the Constitution, America’s Founding Fathers envisioned the First Amendment as enabling citizens to dissent against the policies and politicians of the day. In a republic with constitutional rights and sovereign government by the people, free expression enables citizens to critique and check public officials. This is one of the fundamental building blocks of self-government,² and it requires access to information, or in other words, a right to know what the government is doing.

This article argues that the American judiciary should recognize a constitutional right of access to government information, or more forcefully a “right to know,” for purposes of achieving the self-government that was envisioned by the Founding Fathers. This in turn will subject political leaders to the “consent of the governed” that was also envisioned by the nation’s early theorists. While no such right is stated explicitly in the Constitution, a right to know is implied by Congressional investigative responsibilities that are delineated in the Constitution, particularly in Article II; the idea is also supported by numerous Supreme Court precedents on the rights of citizens to access information on government activities, either directly by request or indirectly via the press, which itself has important privileges and responsibilities granted by the First Amendment. A constitutional right to know has also been theorized by several influential First Amendment scholars.³

This article’s thesis builds upon the *consent of the governed* ideal advanced by philosopher John Locke, whose influence on the Founding Fathers is well documented.⁴ The consent of the governed requires access to information, thus leading to the *informed consent* that must be acknowledged by political leaders who operate under the oversight of the public. Furthermore, this article argues that informed consent can encourage *informed dissent*, or the ability of citizens to criticize unsatisfactory leaders and to call for change in the press and at the ballot box. In more precise terms, information leads to thought, which leads to the speech and expression that is protected by the First Amendment, which then leads to informed dissent, and finally to political action. This process, fueled by obtainable government-held information, enables the self-government that is at the heart of the American Constitution.

Part II of this article will explore the democratic theories adopted by the Framers of the Constitution, and how those influences shaped the ideal of self-government and meaningful,

¹ Ralph Nader, press conference, Nov. 2, 1971. This quote is often misattributed to Thomas Jefferson. See The Jefferson Monticello, “Information is the currency of democracy (Spurious Quotation)” available at <https://www.monticello.org/site/research-and-collections/information-currency-democracy-spurious-quotations>.

² STEPHEN D. SOLOMON, REVOLUTIONARY DISSSENT: HOW THE FOUNDING GENERATION CREATED THE FREEDOM OF SPEECH 7-9 (2016).

³ See e.g. Phillip J. Cooper, *The Supreme Court, the First Amendment, and Freedom of Information*, 46 PUB. ADMIN. REV. 622 (1986); Barry Sullivan, *FOIA and the First Amendment: Representative Democracy and the People’s Elusive Right to Know*, 72 MARYLAND L. REV. 1 (2012); Frederick Schauer, *Positive Rights, Negative Rights, and the Right to Know*, in TROUBLING TRANSPARENCY: THE HISTORY AND FUTURE OF FREEDOM OF INFORMATION 34 (David E. Pozen and Michael Schudson eds., 2018); Chad G. Marzen, *A Constitutional Right to Public Information*, 29 PUB. INTEREST L.J. 223 (2020); A. Jay Wagner, *A Structural Imperative: Freedom of Information, the First Amendment, and the Accountability Function of Expression*, 38 QUINNIPIAC L. REV. 205 (2020). Other examples will be analyzed in Section V *infra*.

⁴ See *infra* notes 14-19 and accompanying text.

informed dissent among citizens. Part III will describe First Amendment-related precedents from the Supreme Court that support the idea that citizens should have access to government-held information. Part IV will discuss existing statutory procedures for accessing government-held information, particularly the Freedom of Information Act, while concluding that those statutory processes are weak and insufficient for supporting the proposed right to know. Part V will provide a history of theoretical works by modern thinkers who have proposed a constitutional right to know for purposes of overseeing the activities of government. Part VI adds modern conceptions of the function of the Legislative Branch as the people’s “investigator” into the other branches of government as an extension of the people’s right of access to government information.

Finally, in Part VII this article will conclude that American democratic theory and First Amendment jurisprudence strongly suggest that the judiciary should acknowledge a constitutional right to know, enabling informed dissent by citizens who in turn will be able to exercise greater oversight of Executive Branch leaders on the road to achieving efficient and effective self-government.

II. Democratic theory and the right to know

First Amendment support for a constitutional right to know is evinced in freedom of speech, freedom of assembly, and freedom of the press.⁵ Although personal expression is typically cited as the unifying value or principle behind the First Amendment’s five freedoms,⁶ those freedoms reach deeper than personal expression given the Constitution’s origins as a check against James Madison’s fears of oppressive majority rule.⁷ Evidence indicates that Madison and the other Framers of the Constitution supported oppositional and informed dissent as a tool against unaccountable tyrants.⁸

The Framers were well-read in the works of political theorists from the age of the Enlightenment until their own time, particularly English philosopher John Locke and French political theorist Baron de Montesquieu, both of whom were early advocates of a governmental structure in which citizens have the right to know what their leaders are doing. An examination of the writings of the Framers and the structure of the Constitution reveals that these two thinkers had a profound influence on the Framers’ notion of what “freedom” means, particularly what the citizens of a democracy should have freedom *from*, and how unrestricted political discussions and access to knowledge support that freedom.

According to the Framers, the proper function of a democratic government is to protect the lives, liberty, and property of citizens, which in turn requires a republican form of government. The roots of American republicanism can be seen in the Biblically inspired theory of natural law, which holds that certain eternal principles are inherent in the universe. The most influential explication of natural law theory was expressed in Locke’s *Second Treatise of Government* in 1690. Locke wrote that among the fundamental laws of nature, there are certain self-evident truths,

⁵ U.S. CONST. amend I.

⁶ The other two First Amendment freedoms, not relevant for this article, are freedom of religion and the right to petition the government for redress of grievances.

⁷ THE FEDERALIST NO. 10 (James Madison). Madison’s exact terminology in this installment of the *Federalist Papers* was “the superior force of an interested and overbearing majority” who enable a tyrant. This concept was later refined as “tyranny of the majority” in JOHN STUART MILL, ON LIBERTY 7-8 (1859).

⁸ Bernard Bailyn, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 43 (1967).

including that men are equal under the law and before God, and that men have the right to pursue life, liberty, and property:

To understand political power right [...] we must consider what state all men are naturally in, and that is a state of perfect freedom to order their actions, and dispose of their possessions and persons as they think fit within the bounds of the law of nature without asking leave or depending upon the will of any other man. A state also of equality, wherein all the power and jurisdiction is reciprocal; there being nothing more evident that all creatures ... should also be equal amongst another without subordination or subjection.⁹

According to Locke, men should form governments and agree on their rules of operation through a social compact. Citizens consent to give up the unrestricted liberty enjoyed in the state of nature in return for recognizing a government that will protect their natural rights. Locke's theory of natural law stressed that a government's power must be limited, and a government must affirm these laws of nature in order to be worthy of being obeyed. Moreover, if government oversteps its bounds by ignoring the social compact or denying the natural rights of man, then a rebellion by the people would be justified. Locke concluded that man's freedom and his ability to reason will lead to a republican system of self-governance: "The freedom then of man, and liberty of acting according to his own will, is grounded on his having reason, which is able to instruct him in that law he is to govern himself by."¹⁰

One of Locke's most lasting contributions to democratic theory is the matter of rule by the consent of the governed. Democratic governments do not rule by divine right; instead they are formed by the people to enforce natural rights. Such a government must exercise power in order to function properly, but if that power is exercised unwisely then the people may replace that government. Therefore, government operates by the consent of the governed.¹¹ Locke also explored the ability of citizens to hold corrupt officials accountable,¹² and his philosophy was a key influence on the Framers' conception of dissent, informed by knowledge of government operations, as a check on political power.¹³

In rejecting England's governmental authority, America's Founding Fathers relied heavily on Locke's philosophy of natural law or natural rights. For example, Thomas Jefferson embraced the concepts of natural law and a social compact in the Declaration of Independence in 1776. Modeling his language on Locke's *Second Treatise*, Jefferson advanced four of Locke's fundamental political philosophies.¹⁴ These four ideas are condensed in the Declaration's celebrated opening sentences:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed. That whenever any form of

⁹ John Locke, SECOND TREATISE OF GOVERNMENT, Ch. II, § 4 (1690).

¹⁰ *Id.* at Ch. VI, § 63.

¹¹ Jonathan Rauch, THE CONSTITUTION OF KNOWLEDGE: A DEFENSE OF TRUTH 50-51 (2021).

¹² LOCKE, *supra* note 9, at Ch. XIII, § 152.

¹³ Vincent Blasi, *The Checking Value in First Amendment Theory*, 3 AM. B. FOUND. RES. J. 523, 542 (1977).

¹⁴ ALFRED H. KELLY, WINFRED A. HARBISON, AND HERMAN BELZ, THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT 59-60 (1991).

government becomes destructive of those ends, it is the right of the people to alter or abolish it, and to institute new government.¹⁵

As the Constitution of the United States was being formulated in the following decade, Locke's philosophy was particularly influential for the Anti-Federalists, who favored limited powers for the new national government. Their opponents in the Federalist faction advocated for a stronger central government, and the two factions fought it out in the famed *Federalist Papers*, a series of essays published in newspapers in 1787 and 1788. In an ironic dichotomy, Federalists and Anti-Federalists both advocated republicanism to advance their opposing views, and each relied on Locke's theories. In particular, Anti-Federalist republicanism defined the constitutional ideal as independently self-governing communities acting through legislative authority under majority rule, organized to promote the common welfare and to subordinate the rights of individuals to the public interest.¹⁶

Some of the *Federalist Papers* echoed Locke's natural law principle that a government must affirm the laws of nature. Natural law presents a contrast to positive law, which holds that law and morality are maintained separately by the ruling authority. In contrast, natural law links law and morality as a singular ideal. This Lockean idea was articulated by Madison, who in *Federalist No. 39* linked justice (positive law) directly to personal liberty (natural law): "Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit."¹⁷

Locke's view that the consent of the governed was an integral component of the social compact was articulated by Madison in *Federalist No. 49*, where he states that "the people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power, is derived."¹⁸ A mysterious Anti-Federalist, writing under the name Brutus, also invoked Locke's philosophy in essays that criticized a centralized federal government, arguing that it would threaten the liberty of the individual. Emphasizing Locke's principle of consent of the governed along with the philosophy of natural rights, Brutus concluded that the proposed Constitution must include a bill of rights for the people. As Brutus said:

The common good ... is the end of civil government, and common consent, the foundation on which it is established. To effect this end, it was necessary that a certain portion of natural liberty should be surrendered in order that what remained should be preserved. [...] So much must be given up as will be sufficient to enable those, to whom the administration of the government is committed, to establish laws for promoting the happiness of the community and to carry to laws into effect. But it is not necessary, for this purpose, that individuals should relinquish all their natural rights. Some are of such a nature that they cannot be surrendered.¹⁹

¹⁵ THE DECLARATION OF INDEPENDENCE, para 2 (U.S. 1776).

¹⁶ KELLY, HARBISON, AND BELZ, *supra* note 14, at 114.

¹⁷ THE FEDERALIST NO. 39 (James Madison).

¹⁸ THE FEDERALIST No. 49 (James Madison).

¹⁹ Brutus, essay, *New York Journal* (Nov. 1, 1787), reprinted in HERBERT J. STORING, ED., THE ANTIFEDERALIST 118 (1985). Historians have not confirmed the identity of Brutus, who wrote sixteen Anti-Federalist essays in the *New York Journal* in 1787-1788.

Other pamphlet writers during this period extolled the need for citizens of a democracy to act as watchdogs against corrupt officials, such as the mysterious Father of Candor, who wrote in the 1760s that “The liberty of exposing and opposing a bad administration by the pen is among the necessary privileges of a free people, and is perhaps the greatest benefit to be derived from the liberty of the press.”²⁰ Another anonymous pamphleteer known only as Junius wrote around the same time that “a constant examination into the characters and conduct of ministers and magistrates should be equally promoted and encouraged.”²¹ Constitutional scholar Zechariah Chafee has confirmed that the Framers of the Constitution were aware of the writings of Junius and the Father of Candor.²²

Meanwhile, the Framers believed that a government cannot earn the consent of the governed if it is too large and unwieldy. Thus, a government that must be large by necessity should be separated into different branches that oversee each other. As this article will argue, a governmental structure in which separate branches oversee each other is essential for an informed public. On this topic, the Framers – especially Thomas Jefferson – called upon the works of French political philosopher Baron de Montesquieu, who had proposed a tripartite separation of governmental powers in 1748.²³ The Framers built Montesquieu’s proposed governmental structure directly into the Constitution, with a system of checks and balances amongst three branches (Legislative, Executive, and Judicial) who were prohibited from performing each other’s functions.²⁴

The bitter experience of American colonists under English rule led them to the separation of powers doctrine as an effective alternative to the “mixed” system of government in England.²⁵ This form of governance, which brought the King, Lords, and Commoners together in Parliament, acknowledged no differences between social authority and political authority; in other words, elites with social and/or economic control were ordained to exercise political control as well.²⁶ By contrast, the separation of powers doctrine recognizes clearly differentiated functions for the different branches of government. This doctrine advanced the notion that governmental powers, not social classes, must be kept in balance to prevent the ascendancy of any one faction as dominant or potentially tyrannical.²⁷

Madison proposed separation of powers for the new American government by citing the originator of the idea: “the oracle who is always consulted and cited on this subject is the celebrated Montesquieu.”²⁸ Madison paraphrased that oracle when explaining the dangers of power accumulating in any one branch of government: “The accumulation of all powers, legislative,

²⁰ Reprinted in Father of Candor, AN ENQUIRY INTO THE DOCTRINE LATELY PROPAGATED CONCERNING LIBELS, WARRANTS, AND THE SEIZURE OF PAPERS 32 (1970). The identity of the Father of Candor has never been confirmed.

²¹ Reprinted in C.W. EVERETT, ED., THE LETTERS OF JUNIUS 8-9 (1927). The identity of Junius has never been confirmed.

²² ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES 21 (1969).

²³ CHARLES DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF LAW, Pt. I, Bk. III (1748).

²⁴ Separation of powers among the three branches of government was proposed in THE FEDERALIST NO. 48 (James Madison); the system of checks and balances was proposed in THE FEDERALIST NO. 51 (James Madison). Both concepts are found in several provisions of the Constitution, with the most specific at U.S. CONST. art II, § 2, cl. 2, which describes certain powers of the President that must be exercised with the advice and consent of the Legislative branch, which in turn can be reviewed by the Judicial branch.

²⁵ KELLY, HARBISON, AND BELZ, *supra* note 14, at 104.

²⁶ *Id.* at 70.

²⁷ *Id.* at 37.

²⁸ THE FEDERALIST NO. 47 (James Madison).

executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self-appointed or elective, may justly be pronounced the very definition of tyranny.”²⁹

With Montesquieu’s separation of powers seen as the antidote to the divine right of kings and other old European structures from which the Founding Fathers had rebelled, the Constitution threaded that ideal with Locke’s consent of the governed, embodied via elected legislators overseeing the executive leadership on behalf of informed citizens. In effect, the Framers of the American Constitution clearly advocated a governmental system built upon the consent of the governed.³⁰ The present article argues that this consent is dependent upon a right to know, which in turn leads to informed consent, and then informed dissent.

III. The First Amendment and the consent of the governed

The Framers of the Constitution were profoundly influenced by the oppositional leaders of England who protested against the monarchy and corrupt officials, and the history of First Amendment jurisprudence shows judicial support for the notion that the Framers intended freedom of speech to enable informed dissent against the abuse of governmental power.³¹ The argument that the First Amendment supports the consent of the governed, and ultimately informed dissent, is bolstered by several First Amendment-oriented rulings by the Supreme Court, including some dissenting opinions that became influential over time. As will be seen below, some of those rulings were focused on freedom of speech and freedom of assembly, but arguments over freedom of the press led to the most numerous rulings on the public’s right to know for purposes of self-government.

Freedom of speech

In *Abrams v. U.S.*, the Supreme Court upheld the conviction of several critics of American involvement in World War I, and their arrest under the Sedition Act of 1918,³² despite the fact that their offense was purely speech-related. In the Opinion of the Court, the defendants’ actions transcended speech protections because they supposedly incited resistance to the war effort.³³ The controversial Sedition Act was repealed by Congress as soon as 1920, consigning it to the dustbin of history.³⁴ Much more enduring was a forceful dissenting opinion in *Abrams* by Justice Oliver Wendell Holmes, who advocated a marketplace of ideas in which good and bad notions can compete for acceptance amongst the public.³⁵ More notable for this article’s argument, Holmes opined that the government’s prosecution of the defendants was an abuse of power against its own

²⁹ *Id.*

³⁰ See e.g. Clarence E. Manion, *The Natural Law Philosophy of Founding Fathers*, 1 NATURAL L. INST. PROCEEDINGS 3 (1949); Clarence E. Manion, *The Founding Fathers and the Natural Law: A Study of the Source of Our Legal Institutions*, 35 AM. BAR ASSOC. J. 461 (1949).

³¹ Blasi, *supra* note 13, at 533.

³² Pub.L. 65–150, 40 Stat. 553 (1918). The name “Sedition Act” is a colloquial designation for an amendment to the Espionage Act of 1917, 18 U.S.C. § 792 et seq.

³³ 250 U.S. 616, 623-624 (1919).

³⁴ GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* 230 (2004).

³⁵ 250 U.S. at 630. Holmes did not use the precise term “marketplace of ideas”, which was coined by later commentators.

critics,³⁶ thus violating the ideal of consent of the governed, who in turn should have the right to discuss possibly controversial political ideas without prosecution.

Historians have concluded that Holmes suggested the marketplace approach as a counterpoint to the government's tendency to suppress dissent.³⁷ In particular, free speech scholar Alexander Meiklejohn framed Holmes's opinion as support for self-government and the informed consent of the governed:

The First Amendment's purpose is to give every voting member of the body politic the fullest possible participation in the understanding of those problems with which the citizens of a self-governing society must deal. When a free man is voting, it is not enough that the truth is known by someone else, by some scholar or administrator or legislator. The voters must have it, all of them. The primary purpose of the First Amendment is, then, that all the citizens shall, so far as possible, understand the issues which bear upon our common life. That is why no opinion, no doubt, no belief, no counter-belief, no relevant information, may be kept from them. Under the compact upon which the Constitution rests, it is agreed that men shall not be governed by others, that they shall govern themselves.³⁸

Whitney v. California is another Supreme Court ruling in which the Opinion of the Court has been overshadowed by later thought. The high court upheld the conviction of Charlotte Anita Whitney for helping establish the Communist Labor Party of America, because that organization had been illegalized under a California criminal syndicalism statute as an entity interested in overthrowing the government.³⁹ The group's offenses were purely speech-oriented. Justice Louis Brandeis wrote an influential concurrence (joined by Holmes) that effectively agreed with the Opinion of the Court on Fourteenth Amendment technicalities on the relationship between Constitutional rights and state criminal statutes. Regardless, Brandeis issued a powerful defense of free speech, including speech that serves as dissent against the government. In Brandeis's words, the Framers of the First Amendment:

... believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that, without free speech and assembly, discussion would be futile; that, with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty, and that this should be a fundamental principle of the American government.⁴⁰

Brandeis concluded that the Framers had "confidence in the power of free and fearless reasoning applied through the processes of popular government."⁴¹ Brandeis proclaimed that this free and fearless reasoning is the primary rationale for freedom of speech, which the Framers envisioned as the means of self-governance in a democratic society.⁴²

³⁶ *Id.*

³⁷ SOLOMON, *supra* note 2, at 299.

³⁸ ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 75 (1948).

³⁹ 274 U.S. 357, 371-372 (1927).

⁴⁰ *Id.* at 375 (J. Brandeis, concurring opinion).

⁴¹ *Id.* at 377.

⁴² SOLOMON, *supra* note 2, at 300.

Freedom of assembly

This article argues that meaningful self-government requires robust political discussions amongst citizens, often in group form. Therefore, the First Amendment freedom of assembly is crucial for informed dissent. Legal scholar C. Edwin Baker argued that American protesters should not be restricted from challenging the status quo, and that “the constitutional right of assembly ought to protect activities that are unreasonable from the perspective of the existing order.”⁴³ While freedom of assembly has a sparser judicial history than its counterpart First Amendment rights,⁴⁴ the Supreme Court has drawn parallels between assembly and informed self-government several times.

Freedom of assembly was a matter of contention in the aforementioned dissenting opinion in *Whitney v. California* by Justice Brandeis, who stated that a gathering of citizens for purposes of political debate or dissent is an act of expression under the First Amendment.⁴⁵ In 1937, the high court ruled more specifically that freedom of assembly “cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions.”⁴⁶ In 1980, the high court combined freedom of assembly with the other expressive rights of the people, stating that “the right of assembly is also relevant [to the instant case], having been regarded not only as an independent right, but also as a catalyst to augment the free exercise of the other First Amendment rights with which it was deliberately linked by the draftsmen [of the Constitution].”⁴⁷

Like the freedom of speech cases discussed above, freedom of assembly has also been proclaimed in Supreme Court dissenting opinions that have become more influential than their corresponding Opinions of the Court. In *Dennis v. United States* in 1951, the high court upheld the arrest of a leader of the Communist Party USA for organizing members for purposes of discussing the overthrow of the government.⁴⁸ In a dissenting opinion, Justice Hugo Black lamented that arresting someone simply for assembling “is a virulent form of prior censorship” and that the First Amendment should not be used only to protect only those with “safe or orthodox views.”⁴⁹ Six years later, another assembly-oriented arrest of American communists came before the Supreme Court in *Yates v. United States*, and this time the high court overturned the convictions as violations of the First Amendment, largely because the defendants had assembled only to discuss political ideas and controversies.⁵⁰ Justice Black again promoted freedom of assembly as a means of self-government and consent of the governed, and this time he was able to do so in the form of a concurring opinion, proclaiming:

⁴³ C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 134 (1989).

⁴⁴ Benjamin W. Cramer, *Envirodemic: Unconstitutional Restrictions on Environmental Protests from the Attacks of 2001 to the Struggles of 2020*, 14 L. J. FOR SOCIAL JUSTICE 79, 94-98 (2021).

⁴⁵ 274 U.S. 357 at 374.

⁴⁶ *DeJonge v. Oregon*, 299 U.S. 353, 364 (1937) (regarding a “criminal syndicalism” statute in Oregon that restricted gatherings by members of the Communist Party).

⁴⁷ *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 556 (1980). This ruling will be discussed in more detail at *infra* notes 63-64 and accompanying text.

⁴⁸ 341 U.S. 494, 516 (1951).

⁴⁹ *Id.* at 579-580 (J. Black, dissenting opinion; some internal quotation marks omitted).

⁵⁰ 354 U.S. 298, 338 (1957).

The First Amendment provides the only kind of security system that can preserve a free government – one that leaves the way wide open for people to favor, discuss, advocate, or incite causes and doctrines however obnoxious and antagonistic such views may be to the rest of us.⁵¹

The less-heralded ramifications of freedom of assembly have also been researched by First Amendment theorists. Legal scholar Thomas Emerson has framed freedom of assembly as essential for purposes of self-governance and informed dissent:

More and more the individual, in order to realize his own capacities or to stand up to the institutionalized forces that surround him, has found it imperative to join with others of like mind in pursuit of common objectives. His freedom to do so is essential to the democratic way of life.⁵²

Hence, informed dissent by way of the consent of the governed can also be supported by the Supreme Court's views on the purposes of the First Amendment right of the people peaceably to assemble.

Freedom of the press

The jurisprudence surrounding the First Amendment freedom of the press is much more robust and instructive on the consent of the governed and informed dissent. This article argues that the press is a crucial component in the progression from public access to government information to the Founding Father's ideal of the consent of the government, and then extending to this article's theory of informed dissent.

The conception of a role for the press in checking government power goes back to the pre-independence trial of Peter Zenger, a printer who had been accused by the British colonial administration of publishing prohibited material in 1735. Zenger's lawyers argued successfully that the press is crucial for a free government because leaders can improve their performance by allowing citizens to review their actions and comment on them via information provided by journalists.⁵³ Thomas Jefferson shared this philosophy, writing in 1823 that the press should serve as a check on government power, because the press assesses the performance of politicians "at the tribunal of public opinion, [and] produces reform peaceably, which must otherwise be done by revolution. It is also the best instrument for enlightening the mind of man, and improving him as a rational, moral, and social being."⁵⁴

Notably for this article's arguments on the right to know what the government is doing, the Supreme Court has upheld the rights of the press to gain access to government-held information for purposes of educating the citizenry. In *Branzburg v. Hayes* in 1972, the high court ruled that journalists could not claim freedom of the press when refusing to provide information to a grand jury.⁵⁵ Justice Lewis Powell issued a concurring opinion that recommended a very narrow interpretation concerning a journalist's momentary presence at a grand jury proceeding, without

⁵¹ *Id.* at 343 (J. Black, concurring opinion).

⁵² Thomas I. Emerson, *Freedom of Association and Freedom of Expression*, 74 *YALE L.J.* 1, 1 (1964).

⁵³ Blasi, *supra* note 13, at 534-535.

⁵⁴ Letter from Thomas Jefferson to Adamantios Coray, Oct. 31, 1823, reprinted in National Archives, *Founders Online*, available at <https://founders.archives.gov/documents/Jefferson/98-01-02-3837>.

⁵⁵ 408 U.S. 665, 709 (1972).

damaging the larger newsgathering process that led to that appearance.⁵⁶ More relevant for present purposes are the dissenting opinions in the *Branzburg* case. Justice Potter Stewart also advocated protection of the newsgathering process but more distinctly, noting that the press should remain independent from all government operations in order to inform citizens accurately on the actions of their leaders.⁵⁷ Meanwhile, Justice William O. Douglas issued a separate dissenting opinion in which he noted that “the wide open and robust dissemination of ideas and counterthought” by an independent press “fosters and protects that which is essential to the success of intelligent self-government.”⁵⁸

In *New York Times v. United States*, the 1971 proceeding known popularly as the “Pentagon Papers” case, the Supreme Court shot down an infamous attempt by the government to prevent journalists from publishing facts about the Vietnam War that were of interest to citizens.⁵⁹ The consent of the governed and knowledgeable self-government were referenced in a concurring opinion by Justice Hugo Black, who declared with finality:

The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people.⁶⁰

Later, the Supreme Court upheld a First Amendment right, via the press, of access to government-held information. In a 1978 opinion, Justice Stewart declared that giving the press access to government information is equal to giving that information to the people.⁶¹ Later that year, the high court ruled that journalists could copy and reuse audio/video recordings that had been submitted as evidence in criminal trials.⁶² Access to records from criminal and civil trials was upheld by the high court in the *Richmond Newspapers* case of 1980.⁶³ In its opinion, the high court raised a larger concern: “The freedoms of speech, press, and assembly, expressly guaranteed by the First Amendment, share a common core purpose of assuring freedom of communication on matters relating to the functioning of government.”⁶⁴ That ruling influenced similar rulings in the *Press-Enterprise* cases, which confirmed a First Amendment right to attend and observe jury selection hearings,⁶⁵ and a right to attend criminal pre-trial hearings and to access the documents pertaining to them.⁶⁶

Freedom of the press is inextricably tied with the newsgathering process by journalists, through which citizens can become informed about the workings of government. In the words of Lilian BeVier, any attempt by government to restrict those processes would violate the First

⁵⁶ *Id.* at 709-710 (J. Powell, concurring opinion).

⁵⁷ *Id.* at 725-726 (J. Stewart, dissenting opinion).

⁵⁸ *Id.* at 720-721 (J. Douglas, dissenting opinion).

⁵⁹ 403 U.S. 713, 714 (1971).

⁶⁰ *Id.* at 717 (J. Black, concurring opinion).

⁶¹ *Houchins v. KQED*, 438 U.S. 1, 16 (1978) (J. Stewart, concurring). See also Margaret A. Blanchard, *The Institutional Press and Its First Amendment Privileges*, 1978 SUP. CT. REV. 225, 242 (1978).

⁶² *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978). In this case, the criminal trials in question were those for several of President Richard Nixon's associates after their arrests for various infractions during the Watergate scandal.

⁶³ *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980).

⁶⁴ *Id.* at 556.

⁶⁵ *Press-Enterprise Co. v. Superior Court of California, Riverside County*, 464 U.S. 501 (1984).

⁶⁶ *Press-Enterprise Co. v. Superior Court of California, Riverside County*, 478 U.S. 1 (1986).

Amendment. Such a restriction would then damage the flow of information toward citizens with a result not unlike that of censorship.⁶⁷ Hence, the First Amendment can be interpreted as supporting robust public debate, which in turn requires the public to be able to obtain information from and about government.⁶⁸ Furthermore, that same public debate can be considered a component of the democratic processes enabled by the Constitution.⁶⁹ The First Amendment, through its free press clause, empowers the press to serve as an important check on government to prevent the abuse of power by public officials.⁷⁰ This is the essence of self-government as direct citizen oversight of political leaders.⁷¹

While the press does not have unlimited access to all government documents (most of the Supreme Court precedents on this topic are narrow and qualified), the press has been acknowledged as a crucial factor in the knowledge of citizens as they exercise self-government.⁷² In an independent article published in 1975, Justice Stewart suggested that the Framers of the First Amendment intended to grant the press special privileges as the “Fourth Estate” that checks and oversees the three branches of government.⁷³ Legal historian Leonard W. Levy has likewise observed that the Framers saw the press as a check on government, serving as an informal or extraconstitutional fourth branch, which in turn functions as part of the system of checks and balances and which can expose public mismanagement while keeping government officials accountable.⁷⁴ Those who support a First Amendment right of press access to government-held information argue that since deliberative democracy depends greatly on information about governmental activities, questions of access should not depend on decisions by bureaucrats and politicians on whether or not to disclose that information to the public.⁷⁵

This discussion illustrates the importance placed on the press by the Framers of the First Amendment. As summed up by John Stuart Mill in 1859, “The time, it is to be hoped, is gone by, when any defense would be necessary of the ‘liberty of the press’ as one of the securities against corrupt or tyrannical government.”⁷⁶

⁶⁷ See Lillian R. BeVier, *An Informed Public, an Informing Press: The Search for a Constitutional Principle*, 68 CAL. L. REV. 482, 498 (1980)

⁶⁸ *Id.* at 499.

⁶⁹ See generally Michael R. Klein, *Towards an Extension of the First Amendment: A Right of Acquisition*, 20 U. MIAMI L. REV. 114 (1965); Wallace Parks, *The Open Government Principle: Applying the Right to Know Under the Constitution*, 26 GEO. WASH. L. REV. 311 (1971).

⁷⁰ See generally HAROLD L. CROSS, *THE PEOPLE’S RIGHT TO KNOW: LEGAL ACCESS TO PUBLIC RECORDS AND PROCEEDINGS* (1953).

⁷¹ See BeVier, *supra* note 67, at 503. It should be noted that BeVier acknowledges that this *could* be a valid interpretation of the First Amendment, but ultimately concludes that such an interpretation cannot be enforced by the judiciary. *Id.* at 517.

⁷² For an analysis of the special access privileges enjoyed and not enjoyed by the press, see generally Blanchard, *supra* note 61.

⁷³ See Potter Stewart, “*Or of the Press*”, 26 HASTINGS L.J. 631, 631-637 (1975). This article was excerpted from a speech by Stewart at Yale Law School, New Haven, Conn., Nov. 2, 1974. The term “Fourth Estate”, used to describe the press, was coined by Scottish philosopher Thomas Carlyle, who observed that although there were three “estates” in the British Parliament, “in the Reporters’ Gallery yonder, there sat a Fourth Estate more important far than they all.” *Quoted in Id.* at 634.

⁷⁴ See Leonard W. Levy, ORIGINAL INTENT AND THE FRAMERS’ CONSTITUTION 213 (1988). See also Leonard W. Levy, EMERGENCE OF A FREE PRESS 110 (1985).

⁷⁵ See e.g. FRANKLYN S. HAIMAN, SPEECH AND LAW IN A FREE SOCIETY 368-69 (1981); ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF GOVERNMENT 245-47 (1948).

⁷⁶ See MILL, *supra* note 7, at 15.

IV. Statutory protections for the ‘right’ to know

The progression from citizen understanding of government to the informed dissent at the heart of this article’s arguments could be enhanced by statutes that provide access to government-held documents. Unfortunately, the United States does not currently have a delineated *right* to know, despite the above discussion on plentiful Supreme Court precedents and historical evidence of its importance for American self-government. While citizens may be able to obtain information on government operations and documents indirectly via the press, direct access by request is only protected by statutory processes enumerated in transparency laws, the most pertinent of which is the Freedom of Information Act.⁷⁷ This article argues that this statute can be a useful procedural tool, but it is not strong enough to enable the right to know and the consent of the governed as envisioned by the Founding Fathers.

Thomas Emerson has stated that transparency statutes, which mandate the release of government-held information to the public, are a crucial component of the right to know. The rise of such laws in the mid-Twentieth Century indicated a belief among citizens and their representatives that government-held information should be made available to citizens.⁷⁸ Or as journalist and government transparency activist Harold Cross observed:

Public business is the public’s business. The people have a right to know. Freedom of information is their just heritage. Without that the citizens of a democracy have but changed their kings. [...] Citizens of a self-governing society must have the legal right to examine and investigate the conduct of its affairs, subject only to those limitations imposed by the most urgent public necessity.⁷⁹

In that era, the federal government was getting larger and more complex, and commentators noted that waiting for journalists to dig up specific pieces of information was no longer sufficient for public knowledge about the government as a whole. As stated in a 1951 editorial in the *Wall Street Journal*:

A free government lives on the freedom of the people to know what their government is doing. There are risks in this, of course, but they are not near so great as the risk we run if government officers are to be free when they choose to deprive the people of the freedom to know what they are doing.⁸⁰

That editorial was in reference to then-recent efforts to promote new federal statutes that would ensure the transparency of an increasingly complex government. Those efforts in turn were reactions to the disappointing first attempt at such a statute: the Administrative Procedure Act (APA) of 1946.⁸¹ The purpose of that act was to establish common procedures among the federal government’s myriad agencies, which made their own rules concerning disclosure of their documents. The key principle behind the APA was that agencies were obligated to keep the public informed of their organizational structure and adjudicatory proceedings, and that rulemaking

⁷⁷ 5 U.S.C. § 552 (2016) (first enacted in 1966).

⁷⁸ See Thomas I. Emerson, *The First Amendment and the Right to Know*, 1976 WASH. U. L. Q. 1, 13-15 (1976).

⁷⁹ See CROSS, *supra* note 70, at xiii-xiv.

⁸⁰ See Editorial, WALL STREET JOURNAL, Sept. 27, 1951, at 6.

⁸¹ 5 U.S.C. §§ 500-706 (1946).

should follow uniform guidelines.⁸² According to a 1945 Senate report accompanying the legislation, “Administrative operations and procedures are public property [that] the general public, rather than a few specialists or lobbyists, is entitled to know or have the ready means of knowing with definiteness and assurance.”⁸³

In practice, however, the APA contained numerous caveats and loopholes that federal agencies routinely exploited to block public access to their records. For example, the APA allowed the government to withhold any information “requiring secrecy in the public interest,” but there were no guidelines as to what would qualify as a public interest standard.⁸⁴ A 1965 Senate report described the APA as “full of loopholes which allow agencies to deny legitimate information to the public. Innumerable times it appears that information is withheld only to cover up embarrassing mistakes or irregularities.”⁸⁵ A 1966 House Report noted that since the 1950s, “case after case of improper withholding based upon [the APA] had been documented.”⁸⁶ The Supreme Court recognized these problems, criticizing the APA as “plagued with vague phrases”, and providing “no remedy for wrongful withholding of information.”⁸⁷ The time was ripe for a stronger replacement.

The Freedom of Information Act (FOIA) created a judicially enforceable procedure to request a wide variety of information compiled by Executive Branch agencies.⁸⁸ Congressional reports during the development of FOIA emphasized that its impetus was the public knowledge that is necessary under American democratic theory. Citizens must have access to government-held information so they can hold government accountable for its actions and make informed decisions pertaining to self-rule.⁸⁹ As stated in a 1965 Senate report: “Government by secrecy benefits no one. It injures the people it seeks to serve; it injures its own integrity and operation. It breeds mistrust, dampens the fervor of its citizens, and mocks their loyalty.”⁹⁰

FOIA favors a general philosophy of full disclosure of records held by federal agencies.⁹¹ The statute tackles Executive Branch secrecy by allowing the public to examine the records held by roughly seventy federal administrative and regulatory agencies, and fifteen executive branch departments.⁹² FOIA makes records available to any person upon request, and the requester is not required to explain the purpose for which a record is being requested or why that record should be disclosed.⁹³ Under the statute, the burden of proof falls on the government to sustain its decisions to refuse disclosure.⁹⁴ President Lyndon B. Johnson, who signed FOIA into law, praised its philosophy:

⁸² See S. REP. No. 752-79, at 7 (1945).

⁸³ *Id.*

⁸⁴ See H. REP. No. 89-1497, at 6 (1966).

⁸⁵ See S. REP. No. 89-813, at 3 (1965).

⁸⁶ See H. REP. No. 89-1497, at 5-6 (1966); S. REP. No. 89-813, at 5 (1965).

⁸⁷ *EPA v. Mink*, 410 U.S. 73, 79 (1973) (concerning the enforcement of various provisions of the Freedom of Information Act, which in turn was compared to its predecessor, the APA).

⁸⁸ 5 U.S.C. § 552 (2016) (first enacted in 1966).

⁸⁹ See generally S. REP. No. 89-813 (1965); H.R. REP. No. 89-1497 (1966). See also *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

⁹⁰ See S. REP. No. 89-813, at 10.

⁹¹ 437 U.S. at 220; 410 U.S. at 80; *U.S. Dep’t of the Air Force v. Rose*, 425 U.S. 352, 360-361 (1976).

⁹² See U.S. DEPARTMENT OF JUSTICE, FREEDOM OF INFORMATION ACT GUIDE & PRIVACY ACT OVERVIEW 31-36 (2004).

⁹³ *Id.* at 44-46.

⁹⁴ 5 U.S.C. § 552(a)(4)(B).

This legislation springs from one of our most essential principles: A democracy works best when the people have all the information that the security of the nation permits. No one should be able to pull the curtain of secrecy around decisions which can be revealed without injury to the public interest.⁹⁵

While FOIA emphasizes the “fullest disclosure” possible, lawmakers understood that some government information must remain secret for the security and safety of the nation, or for particular citizens and businesses. A 1965 Senate report observed that “it is necessary to protect certain equally important rights of privacy with respect to certain information in Government files.”⁹⁶ Congress thus added nine exemptions to the statute, establishing certain categories of information that agencies may withhold from the public.⁹⁷ While a government agency can refuse to disclose a requested document under one or more of these exemptions, that agency still bears the burden of proof on why the document should remain secret.⁹⁸

FOIA has proven to be an effective statutory tool for citizen access to uncontroversial documents, but it suffers from many inefficiencies that blunt its effectiveness in promoting public knowledge and the consent of the governed. These weaknesses were lamented in Congressional reports that began to arise just a few years after the statute was enacted. For instance, FOIA exhibits vague terminology and paperwork procedures that could allow agencies to interpret the exemptions broadly to justify withholding documents.⁹⁹ Officials could also be tempted to use various ploys to discourage FOIA use by citizens, such as high fees for copying documents, long delays, and claims that the documents are lost or too time-consuming to find.¹⁰⁰ Citizens who requested documents but were denied would have to follow a complex and dispiriting appeals process, which usually involved arguing with the same officials behind the original denial via expensive court challenges.¹⁰¹ As noted by the House of Representatives in 1972, the “efficient operation of the Freedom of Information Act has been hindered by five years of foot-dragging,” and “widespread reluctance of the bureaucracy to honor the public’s legal right to know.”¹⁰² In more recent years, the ability of citizens to fight back against agency denials has been whittled away by the courts, with the addition of new requirements for requesters to show that a given document is useful for the public interest, while allowing agencies to use less and less specific reasoning for their usage of the nine exemptions.¹⁰³

⁹⁵ See Lyndon B. Johnson, *Statement by the President Upon Signing the “Freedom of Information Act”*, July 4, 1966, reprinted in The American Presidency Project, available at <https://www.presidency.ucsb.edu/documents/statement-the-president-upon-signing-the-freedom-information-act>.

⁹⁶ See S. REP. No. 89-813, at 3 (1965).

⁹⁷ 5 U.S.C. § 552(b)(1-9). Agency-held documents can be withheld if they fall within one of more of these categories: 1) classified information and national security, 2) internal agency personnel information, 3) information exempted by other statutes, 4) trade secrets and other confidential business information, 5) inter- and intra-agency memoranda, 6) disclosures that constitute a clearly unwarranted invasion of privacy, 7) law enforcement investigation records, 8) reports from regulated financial institutions, and 9) geological and geophysical information.

⁹⁸ 525 U.S. at 361; *Chrysler v. Brown*, 441 U.S. 281, 293 (1979).

⁹⁹ See e.g. H.R. REP. No. 92-1419, at 8-10 (1972). See also Victor H. Kramer & David B. Weinberg, *The Freedom of Information Act*, 63 GEO. L.J. 49, 52 (1974).

¹⁰⁰ See H.R. REP. No. 92-1419, at 14, 57.

¹⁰¹ As then-Professor Antonin Scalia observed, FOIA was rendered “a relatively toothless beast, sometimes kicked about shamelessly by the agencies.” See Antonin Scalia, *The Freedom of Information Act Has No Clothes*, REGULATION (March/April, 1982), at 15.

¹⁰² See H.R. REP. No. 92-1419, at 8.

¹⁰³ This is particularly a problem for documents declared by an agency as secret for reasons of protecting national security (Exemption 1) or preserving the personal privacy of people named therein (Exemptions 6 and 7(c)). See

On the matter of the availability of government-held documents, it should also be noted that government ownership of its own documents was not included in American copyright law. This indicates that lawmakers as far back as the late 1800s believed that those documents should be easily available to citizens and could not be withheld by non-transparent government agencies via copyright infringement claims.¹⁰⁴ As noted by a political commentator in 1960:

Unbridled copyrighting of official material is dangerous. It is subversive in its effect upon the Constitutional rights of the American people and the rights of a free press in a democratic society. Today, it is true, a newspaper or book publisher stands to gain temporary advantage by securing exclusive rights to material made available by an official, but tomorrow every publisher has much to lose if government copyrighting becomes a general practice.¹⁰⁵

The Copyright Act of 1970, which includes some provisions remaining from its predecessor from 1909, states that “No copyright shall subsist [...] in any publication of the United States Government, or any reprint, in whole or in part, thereof.”¹⁰⁶ The statute also requires government-created documents to immediately enter the public domain, after which nobody can declare copyright ownership.¹⁰⁷

The fact that some government-held documents are available to citizens via the Freedom of Information Act and related statutes, and the fact that government cannot claim ownership of those documents via copyright law, indicates that American lawmakers would like citizens to have access to those documents whenever prudent. However, existing statutes suffer from too many procedural vagaries that make them ineffective for widespread self-government by informed citizens. Therefore, this article argues that America should enshrine access as a *right* to know and not just as a statutory protection. This idea has already been hinted upon by several leading theorists.

generally Jonathan Turley, *Through a Looking Glass Darkly: National Security and Statutory Interpretation*, 53 S.M.U. L. REV. 205 (2000); Martin E. Halstuk, *Holding the Spymasters Accountable after 9/11: A Proposed Model for CIA Disclosure Requirements Under the Freedom of Information Act*, 27 HASTINGS COMM. & ENT. L.J. 79 (2004); Martin E. Halstuk, *When Is an Invasion of Privacy Unwarranted Under the FOIA? An Analysis of the Supreme Court’s “Sufficient Reason” and “Presumption of Legitimacy” Standards*, 16 U. FLA. J.L. & PUB. POL’Y 361 (2005); Benjamin W. Cramer, *Privacy Exceptionalism Unless It’s Unexceptional: How the American Government Misuses the Spirit of Privacy in Two Different Ways to Justify Both Nondisclosure and Surveillance*, 16 OHIO ST. L. J. 307 (2020).

¹⁰⁴ See Jerry E. Smith, *Government Documents: Their Copyright and Ownership*, 22 COPYRIGHT L. SYMP. 147, 169 (1972).

¹⁰⁵ See MORRIS BARTEL SCHNAPPER, CONSTRAINT BY COPYRIGHT 4 (1960).

¹⁰⁶ 17 U.S.C. § 8 (1970).

¹⁰⁷ See Smith, *supra* note 104, at 152-154. Note that a creative item like a book or song is owned by the creator for a certain period so that party can reap the benefits of their creativity, but eventually that protection expires and the item enters the public domain. Copyright law intends for government-created documents to skip this process and enter the public domain immediately, so any member of the public can copy them without the need to request authorization. However, given the provisions of the Freedom of Information Act, this public domain process is only relevant for government documents that are obtainable in the first place.

V. The theory of a constitutional right to know

This article proposes a constitutional right to know, to enable the consent of the governed and ultimately informed dissent. However, this is not necessarily a new notion, and in addition to the Supreme Court precedents described previously, several influential legal theorists have advanced the possibility. For instance, Lillian BeVier has described a potential right to know under the Constitution as “a personal right held by every member of the public to have access to information controlled by the government.”¹⁰⁸ The Supreme Court has issued rulings on access to previously banned materials, which Thomas Emerson has interpreted as partial acknowledgements of a constitutional right to know, or at least a right to receive information.¹⁰⁹ In a 1969 ruling, the high court declared that “it is now well established that the Constitution protects the right to receive information and ideas.”¹¹⁰

Legal scholars, journalists, and other commentators have written extensively about the close relationship between public access to government information and democracy.¹¹¹ Alexander Meiklejohn, a leading figure in the development of modern democratic political theory and understanding of the First Amendment,¹¹² believed that “whatever truth may become available shall be placed at the disposal of all the citizens of the community” in order to effectuate self-government.¹¹³ Meiklejohn noted that:

Public discussions of public issues, together with the spreading of information and opinion bearing on those issues, must have a freedom unabridged by our agents. Though they govern us, we, in a deeper sense, govern them. Over our governing, they have no power. Over their governing we have sovereign power.¹¹⁴

Meiklejohn continued on the specific matter of self-government, stating that the purpose of the First Amendment is “to give every voting member of the body politic the fullest possible participation in the understanding of those problems with which the citizens of a self-governing society must deal.”¹¹⁵ Furthermore, “The principle of the freedom of speech springs from the

¹⁰⁸ See BeVier, *supra* note 67, at 484, n10.

¹⁰⁹ See Emerson, *The First Amendment and the Right to Know*, *supra* note 78, at 3; referencing *Lamont v. Postmaster General*, 381 U.S. 301 (1965) (concerning a prohibition on Communist Party publications from abroad), and *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (concerning the Fairness Doctrine enforced by the Federal Communications Commission toward political discussions aired on broadcasting stations; which Emerson interprets as a right for listeners to receive political information).

¹¹⁰ *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (concerning a prohibition on viewing pornography in one’s home).

¹¹¹ See generally JOHN RAWLS, *A THEORY OF JUSTICE* (1971); KARL R. POPPER, *THE OPEN SOCIETY AND ITS ENEMIES* (1971); CROSS, *supra* note 70.

¹¹² For analyses of Meiklejohn’s influence, see BeVier, *supra* note 67, at 503 (“The conception of democracy apparently embraced by proponents of the ‘right to know’ echoes the view of Alexander Meiklejohn, whose insights into the relevance of self-government to First Amendment analysis have been of seminal importance.”); and Emerson, *The First Amendment and the Right to Know*, *supra* note 78, at 4 (“It has been suggested that the right-to-know be adopted as the sole, or at least the principal, basis for the constitutional protection afforded by the First Amendment. Alexander Meiklejohn is the primary source of this theory.”).

¹¹³ See ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO-SELF GOVERNMENT* 88 (1948).

¹¹⁴ *Id.* at 24.

¹¹⁵ *Id.* at 88-89.

necessities of the program of self-government.”¹¹⁶ Lilian BeVier considers this passage by Meiklejohn as supportive of both self-expression and access to government information.¹¹⁷

Meiklejohn also adopted John Locke’s principle of the consent of the governed,¹¹⁸ declaring that:

All constitutional authority to govern the people of the United States belongs to the people themselves, acting as members of a corporate body politic. They are, it is true, ‘the governed.’ But they are also ‘the governors.’ Political freedom is not the absence of government. It is self-government.¹¹⁹

In the estimation of Thomas Emerson, Meiklejohn’s works imply that a right to know should be the primary interpretation of the First Amendment, because the citizen who can receive information about political leaders can best engage in the self-government that is at the heart of Constitution.¹²⁰

Emerson’s own writings are also relevant to the present argument about a constitutional right to know: “The public, as sovereign, must have all information available in order to instruct its servants, the government. [...] There can be no holding back of information, otherwise, ultimate decision-making by the people, to whom the function is committed, becomes impossible.”¹²¹ In Emerson’s assessment, if a citizen seeks information that can be considered necessary for self-government, then the citizen has a constitutional right to that information.¹²² In turn, Emerson advocated a First Amendment focus on the *receiver* of information, who cannot express him/herself effectively if government restricts the flow of political discussion.¹²³ Emerson also noted that the receiver of information may not be in a position to assert the right to know due to lack of personal influence, and that this right should be upheld by the courts.¹²⁴

First Amendment scholar Vincent Blasi wrote that a constitutional right of access flows logically out of the Enlightenment-inspired views of Locke and Montesquieu, who are known to have influenced the Framers of the First Amendment.¹²⁵ Blasi called his theory the “checking value” of the First Amendment, on the premise that one of the most important contributions from those philosophers to democratic theory was the ability of citizens to check the tendency of government officials to abuse their power.¹²⁶ Blasi reasoned that without a right of access to ensure unrestricted investigation, the press (and by extension, citizens) would inevitably face roadblocks in uncovering misconduct, because corrupt or incompetent officials would be motivated to keep their activities secret.¹²⁷ Blasi argued that the American government had become so big and inscrutable that it fostered suspicion by citizens – a worrisome trend that could be alleviated by greater citizen access to government-held documents and operations, either by direct request or indirectly via the press. This in turn would enable the “consent of the governed” that is referenced

¹¹⁶ *Id.* at 26.

¹¹⁷ See BeVier, *supra* note 67, at 504.

¹¹⁸ See *supra* notes 14-19 and accompanying text.

¹¹⁹ See Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 253-254 (1961).

¹²⁰ See Emerson, *The First Amendment and the Right to Know*, *supra* note 78, at 4.

¹²¹ *Id.* at 14.

¹²² *Id.* at 16. See also BeVier, *supra* note 67, at 507.

¹²³ See Emerson, *The First Amendment and the Right to Know*, *supra* note 78, at 6.

¹²⁴ *Id.* at 7.

¹²⁵ See *supra* notes 14-19, 24-27 and accompanying text.

¹²⁶ See Blasi, *supra* note 13, at 538.

¹²⁷ *Id.* at 609-610.

in the nation's founding documents.¹²⁸ Self-government requires that each citizen plays an essential role in the governing process and should enjoy the right to be informed on all matters of governance.¹²⁹

Blasi contends that most early free speech theorists, who in turn influenced the Framers, emphasized the role of free expression in the oversight of government officials:¹³⁰

“There can be no doubt, however, that one of the most important values attributed to a free press by eighteenth-century political thinkers was that of checking the inherent tendency of government officials to abuse the power entrusted to them. Insofar as the views prevalent at the time of adoption have relevance to contemporary interpretation, the checking value rests on a most impressive foundation.”¹³¹

Commentators who contend that the Founding Fathers supported access to government information as a constitutional right of the people often cite a statement by James Madison, who wrote in an 1822 letter: “A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern ignorance; And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.”¹³² This quote by Madison can also be found numerous times in House and Senate debates and in legislative reports leading up to the passage of the Freedom of Information Act in 1966.¹³³

These thinkers have advanced the notion that citizens should have a constitutional right to know what the government is doing, either directly by requesting documents or indirectly via the press. As will be described in the next section, the Constitution also enables Congress to investigate the rest of the government on behalf of the people.

VI. The legislative branch as investigators

Given modern media technologies, the “press” has expanded beyond traditional investigative journalists and periodical publications, and the meaning of the “press” and its

¹²⁸ *Id.* at 541-544.

¹²⁹ *Id.* at 524.

¹³⁰ *Id.* at 527.

¹³¹ *Id.* at 538.

¹³² See James Madison, letter to William T. Barry, Aug. 4, 1822, *reprinted in* GAILLARD HUNT, ED., WRITINGS OF JAMES MADISON 103 (1910). While popular with government transparency advocates, this quote from Madison is frequently misinterpreted. Gates and Chamberlain argue that Madison was actually discussing the public education system in the colonies, as contemporary use of the term “public information” referred to education rather than government-held documents. See Paul H. Gates, Jr. and Bill F. Chamberlin, *Madison Misinterpreted: Historical Presentism Skews Scholarship*, AM. JOURNALISM 41-43 (Winter 1996).

Madison's quote, misinterpreted though it may be, has often been cited by the Supreme Court when extolling the virtues of government transparency; see *e.g.* *Press-Enterprise Co. v. Superior Court of California, Riverside County*, 464 U.S. 510, 518 (1984); *Board of Education, Island Trees Union Free School District v. Pico*, 457 U.S. 853, 857 (1982); *United States v. Mitchell*, 551 F.2d 1252, 1258 (1976).

¹³³ See Thomas M. Susman, *Your Business, Your Trade Secrets, and Your Government*, 34 ADMIN. L. REV. 117 (1982). According to Susman, the quote appeared at least 17 times in legislative history reports.

attended privileges has either expanded or eroded.¹³⁴ While journalists have always investigated government for the knowledge of the people, this article proposes that Congress can perform the same function as established by the separation of powers doctrine and other powers granted by the Constitution. In league with the perception of journalists as investigators from Constitutional theorists, this article argues that the Legislative Branch of the American government is empowered to perform a similar role. This in turn makes Congress a factor in the progression from public knowledge of government activities to the informed dissent at the heart of this article's arguments.

The legal history described in the previous sections of this article points to constitutional and judicial support for the actions of the Executive Branch to be overseen by the other branches of the federal government. In particular, this article argues that the House of Representatives has the authority to obtain and publish any and all documents concerning an elected official's duties, especially if they have aroused suspicion. This enables Congress to act as the investigator on behalf of the people, who may desire information on Executive Branch activities in order to fuel self-government and informed dissent.

The particular matter of Congress as an investigator, not unlike the press, reached the Supreme Court in 2020, as the administration of President Donald Trump attempted to prevent Congress from obtaining documents deemed necessary for its investigation of his financial dealings. On the same day in July 2020, the high court issued rulings in two related cases: *Trump v. Vance*, which addressed subpoenas issued by state prosecutors in a criminal investigation of the then-sitting President;¹³⁵ and *Trump v. Mazars*, which addressed subpoenas of a similar nature from the House of Representatives in Washington.¹³⁶

The *Vance* case originated from a subpoena issued by Cyrus R. Vance Jr., the District Attorney for the County of New York (i.e. Manhattan, New York City), to President Trump's personal accounting firm for use in an investigation of "possibly extensive and protracted criminal conduct at the Trump Organization" that may have violated New York law.¹³⁷ Trump argued that under Article II of the Constitution, in which the President's responsibilities are delineated, plus the Supremacy Clause in Article VI,¹³⁸ a sitting President enjoys absolute immunity from state criminal investigations.¹³⁹ The Supreme Court, in an opinion written by Chief Justice John Roberts, ruled that "Article II and the Supremacy Clause do not categorically preclude, or require a heightened standard for, the issuance of a state criminal subpoena to a sitting President."¹⁴⁰

This holding was supported by a precedent from early in American history, when Aaron Burr was ordered to turn over requested documents to President Thomas Jefferson, with John Marshall (then a Circuit Judge in Virginia) ruling that "the propriety of introducing any papers... depend[s] on the character of the paper, not the character of the person who holds it."¹⁴¹ In other

¹³⁴ See e.g. Robert Corn-Revere, *Protecting the Tools of Modern Journalism*, 30 COMM. LAWYER 9 (Fall 2014); Renee Hobbs, *The Blurring of Art, Journalism, and Advocacy: Confronting 21st Century Propaganda in a World of Online Journalism*, 8 I/S: A J. OF LAW AND POL'Y FOR THE INFORMATION SOCIETY 625 (2013).

¹³⁵ *Trump v. Vance*, 140 S.Ct. 2412 (2020).

¹³⁶ *Trump v. Mazars USA, LLP*, 140 S.Ct. 2019 (2020).

¹³⁷ See Kara Scannell and Erica Orden, *NY Prosecutors Say Trump Investigation Extends Beyond Hush Money Payments*, CNN (Aug. 3, 2020), available at <https://www.cnn.com/2020/08/03/politics/trump-new-york-vance-investigation/index.html>.

¹³⁸ U.S. CONST., art. VI, para. 2.

¹³⁹ 140 S.Ct. at 2420.

¹⁴⁰ *Id.*

¹⁴¹ *U.S. v. Burr*, 25 F. Cas. 30, 34, 37 (CC Va. 1807).

words, some people are not above the law when receiving an order to turn over personal papers. This rule was observed with little controversy by Presidents for nearly the next two centuries.¹⁴²

During the Watergate crisis in 1974, President Richard Nixon attempted to claim absolute privilege for all presidential communications, including audio recordings that were believed to contain crucial evidence in the scandal. The Supreme Court held that the President’s “generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.”¹⁴³ Hence, the need for documents in a criminal investigation outweighs a President’s claim of privilege or immunity. Meanwhile, the high court noted the public interest in fair and accurate judicial proceedings for criminal accusations, per America’s commitment that “guilt shall not escape” nor “innocence suffer,” regardless of the position of the accused party.¹⁴⁴ Nixon was unable to argue that the privacy of his personal documents outweighed the ideals of criminal justice, so he was compelled to hand over the requested audio tapes to Congressional investigators.¹⁴⁵

In the *Vance* case, President Trump argued that state subpoenas posed a unique threat of distracting political harassment that requires absolute immunity.¹⁴⁶ The high court displayed little regard for this argument, claiming that “Two centuries of experience likewise confirm that a properly tailored criminal subpoena will not normally hamper the performance of a President’s constitutional duties.”¹⁴⁷ In *Clinton v. Jones* in 1997, the high court had also held that “that the risk of harassment [from a subpoena] was not serious because federal courts have the tools to deter and, where necessary, dismiss vexatious civil suits.”¹⁴⁸ Chief Justice Roberts opened his opinion in *Vance* with the pointed statement: “In our judicial system, the public has a right to every man’s evidence. Since the earliest days of the Republic, ‘every man’ has included the President of the United States.”¹⁴⁹

Consequently, in *Vance* the Supreme Court concluded that a President cannot claim absolute immunity from subpoenas associated with a criminal investigation.¹⁵⁰ Furthermore, if absolute protection of the President’s personal information is unjustifiable, then the public interest is satisfied via comprehensive access to evidence and information, without which a grand jury’s functions would be restricted.¹⁵¹

The ultimate holding in *Vance* was that “the President is neither absolutely immune from state criminal subpoenas seeking his private papers nor entitled to a heightened standard of need.”¹⁵² If states are not prevented from investigating the President via subpoenas for information and documents, by extension a federal body (particularly the House or Representatives) can do the same in an investigation without being hobbled by a President’s claim of absolute immunity.

On the same day, the Supreme Court issued a similar ruling in the *Mazars* case, which focused on subpoenas for information issued by the House of Representatives in Washington, as

¹⁴² 140 S.Ct. at 2423.

¹⁴³ U.S. v. Nixon, 418 U. S. 683, 713 (1974).

¹⁴⁴ *Id.* at 709.

¹⁴⁵ 140 S.Ct. at 2424.

¹⁴⁶ *Id.* at 2425.

¹⁴⁷ *Id.* at 2426.

¹⁴⁸ *Clinton v. Jones*, 520 U.S. 681, 708 (1997) (internal quotation marks omitted).

¹⁴⁹ 140 S.Ct. at 2420. Roberts traced this conclusion back to a British parliamentary debate in 1742. In a concurring opinion, Justice Brett Kavanaugh agreed that in the American system of government, no one is above the law, including the President. *Id.* at 2432.

¹⁵⁰ *Id.* at 2429.

¹⁵¹ *Id.* at 2430; citing U.S. v. R. Enterprises, Inc., 498 U.S. 292, 297 (1991).

¹⁵² 140 S.Ct. at 2431.

opposed to state or local prosecutors.¹⁵³ The *Mazars* case originated when three committees within the House of Representatives issued four different subpoenas to President Trump's personal accounting firm seeking information on the finances of himself, his children, and his business associates. The committees claimed that the information was needed to guide broad legislative reform efforts in areas ranging from money laundering by terrorists to foreign interference in American elections.¹⁵⁴

President Trump argued that these subpoenas served no legitimate legislative purpose and violated separation of powers, though in this case he did not claim that the records were protected by executive privilege.¹⁵⁵ In the Opinion of the Court, again written by Chief Justice John Roberts, the high court noted that it had never addressed a Congressional subpoena for a President's personal financial information.¹⁵⁶ Roberts also noted that such disputes had arisen before, but the Executive and Legislative Branches were able to resolve those disputes via political deal-making without taking them to court.¹⁵⁷ Thus, the high court endeavored to consider separation of powers issues carefully in its ruling.¹⁵⁸

Roberts opened the Opinion of the Court with the forthright statement that "We have held that the House has authority under the Constitution to issue subpoenas to assist it in carrying out its legislative responsibilities."¹⁵⁹ The high court held that Congress has the power to secure needed information in order to legislate, and this power is "indispensable" because without information, Congress would be unable to legislate wisely or effectively on behalf of the people.¹⁶⁰ Any protection enjoyed by the President over the disclosure of privileged information should not be extended haphazardly to *all* information, including that which is not sensitive to Executive Branch deliberations.¹⁶¹ Such an approach would impair Congress's ability to conduct inquiries and obtain the information it needs to legislate effectively.¹⁶²

However, a subpoena issued for this purpose must be related to a legitimate task of Congress and must serve a valid legislative purpose.¹⁶³ Per the separation of powers doctrine, Congress's power to subpoena the President should have limits, lest the Legislative Branch gain too much power over the Executive.¹⁶⁴ In *Mazars*, the high court proposed a test to determine if a disputed subpoena advanced a legitimate task of Congress.¹⁶⁵ Per this new test, the subpoenas at

¹⁵³ *Trump v. Mazars USA, LLP*, 140 S.Ct. 2019 (2020).

¹⁵⁴ *Id.* at 2026.

¹⁵⁵ *Id.* at 2028.

¹⁵⁶ *Id.* at 2026. Citing the same precedents analyzed in the *Vance* case, Chief Justice Roberts noted that *U.S. v. Burr* (1807) established that a President can be subpoenaed during a federal criminal investigation of someone else; *U.S. v. Nixon* (1974) established that a federal prosecutor could obtain information from a President despite claims of executive privilege; and *Clinton v. Jones* (1997) established that a private litigant could request information from a sitting President in relation to a civil suit. *See supra* notes 141-149 and accompanying text.

¹⁵⁷ 140 S.Ct. at 2031.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 2026.

¹⁶⁰ *Id.* at 2031 (some internal quotation marks omitted); citing *McGrain v. Dougherty*, 273 U.S. 135, 161 (1927); *Watkins v. U.S.*, 364 U.S. 178, 215 (1957).

¹⁶¹ 140 S.Ct. at 2032-2033 (emphasis added).

¹⁶² *Id.* at 2033.

¹⁶³ *Id.* at 2031-2032; citing *Watkins v. U.S.*, 364 U.S. 178, 187 (1957); *Quinn v. U.S.*, 349 U.S. 155, 161 (1955).

¹⁶⁴ 140 S.Ct. at 2034.

¹⁶⁵ *Id.* at 2035-2036. The proposed test includes these four steps: 1) Courts should carefully assess whether the asserted legislative purpose warrants the significant step of involving the President and his papers; 2) Courts should insist on a subpoena no broader than reasonably necessary to support Congress's legislative objective; 3) Courts should be attentive to the nature of the evidence offered by Congress to establish that a subpoena advances a valid legislative

issue in *Mazars* were found to be unacceptably vague because they did not take separation of powers issues into account, and could possibly create a dangerous precedent in which any piece of private information held by a President could be framed as crucial to legislative efforts.¹⁶⁶

Nonetheless, in *Mazars* the high court rejected Trump's claims that the subpoenas lacked a legitimate legislative purpose, because Congress also has the responsibility to conduct investigations into suspected criminal conduct by the Executive Branch.¹⁶⁷ Consequently, courts should determine if such subpoenas are valid per the new test, while addressing both Congress's responsibilities and the unique position of the President.¹⁶⁸

The immediate outcome of the *Vance* and *Mazars* rulings was to remand the matter back to the U.S. District Court for the Southern District of New York (where the legal challenge originated), with instructions for that court to re-assess the subpoenas, and their enforceability, per the new tests concocted by the Supreme Court.¹⁶⁹ The District Court did so immediately and ordered President Trump to comply with the subpoenas,¹⁷⁰ after which Trump appealed immediately.¹⁷¹ The Supreme Court rulings failed to prevent such delaying tactics, which is likely to blunt future time-sensitive investigations. Now it may in fact be easier for a President to resist Congressional demands for information – not by claiming immunity but by grinding down Congress's resolve via interminable and abusive legal motions and paperwork.¹⁷² But regardless of the procedural difficulties, the high court granted Congress the ability to investigate the Executive Branch on behalf of the people.

Meanwhile, the Constitution already contains two provisions that can be interpreted as allowing Congress to serve as investigators on behalf of the people. In his dissenting opinion in *Trump v. Vance*, Justice Samuel Alito noted that the Constitution's impeachment process prevents a sitting President from being criminally prosecuted by anyone but the House of Representatives

purpose; and 4) Courts should be careful to assess the burdens imposed on the President by a subpoena, particularly if this provides an advantage for the Legislative Branch.

¹⁶⁶ *Id.* at 2034. The high court also found that separation of powers issues remain relevant even though the subpoenas at issue in *Mazars* were issued to third parties (Trump's accounting firm and banking partners). *Id.* at 2035.

¹⁶⁷ *Id.* at 2033.

¹⁶⁸ *Id.* at 2035. Justice Clarence Thomas issued a dissenting opinion in *Mazars* that rejected the majority's analysis of whether Congressional subpoenas are valid, and instead recommended the impeachment process for any Congressional investigation of a President. *Id.* at 2046-2047. Thomas's dissent in *Mazars* will be discussed further in the discussion of impeachment at *infra* notes 173-176 and accompanying text.

¹⁶⁹ See Kimberly Wehle, *Actually, the Supreme Court Just Gave Congress a Big Win*, POLITICO, July 11, 2020, available at <https://www.politico.com/news/magazine/2020/07/11/actually-the-supreme-court-just-gave-congress-a-big-win-356274>.

¹⁷⁰ See Nathaniel Sobel & Julia Solomon-Strauss, *Trump v. Vance Moves Forward in the Lower Courts*, LAWFARE, Aug. 4, 2020, available at <https://www.lawfareblog.com/trump-v-vance-moves-forward-lower-courts>.

¹⁷¹ See Katelyn Polantz, *Judge Rules against Trump in Tax Records Subpoena Fight*, CNN, Aug. 21, 2020, available at <https://www.cnn.com/2020/08/20/politics/donald-trump-new-york-tax-records/index.html>. After he had left office, Trump offered to partially disclose the requested documents to Congress, while Congress demanded the remainder as well. See Spencer S. Hsu, *Trump, Fighting to Toss out Subpoena, Offered to Give House Democrats Peek at Financial Statements*, WASH. POST., July 1, 2021, available at https://www.washingtonpost.com/local/legal-issues/trump-taxes-financial-statements-hearing/2021/07/01/78166a2c-da9f-11eb-9bbb-37c30dcf9363_story.html. As of the time of writing, the most recent legal developments include a request by Trump to the Supreme Court, asking for the previous ruling against him to be overturned; the high court rejected this request in November 2022. See Amy Howe, *Justices Clear the Way for House Committee to Obtain Trump's Tax Returns*, SCOTUSBLOG, Nov. 22, 2022, available at <https://www.scotusblog.com/2022/11/justices-clear-the-way-for-house-committee-to-obtain-trumps-tax-returns/>.

¹⁷² See Kyle Cheney & Josh Gerstein, *Supreme Court Casts a Shadow over Congress' Power to Investigate*, POLITICO, July 15, 2020, available at <https://www.politico.com/news/2020/07/15/supreme-court-congress-investigate-361779>.

while in office.¹⁷³ Justice Clarence Thomas, in his dissenting opinion in *Trump v. Mazars*, argued that Congress should not have the authority to issue subpoenas for a President's private documents, but should instead investigate such matters during the impeachment process, for which there is stronger constitutional support.¹⁷⁴ Thomas pointed out that "The power to impeach includes a power to investigate and demand documents,"¹⁷⁵ and this is how Congress should hold a President accountable for high crimes and misdemeanors.¹⁷⁶

The impeachment process is long-winded and politically risky, and it may not be nimble enough for routine investigations. However, the existence of the impeachment process implies that the Founding Fathers intended for Congress to investigate the President when they deem it necessary, and such investigations are central to this article's arguments. In the words of Kinkopf and Whittington, "The impeachment power is a tool that most members of Congress are unwilling to use if it can be avoided, but they have also wanted to preserve it as a tool that is flexible enough to be used in any exceptional circumstances that might arise."¹⁷⁷

Per the Constitution, the House of Representatives has the power to bring impeachment actions against officials in other branches of the government,¹⁷⁸ while an impeachment trial is held in the Senate with the Chief Justice of the Supreme Court presiding.¹⁷⁹ The impeachment process cannot lead to a criminal conviction, though if found guilty the official will be removed from office.¹⁸⁰

While impeachment is often viewed as a politicized trial in which a political leader is prosecuted for misdeeds,¹⁸¹ the Supreme Court has ruled several times that impeachment is better understood as an investigative process that in turn is one of the Legislative Branch's most important functions on behalf of the people. In *McGrain v. Daugherty*, the high court held that "the power of inquiry – with process to enforce it – is an essential and appropriate auxiliary to the legislative function."¹⁸² This includes the ability to obtain information, because:

A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information – which not infrequently is true – recourse must be had to others who do possess it.¹⁸³

¹⁷³ *Trump v. Vance*, 140 S.Ct. at 2444.

¹⁷⁴ *Trump v. Mazars USA, LLP*, 140 S.Ct. at 2037, 2045.

¹⁷⁵ *Id.* at 2046.

¹⁷⁶ *Id.* at 2047.

¹⁷⁷ See Neil J. Kinkopf and Keith E. Whittington, *Common Interpretation: Article II, Section 4, National Constitution Center*, available at <https://constitutioncenter.org/interactive-constitution/interpretation/article-ii/clauses/349>.

¹⁷⁸ U.S. CONST., Art. I, § 2, cl. 5.

¹⁷⁹ U.S. CONST., Art. I, § 3, cl. 6.

¹⁸⁰ U.S. CONST., Art. I, § 3, cl. 7.

¹⁸¹ Throughout American history the U.S. Senate has held 21 impeachment trials. As of the time of writing, three Presidents (Andrew Johnson and Bill Clinton once each, and Donald Trump twice), one Senator, one Cabinet Secretary, and fifteen federal judges (including Supreme Court Justice Samuel Chase) were investigated after being accused of violating the responsibilities of their offices. None of the Presidents were removed from office, but this was the fate suffered by eight of the judges. See United State Senate, "Impeachment", available at https://www.senate.gov/artandhistory/history/common/briefing/Senate_Impeachment_Role.htm.

¹⁸² 273 U.S. 135, 174 (1927) (concerning a Congressional investigation of United States Attorney General Harry M. Daugherty).

¹⁸³ *Id.* at 175.

In *Bowsher v. Synar*, the high court opined that a misbehaving President is subject to “impeachment proceedings which are exercised by the two Houses [of Congress] as representatives of the people.”¹⁸⁴ In *Nixon v. Fitzgerald* the high court noted that the impeachment process conforms to the Constitutional ideals of “constant scrutiny by the press and vigilant oversight by Congress.”¹⁸⁵ Furthermore, impeachment fits within the separation of powers doctrine, because “Whatever the fear of subjecting the President to the power of another branch, it was not sufficient, or at least not sufficiently shared, to insulate the President from political liability in the impeachment process.”¹⁸⁶ In 1983, Supreme Court Justice Byron White stated that impeachment is not a legislative function at all, but an essential function of Congress in playing its part in the checks and balances process.¹⁸⁷

These rulings, while specific to the impeachment process at various levels, indicate the desire of the Founding Fathers to provide Congress with investigative powers in the Constitution. The young Woodrow Wilson, while still a doctoral student at Johns Hopkins University, shared the sentiment that Congress is not just a legislative body but an investigative body on behalf of the people:

It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents. Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served; and unless Congress both scrutinize these things and sift them by every form of discussion, the country must remain in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand and direct. The informing function of Congress should be preferred even to its legislative function.¹⁸⁸

In addition to impeachment, the Legislative Branch has a more specific Constitutional process with which to investigate officials in the other branches of government: the emoluments clause regarding gifts (financial or otherwise) while in office. *Black’s Law Dictionary* defines an *emolument* as the “profit arising from office or employment” or the “advantage, profit, or gain arising from the possession of an office.”¹⁸⁹ Specifically for the President, the Constitution does not allow extra compensation arising directly from his services to other parties.¹⁹⁰

¹⁸⁴ 478 U.S. 714, 722 (1986) (concerning the constitutionality of a bill giving Congress authority over the finances of the District of Columbia; the impeachment of a President was not germane to the case but was discussed as a power held by Congress).

¹⁸⁵ 457 U.S. 731, 732, 757 (1982) (concerning a request for documents from the administration of President Richard Nixon, then out of office, with a discussion of how Nixon’s actions could have been subjected to an impeachment investigation while he was still the sitting President).

¹⁸⁶ 457 U.S. at 772 (J. White, dissenting opinion).

¹⁸⁷ *I.N.S. v. Chadha*, 462 U.S. 919, 989 n. 21 (1983) (J. White, dissenting opinion). This case concerned a dispute over the operations of the Immigration and Naturalization Service, with an analysis of the powers of Congress in which impeachment was mentioned, though it was not germane to the case.

¹⁸⁸ WOODROW WILSON, *CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS* 303 (1885). This quotation was directly cited by the Supreme Court in *U.S. v. Rumely*, 345 U.S. 41, 43 (1953).

¹⁸⁹ See BLACK’S LAW DICTIONARY, “Emolument”, available at <https://thelawdictionary.org/emolument/>.

¹⁹⁰ U.S. CONST., Art. II, § 1, cl. 7 (“The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased [*sic*] nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.”).

The presidential emoluments clause of the Constitution has never been argued before the Supreme Court, and until recently it played almost no role in American political history. But in recent years, Donald Trump’s complex international business dealings have inspired suits from various private persons and state Attorneys General,¹⁹¹ though the sparse and vague judicial history of the emoluments clause has resulted in significant uncertainty over who can investigate the President for emoluments, and how to do so.¹⁹² This matter did not make it to the Federal courts until 2019, when the Second Circuit ruled that private citizens and watchdog groups have standing to sue a President for violations of the emoluments clause, and no evidence is needed of direct financial injury to such parties from the President’s financial dealings.¹⁹³ However, the following year the District of Columbia Circuit ruled that individual members of Congress do not have standing to sue the President for such violations, because evidence of institutional injury to the legislature as a whole is necessary.¹⁹⁴

While the effectiveness of the emoluments clause remains uncertain and impeachment remains a politically fraught process, those powers of the Legislative Branch have been granted by the Constitution, arguably allowing Congress to act as investigators on behalf of the people. The Supreme Court’s rulings in *Vance* and *Mazars* in 2020 formulated other techniques for Congress to use when investigating a sitting President. Thus, Congress has the constitutional ability to serve as investigators, not unlike the press, and both can contribute to public knowledge on the road to achieving the consent of the governed and informed dissent.

VII. Conclusion

As theorized at the beginning of this article, information leads to thought, which leads to the self-expression that is protected by the First Amendment, which then leads to knowledgeable discussion, and finally to political action. This article has argued that a nation that acknowledges the consent of the governed must enable informed consent, and that in turn can encourage informed *dissent*, or the ability of citizens to criticize unsatisfactory leaders and to call for meaningful political change. Since the consent of the governed is embedded explicitly and implicitly in the Constitution, it then flows logically that a means of public access to government held information – necessary for an informed electorate to both consent and dissent – should have at least limited constitutional protection.

That constitutional protection, while not directly delineated, can be inferred from the freedoms of the people granted by the First Amendment. The connection among self-expression, access to information, and a right to know was laid out succinctly by Thomas Emerson:

Note that there is another Emoluments clause targeted at all federal government officials, though this second clause is not directly applicable to this article’s arguments. U.S. CONST., Art. I, § 9, cl. 8, (“No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.”).

¹⁹¹ Congressional Research Service, THE EMOLUMENTS CLAUSES OF THE U.S. CONSTITUTION, available at <https://fas.org/sgp/crs/misc/IF11086.pdf>, at 1.

¹⁹² Walter Dellinger, *Applicability of the Emoluments Clause to Non-Government Members of ACUS*, white paper, Department of Justice Office of Legal Counsel, Oct. 28, 1993, available at <https://www.justice.gov/file/20456/download>, at 121.

¹⁹³ *Citizens for Responsibility and Ethics in Washington v. Trump*, 939 F.3d 131, 142-144 (2nd Cir., 2019).

¹⁹⁴ *Blumenthal v. Trump*, 949 F.3d 14, 19 (D.C. Cir., 2020), *cert. denied* by the Supreme Court, 141 S.Ct. 553 (2020).

It is clear from the outset that the right to know fits readily into the first amendment and the whole system of freedom of expression. Reduced to its simplest terms the concept includes two closely related features: First, the right to read, to listen, to see, and to otherwise receive communications; and second, the right to obtain information as a basis for transmitting ideas or facts to others. [...] Moreover, the right to know serves much the same function in our society as the right to communicate. It is essential to personal self-fulfillment. It is a significant method for seeking the truth, or at least for seeking the better answer. It is necessary for collective decision-making in a democratic society.¹⁹⁵

Emerson also opined that citizens exercising a right to know should be able to obtain information *directly* from the government, not only as concerned taxpayers but as the “ultimate sovereign” as envisioned by the Framers of the Constitution.¹⁹⁶ Emerson concluded forcefully that “If democracy is to work, there can be no holding back of information; otherwise ultimate decisionmaking [*sic*] by the people, to whom that function is committed, becomes impossible.”¹⁹⁷ Meanwhile, C. Edwin Baker has recommended that the First Amendment be viewed as supporting the *receiver* of speech, who in turn has an independent right to know, to perhaps be used against a government that may be prone to restricting information.¹⁹⁸

This path from freedom of expression to investigation of political leaders to dissenting against them can be traced by to the originator of the First Amendment, James Madison, who wrote in 1800 that the “right of freely examining public characters and measures, and of free communication among the people thereon, [...] has ever been justly deemed, the only effectual guardian of every other right.”¹⁹⁹

One of the requirements of modern political liberalism is a government that protects rather than punishes dissent.²⁰⁰ As this article has argued, the early constitutional ideal of the consent of the governed requires that information be available to citizens who can formulate the informed consent necessary for self-government, which in turn can fuel informed *dissent* while demanding accountability from political leaders. Or in other words, there can be no informed dissent without a right to know.

A constitutionally protected right to know would enable independent investigations of government malfeasance by citizens, journalists, or public interest groups, without depending upon piecemeal requests for scattered documents. In particular situations, Congress can also serve as an investigator of the other branches of the government, not unlike the press, and this can also result in useful information that can fuel informed dissent amongst the citizenry. In a republic driven by democratic principles, citizens can use the resulting knowledge to suggest improvements to governmental processes or the removal of offending officials through Constitutional processes like impeachment. This in turn leads from informed dissent to political change through legal and democratic means.

American history and a plethora of Supreme Court precedents support the notion that one of the core purposes of the First Amendment is to preserve the right of citizens to speak freely

¹⁹⁵ See Emerson, *The First Amendment and the Right to Know*, *supra* note 78, at 2.

¹⁹⁶ *Id.* at 14-16.

¹⁹⁷ *Id.* at 14.

¹⁹⁸ Baker, *supra* note 43, at 67-68.

¹⁹⁹ Reprinted in *The First Amendment Encyclopedia*, available at <https://www.mtsu.edu/first-amendment/article/879/virginia-report-of-1800>. Here Madison was stating his disagreement with the Sedition Act of 1798, the fledgling nation’s first legislative restriction of free speech.

²⁰⁰ Rauch, *supra* note 11, at 51.

without prosecution. If this expressive right includes general discussion, it must also include criticism of the government, which in its own right becomes more informed when the necessary information is available to citizens. Thus, informed dissent requires a constitutional right to know. As John Stuart Mill summed up in 1859: “The limitation, therefore, on the power of government over individuals loses none of its importance when the holders of power are regularly accountable to the community.”²⁰¹

²⁰¹ See MILL, *supra* note 7, at 4.